

Neutral Citation Number: [2009] EWCA Civ 789

Case No: A2/2008/2096

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Queens Bench Division
Mr Justice Penry-Davey
TLO/08/0228

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/07/2009

Before:

THE PRESIDENT OF THE FAMILY DIVISION
LADY JUSTICE SMITH
and
LORD JUSTICE WILSON

Between :

Kunal Kulkarni	<u>Appellant</u>
- and -	
Milton Keynes Hospital NHS Foundation Trust	<u>Respondent</u>
- and -	
The Secretary of State for Health	<u>Interested Party</u>

**(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)**

Mr John Hendy QC & Mr Jonathan Davies (instructed by Messrs RadcliffesLeBrasseur) for the
Appellant

Mr Andrew Stafford QC and Mr Damian Brown (instructed by Messrs Hammonds) for the
Respondent

Miss Sarah Lee (instructed by The Department for Work & Pensions, Litigation Division)
for The Secretary of State for Health (Interested Party)

Hearing dates : 17/18 February 2009 & 19 May 2009

Judgment
As Approved by the Court

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Lady Justice Smith:

Introduction

1. This is an appeal against the order of Penry-Davey J made on 1 August 2008 when he refused to make the declaration sought by the claimant, Dr Kunal Kulkarni, that he be entitled to legal representation in disciplinary proceedings brought by his employer, the Milton Keynes Hospital NHS Trust (the Trust). Penry-Davey J also refused to extend an interim injunction granted by Dobbs J on 12 February 2008 restraining the Trust from pursuing the disciplinary proceedings until further order, unless it were to allow Dr Kulkarni legal representation.

Factual Background

2. On 31 July 2007, the claimant entered employment with the Trust as a Foundation Year One Doctor. He was provisionally registered on the Medical Register and the post to which he was appointed was part of the training necessary for him to achieve full registration. Prior to his appointment, a criminal records bureau check had revealed that, arising from a previous employment at the Great Western Hospital, Swindon, he had been prosecuted for an offence of sexual assault on a patient and had been acquitted after trial at Swindon Crown Court. On 24 August 2007, that is less than four weeks after his employment with the Trust commenced, a patient made a complaint that the claimant had placed a stethoscope under her knickers without her consent. The claimant was suspended pending investigation of the complaint. It was clear that, if the investigation so warranted, disciplinary proceedings would follow. The investigation included the collection of information about the earlier allegation from Swindon.
3. The claimant sought the advice of the Medical Protection Society (MPS), the defence organisation of which he was a member and his case was assigned to Dr Marika Davies. Dr Davies is a medical doctor but is not legally qualified. She has a qualification in medical ethics and she is an experienced MPS adviser. On behalf of the claimant, she entered into correspondence with the Trust about a number of matters including the disclosure of evidence and the disciplinary policies and procedures which would govern any disciplinary proceedings. It is not necessary to set out the detail of the issues discussed. What matters for the purposes of this appeal is that, on 23 November 2007 in the course of a conversation between Dr Davies and Ms Chanelle Wilkinson, the Trust's Director of Human Resources, Dr Davies asked whether Dr Kulkarni would be entitled to have legal representation at any disciplinary hearing. Ms Wilkinson replied that he would not. She asserted that the procedures did not allow for legal representation and whoever might accompany the claimant 'must not be acting in a legal capacity'.
4. On 26 November 2007, Dr Lanzon Miller, the Trust's Medical Director, wrote to the claimant informing him that, in the light of the investigation, which included consideration of information from Swindon, there would be disciplinary proceedings. The hearing would take place on 11 December. His letter confirmed that the claimant had the right to be accompanied by a representative 'not acting in a legal capacity'.
5. Dr Davies replied to Dr Miller raising a number of issues, the important one for present purposes being the question of legal representation. She suggested that the

Trust had a discretion to allow legal representation in a case which justified it and submitted that the complexities and potential seriousness of this case were such that the discretion ought to be favourably exercised. It should be understood that Dr Davies was not asking the Trust to pay for Dr Kulkarni's representation; only that he should be permitted to be represented by a lawyer who would, it was intended, be instructed by the MPS. Dr Davies proposed an adjournment of the hearing from 11 December so that the issue of representation could be considered. That was agreed.

6. The Trust's position was that its procedures were based upon the Department of Health Policy Document 'Maintaining High Professional Standards in the Modern NHS' (MHPS). This policy document did not permit legal representation at disciplinary hearings. Notwithstanding that general position, Ms Wilkinson spoke to Dr Davies, at some time between 5 and 21 December 2007, and explained that the Trust had considered the request for legal representation. Its decision was that there were no exceptional circumstances which would justify the Trust in deviating from its disciplinary policy and procedure. Thus it appears that the Trust thought that its procedures did allow a discretion to permit legal representation but it was not prepared to exercise the discretion in Dr Kulkarni's favour. Ms Wilkinson said that the fact that Dr Kulkarni was represented by the MPS and Dr Davies had been taken into account. It appears that, at that time, the Trust believed that Dr Davies was both medically and legally qualified, which she was not. The Trust's reasoning included its belief that the claimant would be able to call upon a legally qualified representative without the need to instruct a lawyer to attend in 'a legal capacity'. Dr Miller confirmed that decision in writing on 21 December 2007.
7. There was also correspondence between the parties about the use which was to be made of the Swindon information. Dr Lanzon Miller indicated that the panel would consider this information as part of the case against the claimant. Dr Davies contended that this information should only be made available to the panel if and when it came to consider sanction after deciding (if it did) that the claimant was guilty of the current charge. That dispute remained unresolved. A hearing date was fixed for 13 February 2008 and the Trust informed Dr Davies that the panel members would receive the Swindon information as part of their bundles.
8. In the light of the refusal to allow representation, the MPS instructed its solicitors, RadcliffesLeBrasseur, who, on 4 February 2008, wrote raising an issue about the legality of the contractual disciplinary procedures on which the Trust was relying for its refusal of legal representation. They asked for documentary proof that MHPS had been incorporated into the claimant's terms and conditions of employment. The letter threatened legal proceedings in the absence of a satisfactory reply.

The application for interim relief

9. No reply was received to that letter and, on 12 February 2008, the claimant issued proceedings seeking a declaration that the Trust was acting unlawfully and in breach of contract in refusing to allow the claimant legal representation at his disciplinary hearing and by threatening to deploy inadmissible material (the Swindon information) at the hearing. The claimant also made a without notice application to Dobbs J seeking to restrain the Trust from proceeding until the issues had been determined by the Court.

10. At the without notice hearing, the claimant relied on a Department of Health Circular HC90(9) which expressly provided for the right of a doctor facing disciplinary proceedings to have legal representation. It was acknowledged that that circular had been withdrawn in 2005 and had been replaced by MHPS but it was contended that, because there was no evidence that MHPS had been incorporated into the Trust's disciplinary policy (which was part of the claimant's contract of employment), HC90(9) still had effect. The claimant did not exhibit a copy of the Trust's disciplinary policy, which had been provided to the MPS by the Trust. The claimant also argued that the implied term of trust and confidence in the contract of employment included a discretion to allow legal representation at disciplinary hearings in a suitable case. He contended that it should have been exercised in this case.
11. Dobbs J made an order restraining the Trust from proceeding with the disciplinary hearing unless he was to be allowed legal representation.
12. When served with the injunction, the Trust's response was to produce evidence that MHPS had been incorporated into its disciplinary policy at a Board Meeting in 2005. Further, the Trust contended that its disciplinary policy made that plain and, had that been shown to the Judge, she could not have accepted the argument that HC90(9) was still effective. The policy in MHPS was clear, it was said, and legal representation was not allowed. There was no room for discretion. Moreover, an implied term in the contract could not displace the clear effect of an express term.
13. RadcliffeLeBrasseur's explanation for their conduct was that they had not had a copy of the Trust's disciplinary policy at hand when they had prepared their evidence and they had not intended to mislead the judge.

The judgment of Penry-Davey J

14. A speedy trial was ordered and the claim was heard by Penry-Davey J. He considered that the conduct of the claimant's legal representatives on the interim application was unacceptable. He said that in failing to disclose the disciplinary policy, their conduct 'fell short of the full disclosure that is incumbent upon those seeking interim and, more particularly, without notice injunctive relief'. This was a serious default. That default was compounded by the claimant's failure to tell the judge what the Trust's position was, as revealed in correspondence. Moreover, as the parties had been in correspondence about the issue of legal representation, there had never been any need for a without notice application. The claimant had delayed approaching the court until the day before the proposed disciplinary hearing. The judge was of the view that those matters alone provided powerful reasons for discharging the injunction. However, he had to consider the underlying merits of the dispute.
15. Penry-Davey J then considered the arguments advanced by the claimant as to why he was or ought to be entitled to legal representation at the disciplinary hearing. They were first that the employer had a discretion to allow legal representation either under the express terms of the contract of employment or pursuant to the implied term of trust and confidence. On the facts of this case, that discretion could only have been rationally exercised in favour of the claimant. Alternatively, the denial of legal representation was a breach of natural justice and a denial of his rights under article 6 of the European Convention on Human Rights (ECHR). The Trust, being a public

employer, had to act in compliance with the ECHR. Article 6 required that the claimant be permitted to have legal representation.

16. The Judge concluded that, in the light of the express term in the defendant's disciplinary policy, which prevented legal representation and was a part of the claimant's contract of employment, there was no room for an implied term providing a discretionary right. Alternatively, if there was a discretion to permit legal representation, there were no exceptional circumstances in the present case such as would require the discretion to be exercised favourably. The refusal was a proper exercise of the discretion if there was one.
17. Second, the Judge considered that the denial of legal representation did not amount to a denial of natural justice. As to Article 6 rights, the judge was not convinced that Article 6 was engaged in the context of disciplinary proceedings. But even if it were and even if the disciplinary proceedings themselves were not article 6 compliant, the proceedings as a whole would be compliant because, thought the judge, they could include proceedings before the General Medical Council (GMC) and the employment tribunal, both of which were article 6 compliant.
18. The judge dealt with the claimant's submission that the Trust should be restrained from including in the bundle of documents prepared for use at the disciplinary hearing any of the Swindon material. The judge rejected that part of the application, saying that the application was misconceived. The High Court was not the proper vehicle for the management of internal disciplinary proceedings.
19. The result was that the judge discharged the interim injunction and dismissed the application for declaratory relief.

The appeal to this Court

20. The claimant sought permission to appeal, which was granted by Ward LJ on consideration of the papers. Although the grounds put before him were ten in number, by the time of the hearing before us, they had been refined. Essentially, the same arguments were advanced on both sides as were aired before the judge, although I think that some issues have been explored in greater depth before us than had been the case below. The appeal is concerned with the appellant's substantive rights and not with his conduct of the without notice application. However, I would endorse Penry-Davey J's observations on that subject. The claimant's leading counsel expressed his apologies and regret for what had occurred (although neither he nor his junior on this appeal had appeared before Dobbs J).
21. The appellant, Dr Kulkarni, was represented by Mr John Hendy QC and Mr Jonathan Davies. Mr Andrew Stafford QC and Mr Damian Brown appeared for the Trust. During the course of the hearing, Mr Stafford made it plain that he had instructions only from his client, the Trust, and did not know what stance the Secretary of State for Health would take on the issues. Because it appeared to us that the Secretary of State might well wish to be heard on the issue of the rights of doctors and dentists to be legally represented at disciplinary hearings, we decided to adjourn the hearing to allow him to appear as an interested party and to put in evidence if he so wished. He did so and instructed Miss Sarah Lee to appear on his behalf. For similar reasons,

we invited the British Medical Association and the British Dental Association to appear but neither wished to do so.

22. Before turning to the main issue in the case, I wish to dispose of the side issue relating to the claimant's attempt to prevent the Trust from introducing the Swindon information at the hearing of the complaint against him. Although the point was taken on the appeal, it was argued only faintly by Mr Hendy. In my judgment, Penry-Davey J was plainly right, for the reasons he gave, to refuse to allow the High Court to become involved in the micro-management of disciplinary hearings. I would dismiss that ground of appeal and say no more about it, save to observe that the Trust will no doubt have the benefit of legal advice as to the admissibility of such evidence and its relevance or otherwise to the issues before them.
23. I now turn to the main issue on the appeal which is to determine the effect of the contractual provisions affecting the right of a doctor to have legal representation at a disciplinary hearing.

The contractual documents

24. Before describing the parties' submissions on the appeal, it will be helpful to set out the relevant parts of the contractual documents and to explain the background to certain modifications to the contracts of doctors which took place in 2005.
25. At all material times, the employment contracts of doctors employed in the National Health Service (NHS) have been subject to terms and conditions determined by the General Whitley Council. The standard terms and conditions were incorporated into a written contract of employment which all doctors had to sign on entering employment. The contract which, as I understand it, was signed by the claimant in July 2007 contained the following clause dealing with disciplinary procedures:

“17. The provisions relating to disciplinary procedure appear in section 42 of the General Whitley Council Conditions of Service as incorporated by paragraph 189 of the Terms and Conditions of Service”

26. Section 42, as apparently amended in 1995, referred to the introduction of various protocols but stated that these were not to apply to any matter covered by arrangements set out in various circulars. These included HC(90)9 which as I understand it was the ninth circular issued by the Department of Health in 1990. As I have said, that circular provided that any doctor who faced disciplinary proceedings was entitled to legal representation. However, by the time the claimant began his employment in 2007, paragraph 189 of the Terms and Conditions of Service provided as follows:

“Disciplinary Procedures

189.a. In England, wherever possible, any issues relating to conduct and capability should be identified and resolved without recourse to formal procedure. However, should an employing authority consider that a practitioner's conduct and capability may be in breach of the authority's code of conduct

or that the practitioner's professional competence has been called into question, the matter will be resolved through the authority's disciplinary or capability procedures (which will be consistent with the 'Maintaining High Professional Standards in Modern NHS' framework,) subject to the appeal arrangements set out in those procedures."

27. Exactly when that version of paragraph 89 was promulgated is not clear from our papers. However, it is common ground that, in 2005, for doctors in England (not Wales), HC(90)9 was withdrawn and the arrangements which would govern disciplinary proceedings for doctors thereafter were those of the employing authority. Those procedures had to be consistent with MHPS. MHPS was different in several respects from HC(90)9, in particular in respect of the arrangements for representation at disciplinary hearings.
28. The thinking which led to that change in the arrangements for representation has not been fully explained to us. However, the evidence suggests that the Department of Health had decided to make a change because it was of the view that the involvement of lawyers in the disciplinary process was resulting in delay in and over-complication of the proceedings. Concern had been expressed publicly about the length of time which some disciplinary proceedings were taking and in particular about the periods for which some doctors were suspended (on full pay) pending the proceedings. It does not appear that there was any objective evidence that it was the involvement of lawyers which was causing these problems but it seems that that was the view taken by the Department of Health.
29. In December 2003, the Department of Health issued '*High Professional standards in the Modern NHS; a framework for the initial handling of concerns about doctors and dentists in the NHS*'. This document was designed to bring about a change of approach towards the management of misconduct, incapability and poor performance among doctors and dentists in the NHS. It comprised two parts. Part I dealt with the general approach to be taken when a complaint or concern was raised. It focused mainly on the procedures to be followed to investigate the complaint or concern. It advised employers to avoid formal proceedings where possible but recognised that, in some cases, formal action might be necessary. Part II, which is not relevant to this appeal, dealt with the procedures to be followed if it was thought necessary to exclude a practitioner from work pending an investigation or subsequent proceedings.
30. Paragraph 14 of Part I stated as follows:

"At any stage of this process (*the investigation*) – or subsequent disciplinary action – the practitioner may be accompanied in any interview or hearing by a companion. In addition to statutory rights under The Employment Act 1999, the companion may be another employee of the NHS body, an official or lay representative of the British Medical Association, British Dental Association or defence organisation; or a friend, partner or spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity."

31. The reference in that paragraph to statutory rights under The Employment Relations Act 1999 was to section 10 of the Act, as amended, which is headed 'Disciplinary and Grievance Hearings'. So far as relevant, section 10 provides that where a worker is required or invited to attend a disciplinary or grievance hearing and reasonably requests to be accompanied at the hearing, the employer must permit the worker to be accompanied, but this must be a person drawn from a limited class. The companion must be either a fellow employee or an official or employee of a trade union. The employer must permit that companion to put the worker's case, sum up the case and respond on the worker's behalf to any view expressed at the hearing. The companion must be allowed to confer with the worker during the hearing. The employer need not permit the companion to answer questions on the worker's behalf, address the hearing if the worker indicates that he does not wish this or use the powers conferred by the section in a way that prevents the employer from explaining his case or prevents any other person from making his contribution to the hearing.
32. Accordingly, it appears that the intention of paragraph 14 of Part I of MHPS was to permit a doctor facing disciplinary proceedings to be accompanied by a person who would, within certain limitations, conduct the case on the doctor's behalf. The companion could be any of a wider range of persons than permitted by section 10, including an official or lay representative of the BMA or MPS or a friend, partner or spouse. The companion could be legally qualified. Exactly what was meant by the proviso that the legally qualified companion would not be 'acting in a legal capacity' is not clear to me and I will return to the question later.
33. After the publication of this framework document in December 2003, the Department of Health continued negotiations with the British Medical Association with a view to reaching agreement on a number of issues in relation to the guidance which the Department intended to promulgate in what became MHPS. We were told that these negotiations involved not only issues in relation to disciplinary hearings (the results of which would eventually go into MHPS) but also an entirely new contract of employment for hospital consultants.
34. So far as concerned rights of representation, as I have said, the Department's stance was that it wished to remove the right to legal representation that doctors had enjoyed under HC(90)9 and replace it with a right akin to the statutory right pursuant to section 10 of The Employment Act. The BMA was reluctant to give up the doctors' previous rights. There appears to have been some 'horse-trading' or 'give and take' in respect of rights of representation and the other issues and in due course agreement was reached on a form of words. We were shown some documents which recorded the progress of these negotiations. However, I do not think that those documents were strictly admissible in evidence as our task must be to construe the contractual term which emerged from those negotiations. I shall not refer to them.
35. Following the conclusion of negotiations, MHPS was promulgated. Its first two parts were taken directly from the earlier framework document. Parts III, IV and V were new. Part III dealt with proceedings for misconduct. Its main provision was that proceedings for misconduct against doctors and dentists (practitioners) must be dealt with under the procedures which the employer used for its other staff, when charged with similar matters. This Part was quite short. It contained valuable advice on several issues but no detailed requirements as to the procedures to be adopted at misconduct hearings and no reference to the rights of a doctor to be accompanied or

to be represented at a hearing. Nor did it contain any reference to the need for any appeal mechanism or how that should be conducted.

36. By contrast, however, Part IV, which covered procedures for dealing with issues of capability, did cover the question of representation at hearings. Paragraphs 21 and 22 provided as follows:

“21. The hearing is not a court of law. Whilst the practitioner should be given every reasonable opportunity to present his or her case, the hearing should not be conducted in a legalistic or excessively formal manner.

22. The practitioner may be represented in the process by a friend, partner or spouse, colleague or a representative who may be from or retained by a trade union or defence organisation. Such a representative may be legally qualified but they (*sic*) will not, however, be representing the practitioner formally in a legal capacity. The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence.”

37. Part IV then set out in some detail the procedures to be followed at a capability hearing. When asked why she thought there was this difference between the detail of the instructions given for capability hearings and those for misconduct hearings, Miss Lee, for the Secretary of State, said that this was probably because all NHS bodies would be accustomed to holding misconduct hearings but some would be less familiar with capability hearings.
38. In addition to the detailed guidance about the conduct of capability hearings, similarly detailed guidance was given about the conduct of an appeal from the decision made at the initial hearing, although there was no further reference to the right to be accompanied or represented.
39. For the sake of completeness, I mention that Part V of MHPS dealt with health procedures. It was anticipated that concerns regarding a practitioner’s health would usually be dealt with at an informal meeting. At paragraph 8 it is recognised that the practitioner may wish to bring a ‘support companion’ to such a meeting. This could be a family member, a colleague or a trade union or defence association representative. In the unlikely event that formal proceedings became necessary, the procedures in Part IV should be followed, including, presumably, the arrangements for representation.
40. It should be noted that there are some differences between the provision in paragraph 22 of Part IV and that in paragraph 14 of Part I. In Part IV, the practitioner is entitled to a ‘representative’ whereas in Part I he is entitled to a ‘companion’. However, the Part I companion may do all the things that a representative normally does. In Part IV, the representative may be ‘from or retained by’ a defence organisation. In Part I, the companion may be an official or lay representative of a defence organisation, but there is no reference to a retainer. In Part IV, if the representative is legally qualified, he or she is not ‘formally representing the practitioner in a legal capacity’ and in Part I the legally qualified companion is not ‘acting in a legal capacity’.

41. As I have already pointed out, under paragraph 189a of the Terms and Conditions, all NHS organisations had to have disciplinary procedures which were consistent with the provisions of MHPS. The respondent Trust devised its new disciplinary policy in May 2005 and incorporated it into the employment contracts of all staff. In its introduction, the need for consistency with MHPS was recognised:

“It should be noted that the policy and procedure incorporates the new framework covering the new disciplinary procedures for doctors and dentists employed in the NHS. This new framework is contained in Maintaining High Professional Standards in the Modern NHS and should be referred to in conjunction with this policy and procedure when dealing with cases involving a doctor or dentist.”

42. At paragraph 2 of Part 1, under the heading ‘Representation’, the policy document provides:

“A member of staff required to attend either an investigative interview or a formal disciplinary hearing at any level within the Procedure will have the right to be accompanied by a representative of a trade union/professional organisation, by a work colleague, or friend, partner or spouse not acting in a legal capacity (companion). The trade union/professional representative or companion will be allowed to present the case on behalf of the member of staff and to question any witnesses called. The member of staff should, however, respond personally to questions posed by the investigating manager or disciplining manager, as appropriate.”

43. Paragraph 3 provides for the information which must be given to a member of staff facing a disciplinary hearing. This includes information relating to the right to be ‘accompanied’ by either a trade union representative or a work colleague. Later, that paragraph refers to allowing time to arrange ‘representation’ and also provides for postponement of the hearing where a member of staff’s companion or trade union/professional representative cannot attend on the due date. Also in paragraph 3, it is said that the member(s) of staff, who can be represented by a trade union/professional organisation representative, will be given the opportunity to explain their behaviour. In short, it appears that the words ‘companion’ and ‘representative’ are interchangeable.
44. Paragraph 7 provides for an appeal by an aggrieved member of staff and Appendix A makes detailed provision for the conduct of the appeal. As to the rights of representation, similar words are used as in paragraph 2 above. The employee may be accompanied by a representative of his or her trade union or professional organisation or by a colleague or by a ‘friend, partner or spouse not acting in a legal capacity’. The procedure makes it plain that the representative or companion can take a full part in the conduct of the appeal.

Submissions in respect of the construction of the contract

45. Mr Hendy's submissions shifted to some extent during the hearing. At the outset, he appeared to have accepted that, under the contract, a doctor was not allowed as of right to instruct a lawyer to represent him at a disciplinary hearing. That was what the Department of Health had insisted on and what the BMA had eventually accepted, although it had negotiated successfully for some improvement in the doctor's position as compared both with the statutory rights under section 10 of The Employment Act and also with the rights set out in paragraph 14 of Part I of MHPS. His main contention was that the contractual terms allowed the employer to exercise a discretion to permit representation. In the alternative, the implied term of trust and confidence present in all contracts of employment required that there must be a discretion to permit representation. The facts of the instant case were such that no reasonable employer could rationally refuse to allow representation. The judge had erred in holding that the Trust had been entitled to exercise its discretion as it had.
46. Mr Stafford's position was that the contractual term was clear. There was no right to legal representation and no room for a discretion to permit it. Nor was there room for an implied term which would effectively contradict the provisions of an express term. If he was wrong about that, and there was a discretion, the judge had been right to hold that it had been properly exercised.
47. The Secretary of State's position as to the meaning of the contract was that it was clear. Legal representation was not allowed. So clear was it that Miss Lee's skeleton argument, crafted with understandable sensitivity to the fact that we had already heard substantial legal argument, dealt only with Article 6 and the rules of natural justice. However, in oral argument, the court took the opportunity to ask for her submissions about the meaning of the paragraphs of MHPS covering rights of representation. The court had become concerned that the focus of the argument below had been on the wrong points, namely discretion and Article 6; it ought to have been on what the contract actually provided.
48. In particular, we sought Miss Lee's submissions on the absence of any express provision as to representation in Part III of MHPS which dealt with misconduct hearings and the presence of quite detailed expression provisions in Part IV in respect of a capability hearing. Miss Lee accepted that it would be illogical to provide the practitioner facing misconduct proceedings with a lower level of protective representation than one facing capability or health proceedings. Mr Stafford also accepted that and I agree that that must be correct. It follows that paragraph 22 of Part IV must be taken to apply to all types of proceedings. Also, in so far as there are differences between paragraph 14 of Part I (drafted in 2003) and paragraph 22 of Part IV, drafted after or during the negotiations with the BMA, the parties appeared to agree that the later paragraph must be taken to be definitive. Further, as I understand it, Mr Stafford accepted that, because the Trust's disciplinary policy must be consistent with MHPS, the latter document must hold sway if there are any differences between the two.
49. In the light of those concessions which I think were correctly made, it is clear that the contractual rights to representation of all practitioners facing formal proceedings (whether for misconduct, capability or health) are as set out in paragraph 22 of Part IV

of MHPS. The scope of the representation is also defined in paragraph 22; it includes presenting the case, calling witnesses and making submissions.

50. During the hearing, there was a good deal of discussion about exactly what paragraph 22 permitted. Miss Lee accepted that the paragraph permitted the doctor to be accompanied and represented by a person who was legally qualified. But, she submitted, the intention was that he should not instruct a lawyer. The provision permitting the representative to be a lawyer was designed only to cover the situation where the doctor's spouse or partner or neighbour happened to be a lawyer and was prepared to represent him, as an act of friendship. So he was not acting in a 'legal capacity', by which I think she meant he would be acting in a personal capacity rather than a professional capacity. However, she accepted that the expression 'from a defence organisation' would cover an employee of the MPS. So, if the MPS employed a solicitor or barrister, that person could represent the doctor. Plainly such a person would be acting in a professional capacity. But Miss Lee submitted, the paragraph definitely excluded a lawyer who was professionally instructed. That was somewhat difficult to understand given the inclusion in the list of potential representatives in paragraph 22 of a person 'retained' by a defence organisation. What is the difference between a lawyer who is 'retained' and one who is 'instructed'? No one was able to suggest that there was any difference between the two. Everyone agreed that the word retained did not mean employed; thus the expression 'from or retained by a defence organisation' must extend further than employees only. I think that, although Miss Lee did not make any concessions, she found it difficult logically to justify her submission that the paragraph permitted a solicitor or barrister employed or 'retained' by a defence organisation to represent the doctor but not a solicitor or barrister instructed by that organisation.
51. The court also took the opportunity to ask Miss Lee for her submissions as to what was meant by the expression 'not representing the practitioner formally in a legal capacity'. Given that the paragraph envisaged that a legally qualified person employed or retained by a defence organisation could appear and represent the doctor, doing all the things that lawyers usually do when appearing for a client, we were puzzled as to what that expression could mean.
52. This request took Miss Lee somewhat by surprise. However, after the short adjournment, during which she was able to take instructions, she made her submissions. The expression 'not representing the practitioner formally in a legal capacity' meant, she said, first that the lawyer was not to conduct the hearing in the way that a lawyer conducts a hearing in court. Pausing there, that submission seemed sensible in that, at first, I understood her to mean that the lawyer/representative must not take control of the proceedings and run the case in the way that an advocate does in an adversarial hearing. Most disciplinary proceedings are not formally adversarial; they are often informal and may well entail a mixture of adversarial and inquisitorial practice. If the expression was intended to mean that the lawyer was not to 'run' the case, that would make sense, although the concept might have been more clearly expressed.
53. However, having proffered that initial explanation, Miss Lee went on to give some examples of what she meant – and they were not at all what I had thought she meant. She said, for example, that the lawyer must not take 'technical legal objections on procedural grounds or admissibility'. He or she must not 'introduce arguments on

points of law unnecessarily unless circumstances required it'. Also, there must not be 'excessive cross-examination'. These, she said, were the sorts of behaviour which created the feeling of inequality of arms. It seems that she was saying that the lawyer must not obstruct the proceedings or waste time. Well, of course not. But the way to avoid time wasting and obstruction is for the chairman of the panel to exercise control over the proceedings. One cannot sensibly decide to exclude lawyers because some of them waste time. More important, one cannot sensibly say that time wasting and obstruction are to be equated with 'acting in a legal capacity'.

54. Mr Stafford was quick to dissociate himself from Miss Lee's explanation of the meaning of 'not representing the practitioner formally in a legal capacity'. He submitted that, in so far as a lawyer was permitted to represent the doctor, he or she must be permitted to represent the client to the best of his or her ability, without restriction. However, he had some difficulty in explaining what he submitted the expression meant. He suggested that what the paragraph was driving at was that the doctor was entitled to seek the advice of a lawyer employed or retained by the defence organisation but that such a person could not appear to make oral representations. He envisaged that, in a case such as the present, where a potentially difficult issue arose on the admissibility of the Swindon information, it would be permissible and appropriate for a lawyer instructed by the defence organisation to put in written submissions but not to address the panel orally. However, that does not appear to me to provide an explanation of what is meant by 'not acting in a legal capacity'.
55. The Court asked Mr Stafford to explain what he submitted was allowed under paragraph 22. He said that the intention was that the practitioner should not instruct a lawyer. If the practitioner happened to have a wife, partner, friend or neighbour who happened to be a lawyer and who was prepared to represent the practitioner, that person was not to be excluded merely because he or she was a lawyer. However, Mr Stafford could, I think, see that that submission did not fit with the provision that the practitioner could be represented by lawyer employed or retained by the defence organisation. He strove to draw some sort of sensible distinction between the right to be represented by a lawyer retained by the defence organisation and one instructed by the practitioner. I think the attempt defies logic.
56. Unsurprisingly, after listening to these submissions, Mr Hendy shifted his ground in his reply. He submitted that paragraph 22 permitted representation by a lawyer retained by the MPS. To be retained was the same as to be instructed. The exchanges between the Court, Miss Lee and Mr Stafford had shown that the expression 'not be representing the practitioner formally in a legal capacity' was meaningless and should be blue-pencilled. Shorn of that expression, paragraph 22 permitted the MPS to instruct a barrister to represent Mr Kulkarni which is what it wanted to do.

Discussion

57. The task of the court when construing a contractual term is to decide objectively what it means. Here, the contractual term is that set out in the Trust's own disciplinary policy. However, where the employed person is a doctor or dentist, the provisions of that policy must be consistent with MHPS. I have already said that the definitive expression of the right to representation in any type of disciplinary proceeding is that set out at paragraph 22 of Part IV. So, we have to decide what paragraph 22 means and what it permits.

58. What it means is what the parties must, objectively considered, be taken to have agreed. The subjective wishes and intentions of the parties are not relevant but the court can take into account all the surrounding facts and circumstances. Here, it is not relevant that the Department of Health wanted to remove the right to legal representation which the doctors and dentists had enjoyed for many years. Nor is it relevant that the doctors did not want to lose that right. The parties negotiated. There were a lot of issues to be dealt with besides this one. As Mr Stafford said, there was probably some horse trading and eventually the parties arrived at a form of words which both sides were prepared to accept on the representation issue. It matters not whether the Department thought it had achieved its objective. It matters not what either of the parties thought the agreement meant. It has not been suggested that the words used in paragraph 22 did not represent the true agreement and that the paragraph ought to be rectified. So, the question for us is what that form of words means. It means what a reasonable onlooker, appraised of the background, would have thought they meant.
59. In my view, properly construed, paragraph 22 permits a practitioner to be represented by a legally qualified person, employed or retained by a defence organisation. 'Retained by' must include 'instructed by'. The two words mean the same. However, the doctor is not permitted to bring a legally qualified person whom he has instructed or retained independently, for example, his family solicitor or a barrister instructed by that solicitor. He cannot, for example, bring a legally qualified person employed by a law centre. If he happens to have a spouse, partner, colleague or friend who is legally qualified and who is prepared to represent him, that is permitted.
60. In my view, the expression 'not representing the practitioner formally in a legal capacity' is devoid of meaning. If 'legal capacity' were intended to be synonymous with 'professional capacity' then I could understand that the lawyer who was a friend, spouse, partner or colleague could be said to be acting in a personal capacity as opposed to a professional capacity. Even so, that person would be entitled to do all the things that lawyers do when representing clients. Those functions are set out at the end of paragraph 22. But when it is seen that a legally qualified person either employed or retained by a defence organisation may represent the practitioner, it is meaningless to say that that person is not acting in a 'legal' or 'professional' capacity. I wholly reject Miss Lee's attempts to limit the scope of what the lawyer might be permitted to do. I accept Mr Stafford's submission that, once a lawyer is admitted as a representative, he or she is entitled to use all his or her professional skills in the practitioner's service.
61. It follows from what I have said that I would allow this appeal on the ground that Dr Kulkarni was and is contractually entitled to be represented at his disciplinary hearing by a lawyer instructed by the MPS. I have much sympathy with Penry-Davey J. The hearing before him did not focus on the meaning of paragraph 22. There seems to have been a tacit assumption that legal representation was not allowed. The hearing focussed on Article 6 compliance, whether or not the employer had a discretion to permit representation and if so whether it was properly exercised.
62. None of those other issues are now germane in this particular case. Dr Kulkarni is a member of the MPS and they will represent him. However, these other issues could well be important in other cases. For example, they would be important if the practitioner was not a member of a defence organisation or, where he was, either he or

the defence organisation did not wish the defence organisation to arrange representation. Then, unless the practitioner had a legally qualified spouse, partner or friend who was prepared to represent him, he would not be entitled to legal representation.

63. I will therefore make some brief observations on the other grounds. What I say is necessarily *obiter*. The important question is whether it is lawful for the employer to restrict the employer's rights of legal representation in the way that I have held them to be restricted under paragraph 22. That question could be framed as a question of natural justice in purely domestic law or of breach of Article 6 rights (if engaged). I do not think that it should matter how the question is framed; the answer should be the same.
64. In *Le Compte v Belgium* [1981] 4 EHRR the appellants, who were medical practitioners had faced disciplinary proceedings before the Belgian *Ordre des médecins*, as a result of which they were suspended from practice. Dr Le Compte had defied the suspension; criminal proceedings followed and he was imprisoned and fined. The applicants appealed to the ECHR alleging *inter alia* that the disciplinary proceedings had not been Article 6 compliant. The Court said that Article 6 rights were not usually engaged in disciplinary proceedings but that they could be in some circumstances. What those circumstances might be was not explained. In the present case, the right to practise medicine was a civil right and article 6 was engaged.
65. It appears to me that the distinction which the court was drawing was that, in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, article 6 would not be engaged. However, where the effect of the proceedings could be far more serious and could, as in that case, deprive the employee of the right to practise his or her profession, the article would be engaged.
66. The difficulty is to know where to draw the line. Mr Stafford and Miss Lee both submitted that Dr Kulkarni was facing ordinary disciplinary proceedings brought by his employer and the only effect, if the charge were found proved, would be that he would lose his job. Only proceedings before the General Medical Council can deprive a doctor of the right to practise. But, as Mr Hendy pointed out, the National Health Service is, to all intents and purposes, a single employer for the whole country. Indeed, for a trainee doctor, that is literally true as a doctor cannot complete his training in the private sector. If Dr Kulkarni is found guilty on this charge he will be unemployable as a doctor and will never complete his training. If he applies for any other position he will be obliged to declare the finding against him and the fact of his dismissal. Moreover, submitted Mr Hendy, it is highly likely that the system of 'alert letters' would be operated in this case if Dr Kulkarni were found guilty. An alert letter is a letter warning other NHS employers not to employ the doctor named, who is regarded as presenting an unacceptable risk to patients. The alert letter procedure is currently governed by the Healthcare Professionals Alert Notice Directions 2006.
67. It seems to me that there is force in Mr Hendy's submission and, had it been necessary for me to make a decision on this issue, I would have held that Article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS.

68. The next question is whether, in the context of civil proceedings, Article 6 implies a right to legal representation. In my view, in circumstances of this kind, it should imply such a right because the doctor is facing what is in effect a criminal charge, although it is being dealt with by disciplinary proceedings. The issues are virtually the same and, although the consequences of a finding of guilt cannot be the deprivation of liberty, they can be very serious.
69. Accordingly, I would have held that for a doctor in Dr Kulkarni's position but who for some reason could not obtain legal representation under paragraph 22, there would be non-compliance in respect of the initial disciplinary hearing. However, it seems to me that, in his particular circumstances, able as he is to obtain legal representation through the MPS, there would be no breach.
70. Mr Stafford and Miss Lee submitted that, even if Article 6 was engaged and even if the initial disciplinary proceedings brought by the Trust were not compliant, the process taken as a whole would be. In *R (ota Hammond) v Secretary of State for the Home Department* [2005] UKHL 69, [2006] 1 AC 603, Lord Bingham observed that the ECHR had extended the effect of Article 6 to include some administrative and disciplinary decisions. At [11] he said:
- “In defining the autonomous meaning, for convention purposes, of ‘civil rights and obligations’ in art 6(1), the court has chosen to give the expression a broad meaning, so as to embrace some administrative and disciplinary decisions. This has the consequence that decisions in fields such as this are routinely made in the first instance by bodies that do not have and are not intended to have the independence and impartiality required by art 6(1). The court has not however, held that the making of an initial decision by a body which does not meet convention standards of independence and impartiality necessarily taints or invalidates the further stages of decision-making consequent on that initial decision But, as it was put in *Albert v Belgium* (1983) 5 EHRR 533 at 542 (para29):
- ‘in such circumstances the Convention calls for at least one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1) or they do not so comply but are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1).’”
71. The submissions of Mr Stafford and Miss Lee were that the GMC and/or the employment tribunal satisfied that second requirement, so that the process as a whole was Article 6 compliant. Penry-Davey J accepted that submission.
72. With respect, I cannot agree with that view. Certainly a doctor appearing before the GMC has full rights of representation but the process there undertaken cannot be described as ‘subsequent control by a judicial body’ of the disciplinary proceedings. First of all, the GMC is not a judicial body. Second, it does not conduct an appeal from the disciplinary proceedings by the employer. It decides whether the doctor's fitness to practise is impaired. I entirely accept that consideration of that issue would,

in the case of Dr Kulkarni, include deciding whether he had indeed touched his patient improperly as alleged in the disciplinary proceedings. And I also accept that, if the GMC found that he had not, he should be able to obtain employment again within the NHS. But there is no certainty that there will be GMC proceedings. The doctor cannot instigate them.

73. Also, employment tribunal proceedings are of a different nature from disciplinary proceedings and the issues which the employment tribunal has to consider (in a case where the dismissal has been by reason of misconduct) is not whether the employee was guilty of the misconduct but whether, having conducted a reasonably thorough investigation, the employer believed that the employee was guilty of the misconduct alleged and dismissed him for that reason; also whether the employer acted reasonably in treating that misconduct as a sufficient reason to dismiss the employee: see *British Home Stores v Burchell* [1978] ICR 303. In short, the employment tribunal does not decide the crucial question of fact for an employee in Dr Kulkarni's position; it is not, in my view, a tribunal of full jurisdiction.
74. I do not wish to say much about the arguments on discretion. I think that, in the presence of an express term covering the right to representation (albeit limited as here) there is no room for an implied term entitling the practitioner to require the employer to exercise a discretion to extend the right of representation. However, it is always open to an employer to waive the strict terms of the contract of employment and there is nothing to stop a practitioner from asking the employer to permit him to be legally represented outside the terms of the contractual provision. It seems to me that the employer could say that he is not prepared to consider the request. If he does consider it, he should do so fairly and rationally.
75. The employer faced with such a request is in some difficulty in that the line between cases in which Article 6 is and is not engaged (because of the potentially grave effect of an adverse finding on the doctor's ability to practise his profession) may be a difficult line to draw. If the employer refuses to grant representation in a case which does engage Article 6, his refusal will be unlawful. It may be that an employer who receives such a request would be well advised to give it fair consideration and when doing so to bear in mind the possibility that a denial of full rights of representation might be held to be a breach of Article 6.
76. I can see that these observations are less than definitive and therefore less than satisfactory for both doctors and employers and it seems to me that it may be sensible for the Secretary of State to give further thought to question of legal representation in the light of this decision.
77. For the reasons I have given, I would allow the appeal and make the declaration that, pursuant to his contract of employment, Dr Kulkarni is entitled to be represented by lawyer instructed or employed by the Medical Protection Society. I am sure that the Trust will comply with that declaration and that it will not be necessary to make an injunction.

Lord Justice Wilson:

78. I agree.

President of the Family Division:

79. I also agree.