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Case No: HQ07X04296

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th April 2008

Before Simeon Maskrey QC

Between :

DR VIJAYA LAKSHMI **Claimant**

− and −
MID CHESHIRE HOSPITALS NHS TRUST **Defendant**

For the **Claimant**

John Hendy QC
Deshpal Panesar

For the **Defendant**

Andrew Hillier QC
Giles Powell

Hearing dates:
25th - 28th February 2008

JUDGMENT

NARRATIVE

1. I shall not recite all of the facts of this case. It is unnecessary to do so, particularly as the chronology is essentially agreed and excess detail can obfuscate rather than bring clarity. However, it is necessary to set out the salient matters in order to make this Judgment intelligible. References to documents will either be to the page of the trial bundle [TB] or core bundle [CB]. References to statements [S] will be to the paragraph number. Where

there is a dispute of fact I will say which version I prefer, and why, during the course of the narrative.

2. Dr Vijaya Lakshmi (Dr L), the Claimant, is a Consultant Physician. Since January 1998 she has been in the employ of the Defendants, the Mid Cheshire Hospitals NHS Trust (the Trust). The matters that concern this case all occurred at the Leighton Hospital, although Dr L had responsibilities at the Victoria Infirmary, Northwich. Her contract of employment is at [CB 73].

3. In the winter of 2005, said Dr L, she found it difficult to visit the Crematorium of her Hospital in order to complete Form C of the Cremation Act Certificate. A blank copy of such a certificate is found at [CB 100]. The Cremation Act certificate comes in three stages. The first is a certification from the treating doctor (the "medical attendant") to the effect that he or she knows of no reasonable cause to suspect that the deceased died a violent or an unnatural death or a sudden death of which the cause was unknown (form B). The second is confirmation of the treating doctor's certification by an independent medical practitioner (form C). It is necessary in order to give this independent view, and in any event it is a statutory requirement, that the independent doctor will discuss the death with the treating doctor, and will perform a visual examination of the body. The importance of the confirmation is obvious: it helps to ensure that the deceased has not died as a consequence of acts or omissions on the part of treating doctors that are then being covered up. The Shipman enquiry ought to have brought home to every doctor the importance of the confirmatory certificate. Finally there is then the authority to cremate, a form which is completed by a medical referee (form F). The medical referee acts on the basis of the information provided in Forms B and C.

4. Because, she said, of difficulties of access and the pressure for swift closure placed upon her by families, Dr L fell into the habit of signing Form C without seeing the bodies and, on occasion, without discussing the death with the treating doctor. The Trust found evidence that on at least 46 occasions Dr L had signed Form C without examining the body [CB 86]. There may have been more occasions but Dr L accepted in evidence that there were 46 and I proceed on that basis.

5. She was, she said, concerned and distressed by what she was doing and on the 10th April 2006 she drew to the attention of Dr Dodds, her Clinical Director and thus line manager, the fact that she had difficulty with access to the mortuary [S 18]. In evidence Dr L went further and said that she had told Dr Dodds that she was signing form C without viewing the bodies.

6. Dr Dodds was called to give evidence by the Trust. He denied having any recollection of crematorium forms being raised at the meeting in April. He said that if it had been raised he would have taken it seriously: he knew the importance of examining the body and the rationale that lay behind having the body examined by an independent doctor. It was suggested to Dr Dodds that he bore Dr L some antipathy. I do not accept that he did. I have little doubt Dr L held some resentment as to the way she believed she had been treated on the distribution of office space and administrative support and it may be (I do not know) that this made her an exasperating colleague. But I do not believe that any such exasperation developed into antipathy such as to cause Dr Dodds to lie about a conversation that I am sure he would have remembered had it taken place. Whether or not Dr L made mention of difficulties of access to the mortuary I am sure she did not tell Dr Dodds that she was signing Form C without viewing the bodies. If she had made such an observation I am sure she would have been told to desist forthwith. I am sure that Dr Dodds would have

regarded it as a serious matter that could not be allowed to continue. I am sure he would have asked her if others were engaged in the practice.

7. She said that Dr Dodds appeared busy. He drew the meeting to an end without commenting upon her assertions or otherwise saying what he would do. I find it impossible to accept that that is what he would have done if given the information that Dr L says she gave him. Moreover, if what she said were true one would expect that over the next five months Dr L would have raised the matter again, particularly if it was causing her the distress she said it caused. She did not. She had no convincing explanation as to why she did not.

8. Dr Dodds did become alerted to a problem with crematorium forms. I accept that this was in August 2006 and that it provoked the investigation carried out by Mr Goodwin, the Trust's Director of Finance, assisted by Mr Slater, the Trust's local counter−fraud specialist [CB 79]. As the investigation progressed it became apparent that there were a number of doctors signing Form C when there was no evidence that they had visited the mortuary. Letters were sent by Mr Goodwin to three of the doctors, Dr L included, asking if they had an explanation. The letter to Dr L is dated the 18th September 2006 [CB 143]. It was non−combative and non−judgmental. It simply sought an explanation. Dr L did not meet with Mr Goodwin. She did not provide an explanation. Her letter in response, dated the 21st September 2006 [CB 145] simply side−stepped the issue. Mr Goodwin was obliged to report to Dr Thomson, the Trust's Acting Medical Advisor, without having any explanation from Dr L. Dr Thomson called a meeting with Dr L. She did not attend. Consequently he wrote to her on the 16th October 2006 informing her of his decision to carry out a formal disciplinary investigation [CB 148]. He did not consider it necessary to suspend Dr L from work. He considered that the risk to patients was appropriately managed by restricting her from taking part in the completion of Cremation Act

forms. He advised her that he would be informing, amongst others, the GMC and the police. Still Dr L did nothing.

9. Dr L's reasons given in evidence for failing to meet with Mr Goodwin or Dr Thomson and failing to offer an explanation to them for what had been happening were utterly unconvincing. I am driven to the conclusion that she appreciated the seriousness of what she had done and thought that if she undertook to and did abide by a new procedure, promulgated in a letter dated the 20th September 2006 [CB 144], the complaint would go away.

10. It did not go away. Mr Goodwin and Dr Thompson considered that possible persistent breaches of the Act, which amounted to the commission of criminal offences, could not be overlooked. I have considered (though it was raised tangentially at best) whether Dr Thompson was driven by mistrust or some other animus towards Dr L. I am satisfied that he was not. He considered, rightly, that the matter was serious. It is true that he informed the GMC that Dr L also faced other disciplinary matters (which will be referred to in this judgment as "other matters") and it is true that he did so before she knew of it. That was, in my judgment, a mistake; but it was not one driven by antipathy towards Dr L. Dr Thompson then told me that as a consequence both of the Police request and Clause 3.7 of HR2 he stayed the investigation.

11. Mr Thomson in evidence accepted that he was aware of the Trust's Disciplinary Policy that had come into effect in September 2006 (referred to in this judgment as "HR2") [CB 64] and in particular to clause 3.7 [CB 71]. As a consequence, he said, of both the police request and clause 3.7 he did stay the investigation and on the 3rd November 2006 he informed Dr L of that fact [CB 151]. In truth, by this time, the investigation was almost complete. All that was missing was

an account from Dr L and the other doctors of their actions and an acceptance or denial of the fact that they had signed Form C without examining the bodies.

12. There matters rested until May 2007 when the Trust was informed that the Police had sent the papers to the CPS.

13. Dr L had not been suspended as a consequence of these allegations. She had been permitted to continue working but stopped from signing cremation forms. However, the investigation into the other matters referred to at paragraph 8 of this Judgment had resulted in her suspension in January 2007. She also asserted that she could not work through ill−health brought about, she implied, by the stress of what was happening to her.

14. It seems that in May 2007 the Police forwarded their file to the CPS. The Trust was informed. Nonetheless Dr Thomson was sufficiently concerned by the delay to make the decision in early June 2007 to continue the investigation [CB 203]. Dr L was informed [CB 158A]. Dr Thompson told me that on several occasions he had sought information as to when a decision would be reached whether to prosecute or not. The response was that the decision would be made in the near future. Come June 2007 he and Mr Eames had decided that matters could not continue in this way and the decision was taken to resurrect the investigation. The Police were informed and duly protested [CB 204]. The advice the Trust received was that the Police objections were unjustified. In August 2007 Mr Goodwin requested that Dr L attend for interview [CB 160]. She did so but, on advice she said, she declined to answer any questions. [CB 162] The other two doctors against whom similar allegations were made took the same stance. Mr Goodwin offered Dr L further opportunities to provide him with an explanation or attend for interview. She did not take them up. In evidence Mr Goodwin said that he hoped she would provide an explanation and

that he thought she might do so by the time of the disciplinary hearing. I do not consider that anyone on behalf of the Trust thought that there was a realistic prospect of her providing an explanation until the CPS had made a decision whether to prosecute or not. The letter from her solicitors dated the 25th September 2007 [CB 166] made that clear. Representatives of the Trust arranged the disciplinary hearing in the knowledge that she would offer no defence and no mitigation: that she would say nothing.

15. Of course, there may be good objective reasons why a person would prefer to say nothing to a disciplinary panel when faced with a concurrent Police investigation. However, in this case Dr L had admitted to the Police the essential allegations made against her, and had offered her explanation of why she had felt compelled to act as she did. When asked in evidence why she did not repeat to the Trust what she had told the Police her only answer was that she was acting on advice. Indeed, it became apparent that some attempts were made by her or on her behalf to prevent the Trust gaining access to the Police interviews [TB 26]. No good reason was advanced as to why she took this step. In a Witness Statement made for the purposes of interlocutory proceedings she failed to state that she had signed Form C's without viewing the bodies and had admitted as much to the Police [TB 10]. She could not provide an explanation for that omission.

16. I find as a fact that there was no objective reason why she had to remain silent in the face of the disciplinary hearing. No doubt one can construct speculative scenarios whereby prejudice could occur. But the reality was and is very different in this case. It could not possibly have prejudiced her position in the criminal investigation to have provided the Trust with the same information she provided the Police unless, of course, that information was untrue. In evidence she told me that what she had told the Police was in fact true. The renewal of

the investigation and the disciplinary hearing may have made the task of the police or the CPS more difficult. But I am not concerned with that. I am concerned with the disadvantage to Dr L in allowing the hearing to take place before the CPS had decided whether to prosecute or not. As I say, I find that there was no good reason why Dr L had to remain silent.

17. The hearing was arranged to take place on the 15th November 2007. Dr L was informed on the 2nd November 2007 [CB 168]. Her solicitors protested and referred specifically to the Department of Health Guidance which contained a provision almost identical to clause 3.7 in HR2 [CB 172]. The Police protested by letter dated the 9th November 2007 [CB 209]. The police informed the Trust that a decision was likely to be forthcoming from the CPS within two weeks. They *"implored"* the Trust not to continue with the hearing. The view of Dr Thompson, reinforced by legal advice received by him, was that there was no reason to postpone the hearing. He was asked what the benefit was to the Trust in declining to postpone the hearing. I consider that in this respect his evidence was unsatisfactory. He asserted that the reason was patient safety. But given that Dr L (a) was not at work and (b) had not been suspended as a consequence of these allegations, I find that any suggestion that patient safety was at risk was tenuous to say the least. More realistic was the assertion by Dr Thompson that he was not convinced that the decision would have been made by the CPS within a fortnight. Mr Eames, who was at that time the Trust's CEO, gave evidence. He held to the view expressed in his statement [S 10 & 16]. He also asserted that he did not believe that clause 3.7 of HR2 had any effect because the police investigation was over. When the letter of the 9th November 2007 from the police was put to him [CB 209] he had some difficulty continuing to assert that he believed the investigation was over. Nonetheless he still insisted that that was his view. He went so far as to say that although he had not considered a joint approach to the CPS with the doctors' representatives with a

view to obtaining a definite timescale for the decision he did not, even now, believe that that was necessary. As far as he was concerned the investigation was over; no further delay was justified, and the hearing would take place on the 15th November as planned.

18. I have considered all of the reasons advanced for declining to postpone the hearing. I do not consider that, whether taken individually or together, they were good reasons. Dr L was not asking for an indefinite adjournment. She was, as was the Trust, relying on legal advice. Although that legal advice might have been (as I have found) over−cautious, the fact is that it places a doctor in an intolerable position to second−guess the advice offered by lawyers. The Trust had no way of knowing whether matters material to the outcome would be forthcoming if she was allowed to give her explanation "unfettered". There would be no risk to patient safety if there had been an adjournment for 2 weeks. Whilst the stress on the doctors themselves would continue that was more than counter−balanced by the relief of knowing that an account could be given without fear of the consequences in the criminal case. Moreover, a delay might have given the Trust the opportunity to consider the reasons for the CPS taking no further action, if that was what they had chosen to do. I consider that there was no good reason why the hearing could not have been delayed for a month.

19. In any event, the hearing went ahead with the predictable result that Dr L said nothing and the case against her was proved. She was summarily dismissed. She has appealed against the decision. The Trust has undertaken that an appeal will be by way of rehearing, thus allowing Dr L to give her explanation. Any impediment to her so doing has now gone given that the CPS has decided that no further action should be taken against her.

THE ORDER SOUGHT BY THE CLAIMANT

20. In essence Dr L seeks a declaration that the disciplinary hearing was a nullity; that her dismissal was a nullity; that she remains employed by the Trust; and that if any disciplinary proceedings are to be continued they must comply with the disciplinary procedures specified in the contract of employment [CB 10]. In addition she seeks damages for breach of contract and she has served a schedule of loss [CB 11].

21. The basis of her case is that HR2 has been incorporated into her terms and conditions of employment; that the relevant clauses and in particular Clause 3.7 are expressed in mandatory terms; that the failure to comply with those terms amounts to a repudiatory breach of contract which she has not accepted; and that this entitles the Court, in the exercise of its discretion, to declare that the purported dismissal is of no legal effect and to order specific performance of the contract. She asserts that restricting the Claimant to damages would be an inadequate remedy, given that, at best, the damages would consist of the loss of income during her notice period of three months.

22. The Claimant's case has developed in argument. In the alternative it is said that HR2, if not expressly incorporated into the Claimant's terms and conditions, is nonetheless the published and agreed guidance of the Trust and that, at the least, the Trust should adhere to it unless it can establish a good reason not to. In essence it is said that it is a breach of the implied term of mutual trust and confidence, (good faith) not to adhere to the guidance unless there is good reason.

23. The Trust has denied that the provisions of HR2 have been incorporated into the contract of employment; and they deny in any event that there has been a breach of contract. On the footing that a breach is found, contrary to its primary case,

the Trust argues that the declarations sought are not available to Dr L and that any claim to damages is restricted because (a) if the Trust had known of the admissions made by Dr L to the police it could and would have dismissed her as at January 15th 2008 (the date by which any delayed disciplinary hearing could have been concluded) and (b) in any event Dr L's notice period is restricted to 3 months. It is noteworthy that the Trust did not plead that Dr L was not entitled to claim damages for breach of contract if a breach was proved [CB 29].

IS CLAUSE 3.7 INCORPORATED INTO THE CONTRACT OF EMPLOYMENT?

24. Mr Hendy QC, for Dr L, argued that the provisions of clause 3.7 (and clause 3.9) were expressly incorporated into the contract of employment. He points to the letter of appointment [TB 78] which states that Dr L will be "subject to the Trust's normal disciplinary procedure and rules". Consequent upon national agreement reached between the BMA and the Department of Health a document entitled "Maintaining High Professional Standards" was produced. Trusts were required to amend disciplinary policy to accord with this document. The Trust did so and produced HR2. On the 14th September 2006 staff at the Trust were informed that the Trust had duly amended its policy, that it was contained in HR2 and that it "constitutes a change to Terms and Conditions of Service" [TB 113]. Although Mr Hendy conceded that some parts of HR2 might not be apt to be incorporated into the contract of employment there was nothing about clauses 3.7 and 3.9 that were inapt for incorporation.

25. Mr Hillier QC, for the Trust, relied upon the approach adopted by Hobhouse J in ***Alexander v. Standard Telephones and Cables Ltd (No 2)*** **[1991] IRLR 286** at 291−292.

"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.

26. I adopt the guidance given by Hobhouse J. I note and accept that HR2 was said to constitute a change to Terms and Conditions of Service. I do not think that that is inconsistent with HR2 being and remaining policy guidance for the Trust rather than a set of rules to be read into the contract of employment. The change to the Terms and Conditions of Service was that henceforth the Trust agreed that it would act in a way that was consistent with HR2 rather than any other set of guidelines. I consider that the breadth of HR2 and the language that it uses is inconsistent with it being regarded as a contractual document itself. I note that Mr Hendy accepted that some parts of HR2 were not apt to be regarded as contractual provisions; yet that means that if he is right when he submits that some parts do have contractual force that the parties have left it wholly unclear as to which parts should be incorporated and which should not. I note and accept Mr Hillier's submission that if parts of HR2 are expressly incorporated into the contract of employment then they have to be construed strictly and in accordance with contractual law. On that basis it is at least arguable that clause 3.7 allows the Trust no discretion: whenever it suspects a

criminal offence it will be reported to the police and its own investigation will only proceed in respect of other unrelated aspects. Mr Hillier argued that that would be absurd and that the clause could not be mandatory. Mr Hendy was inclined to agree. Yet it is the fact that it needs to be regarded as discretionary whilst couched in mandatory terms that leads me to conclude that it is not apt to be viewed as an express contractual provision. Moreover, in clause 3.9 no guidance is given as to when a Trust might consider it appropriate to refrain from "taking action pending outcome of a court case" and there is no definition of what is meant by "taking action". Again, the nature of the language leads me to conclude that this document is guidance and that as guidance its provisions should not be regarded as contractual in nature.

27. As an alternative Mr Hendy argued that the Trust had contracted to adopt and follow the policy set out in HR2. He argued that it must be accepted that the contract of employment contained an implied term of mutual trust and confidence that neither the Claimant nor the Defendant would, without reasonable and proper cause, conduct themselves in a manner likely to destroy or seriously damage the relationship of trust and confidence, (***Malik v. BCCI*** **[1998] AC 20**). He submitted that to act contrary to published policy could breach that implied term of trust and confidence (or good faith). Mr Hillier accepted that that might be so. However, he submitted that all the Trust had to do to comply with the implied term was "have due regard" to the provisions of HR2.

28. I do not accept that. First, the expression "have due regard" is so wide as to be almost meaningless. What is meant by "due" and what is meant by "regard"? Does it mean that the Trust simply has to show that it was cognisant of the policy and no more? I cannot accept that. The medical profession had given away the right to an appeal to the Secretary of State in the collective bargaining

that gave rise to HR2. It was well aware of the fact that by permitting the individual Trusts to determine procedure in disciplinary matters the medical profession had lost the protection that might be provided from independent sources. In exchange it had negotiated a policy that the Trust had agreed to follow, but which was not mandatory because circumstances might arise whereby that was not workable, fair or rational. Thus, the Trust had to have some discretion. The only appropriate way of looking at the policy was that it would be followed by the Trust unless the Trust could establish that there was a good reason not to do so.

29. I therefore find that although HR2, or more particularly clauses 3.7 and 3.9 of HR2, were not expressly incorporated into the contract of employment, there was a term of the contract that the Trust would comply with HR2 unless it could establish good reason not to do so. I find that this was a free−standing term of the contract of service, necessary for the contract of service to be effective; and in the alternative that the Trust only complied with its obligation to act in good faith if it complied with HR2, absent a good reason not to do so.

30. I should add this: I also find that the implied term to act in good faith applied irrespective of the existence of HR2. Thus, if there was a disciplinary hearing and a request was made on apparently reasonable grounds for it to be adjourned, then it would be a breach of the implied term to decline to adjourn it in the absence of good reason not to do so.

WAS EITHER PARTY IN BREACH OF CONTRACT?

31. In analysing clauses 3.7 and 3.9 in the way that I have there is a risk of forgetting that the employee owes her employer obligations as well as the other way around. Dr L had acted, on my finding of the facts, in a wholly improper

way. She had signed Form C on at least 46 occasions knowing that what she was asserting was not true. She did so knowing that the consequence of what she was failing to do might be extremely serious. She failed to seek help from her employers but simply continued to act in contravention of the law. When her actions were being investigated she prevaricated so as to avoid admitting what she had done and she embarked on a course of conduct designed, as I find, to provoke the Trust to let matters rest. There can be no doubt that these actions were themselves serious breaches of her obligation of trust and confidence. I am satisfied that the breaches were such as to amount to repudiatory breaches of contract that the Trust could choose to accept. Put in more modern terms, these actions amounted to gross misconduct and the Trust had the option of summarily dismissing her or not.

32. However, the Trust had a contractual obligation to determine whether the employee had committed an act of misconduct, and if so whether it was gross misconduct, and if so whether it would summarily dismiss, in accordance with its disciplinary process. It had an obligation to proceed fairly and it had an obligation to comply with clauses 3.7 and 3.9 unless it had good reason not to do so. It contractually bound itself not to determine whether there had been misconduct and if so what to do about it other than by way of its disciplinary process. Consequently, any antecedent breach of contract by Dr L did not entitle the Trust to act outside of or contrary to its own disciplinary process. I reject Mr Hillier's submission that ***Boston Deep Sea and Ice Company v Ansell*** **[1888] L.R. 39 Ch.D. 339** is authority for the contrary proposition. In my judgment an employer is only able to rely upon antecedent misconduct of which it was not aware at the time of dismissal as a reason to justify the original dismissal where there is no disciplinary process in existence. In all other cases it must dismiss only consequent to its disciplinary process. To argue otherwise would be to accept that the whole disciplinary process could be side−stepped

simply because an employer regarded the alleged breach by the employee, and the action to be taken by the employer, as obvious. Of course, ***Boston*** remains relevant even in cases where there is a disciplinary process because the remedy that may be obtained by an employee for breach of a disciplinary process will depend on the facts determined at the time the remedy is sought; not the facts known to the employer at the time of its breach.

33. Thus, one must ask whether my finding at [18] above is such as to render the Trust in breach of contract. I have no doubt that it does. The police investigation was continuing as at the 15th November 2007, the date of the disciplinary hearing. That is what the police said in their letter of the 9th November and it is readily apparent that that must be so. The CPS might have asked that more enquiries be carried out. There was no good reason why the hearing could not have been adjourned for 2 weeks. The alleged activity of Dr L did not carry with it a risk to patient safety that could not have been managed, as it was throughout the best part of a year. By waiting, the Trust would have placed itself in the position of being able to determine whether it would act on the presumption of reinstatement set out at clause 3.9 of HR2. Moreover, I do not believe that the Trust acted in a way that was compatible with the obligation of trust and confidence that it owed Dr L by continuing with the hearing. It knew that Dr L would thereby not feel able to say anything in her defence. It had no reason to doubt the fact that she had received advice to remain silent. Whilst that advice might turn out to be wrong, there was nothing (other than relatively minor administrative inconvenience) to be lost by adjourning the case. In truth I believe that Dr Thomson and Mr Eames had lost patience with the CPS. But at no stage did they invite the doctors to join with them in a request for expedition; and at no previous stage had they received a written assurance that the delay was to be no more than 2 weeks. Whilst their loss of

patience may be explicable it does not alter the fact that it caused them to breach the terms of their contract with Dr L.

34. Does it make any difference that Dr L had in fact admitted what she had done to the police and, in the event, as I have found, had no good reason to remain silent? In respect of the issue as to whether the Trust was in breach of contract I do not believe that it does. The fact that the advice Dr L was receiving was arguably wrong does not impact upon her reasonableness in relying on it. In any event, I do not believe that the fact that she had no reason to remain silent can cure a breach of contract committed by the Trust. What it has is an impact on the remedy available.

35. It follows that I find that both parties were in breach of contract. However, the breach on the part of Dr L did not entitle the Trust to dispense with its disciplinary proceedings, or its obligation to follow clause 3.7 of HR2, or its obligation to act in good faith and in a way that was conducive of trust and confidence. I thus find that the Trust was in breach of contract in failing to adjourn the disciplinary process until the CPS had reached a conclusion (and thus until the police investigation was concluded). The Trust was in breach because there was no good reason not to follow its own disciplinary policy and procedure. The Trust was, consequent upon this breach, also in breach of contract in summarily dismissing Dr L.

THE AVAILABILITY OF AN APPEAL

36. At one point I was attracted to the submission made by Mr Hillier that one should look at the disciplinary process as a whole. The fact is that an appeal process is available to Dr L. The Trust has undertaken that it will be by way of re−hearing. Thus, at the appeal Dr L will be able to put forward all of her

explanations and mitigation without fear that the appeal will impact upon the criminal proceedings. Provided that the appeal is conducted fairly (and there is no reason to suppose that it will not be) there will be a finding that is fully compliant with HR2 and the implied terms of good faith. Moreover the disciplinary process does not prescribe the method of acceptance of a repudiatory breach. The purpose of the disciplinary process is to ensure fairness for the purposes of **Section 98 of the Employment Rights Act 1996**

37. However, I have been persuaded by Mr Hendy that where (as here) the contract provides an entitlement to two hearings, and where (as here) there is a contractual right that the hearings should be fair and should comply with the implied term that the employer will maintain trust and confidence, it would be wrong to allow the employer to disregard that contractual right and permit the employee only one fair hearing. The appeal process is more than an opportunity to put right the failings of the first instance hearing; it is an opportunity for the employee to persuade the employer that his or her conduct does not amount to gross misconduct and/or should not result in summary dismissal. It is a contractual right to two bites at the cherry. Whilst the trenchant observations of Megarry J in ***Leary v Nat. Union of Vehicle Builders*** **[1971] 1 Ch 34 @ 49 D−F** have not been wholly endorsed in subsequent cases, they remain apposite where there is a contractual duty to hold a fair first instance hearing and to offer an appeal hearing. I do not consider that the observations of Lord Wilberforce in ***Calvin v Carr*** **[1980] 1 AC 574** should be taken as entitling an employer to abandon the contractually binding disciplinary process simply because there is also an appeal process.

DAMAGES

38. It is here that many of the rival submissions have been focused. There has been a breach of contract. The disciplinary hearing should have been adjourned for (say) a month. In such circumstances (says Mr Hendy) Dr L would have received her salary from the Trust for another month. In addition, he argues that the court should pragmatically award her damages to reflect the 3 months notice period given that one cannot assume that at the appeal she will be dismissed summarily. Mr Hillier did not dispute in his skeleton argument that Dr L would be entitled to damages to reflect 4 weeks salary. However, during the course of submissions I was invited to consider ***Johnson v Unisys Ltd*** **[2003] AC 518** and ***McCabe v Cornwall CC*** **[2004] 3 All ER 991** and as a consequence the approach of the House of Lords in both cases has received considerable attention in this case.

39. The headnote in ***McCabe*** reads as follows:

> *If before his dismissal, whether actual or constructive, an employee had acquired a cause of action at law, for breach of contract or otherwise, that cause of action remained unimpaired by his subsequent unfair dismissal and the statutory right flowing therefrom. By definition, in law such a cause of action existed independently of the dismissal. In the ordinary course, suspension apart, an employer's failure to act fairly in the steps leading to dismissal did not of itself cause the employee financial loss. The loss arose when the employee was dismissed, and it arose by reason of the dismissal. The resultant claim for loss would then fall squarely within the exclusion area established by the House of Lords authority.*

40. The headnote is derived from the speech of Lord Nicholls at paragraphs [27−30]. Lords Hoffman, Rodger and Brown expressly agreed with him. Thus, the headnote accurately reflects the reasoning of four of their lordships. Arguably what Lord Nicholls was there discussing (a loss flowing from a dismissal consequent upon an antecedent breach) is just this case. The loss sustained by Dr L was sustained as a consequence of her dismissal, notwithstanding that the fact of the dismissal was itself in part consequent upon an antecedent breach of the contract. The antecedent breach of contract did not

itself cause loss. It follows that if damages for wrongful dismissal are irrecoverable on the authority of ***Johnson*** then damages for the dismissal in this case must likewise be irrecoverable at common law. Dr L must be left to obtain whatever statutory compensation she can.

41. Following the conclusion of the case I received written submissions from counsel for Dr L on this point. They asserted that the loss sustained by Dr L flowed from the antecedent breach, namely the decision not to adjourn the disciplinary hearing and not from the dismissal itself. The dismissal would have been delayed for 4 weeks had the breach not occurred and thus Dr L would have received an additional month's salary.

42. I have no doubt that the breach of contract on the part of the Trust in failing to adjourn the disciplinary process was an antecedent breach and thus not caught by the ***Johnson*** exclusion zone. I am equally sure that if loss flowed from that breach that was entirely unconnected with the dismissal (such as psychiatric injury or loss of salary during a suspension) that loss would sound in damages recoverable at common law. The difficulty arises where, as here, the loss is closely connected with the dismissal but can be said to have arisen independently of it.

43. I have come to the conclusion that Mr Hendy's written submissions are correct. The breach of duty caused the disciplinary hearing to go ahead when it should have been delayed for 4 weeks. The dismissal would thus have been delayed for 4 weeks. Dr L is thus entitled to damages to reflect the loss of salary consequent upon the failure to adjourn. I should make it clear that one of the reasons I have reached this conclusion is because I am uneasy at reaching a conclusion that there has been a breach of contract and then finding that the common law cannot provide a remedy. ***Johnson*** may drive the court to that

conclusion in many circumstances. But if it does not, then the court should be reluctant to find that although a breach causes loss the common law cannot provide a remedy in damages.

44. However, it is there that the entitlement to damages ends. The additional loss sustained by Dr L arises solely from the fact that she was summarily dismissed. Mr Hendy argued that the court is not permitted to award damages on an evaluation of the prospects of the employer succeeding in a charge of gross misconduct: ***Janciuk v Wineright*** **[1998] IRLR.** The solution, he said, is pragmatic: the award of loss of salary up to the date of the hypothetical hearing the employee should have had **plus** the minimum period of notice to terminate the contract. This was what was done in ***Gunton v London Borough of Richmond and Thames*** **[1980] IRLR 321** and this is what should be done in this case. I do not accept that. A condition precedent to obtaining any damages and to deciding what approach is taken to quantification is that the loss must flow from the antecedent breach rather than from the dismissal. In this case the entitlement to damages representing the minimum notice period can only arise as a consequence of the summary dismissal. The fact that the dismissal was wrongful and thus in breach of contract would have given Dr L an entitlement to damages but for the decision in ***Johnson*** . But for this decision I would have had to decide whether to make the pragmatic award sought by Mr Hendy; or whether to adjourn the assessment of these damages; or whether I should conclude that no damages should be payable because even if the Trust had adjourned the hearing and Dr L had had an unfettered opportunity to explain herself, nonetheless the Trust would have been entitled to and would have dismissed her summarily. But given that I find, that save for the loss of a month's wages consequent upon the decision not to adjourn, any other loss flows from the dismissal, this additional loss (if any), falls squarely within the ***Johnson*** exclusion zone and is irrecoverable.

DECLARATION AND/OR INJUNCTION

45. An award of damages was, of course, a subsidiary part of Dr L's claim. What she was keen to achieve was an Order that the dismissal was wrongful and was consequently a nullity and thus a declaration that she remained employed by the Trust. Such an Order would entitle her to her earnings from the date of her dismissal, would entitle her to another disciplinary hearing and would entitle her to an appeal should she be dismissed at that hearing. Mr Hillier argued for the Trust that this would be an artificial Order because, given the admissions that Dr L has made as to her conduct, the Trust would simply reinstate the disciplinary proceedings and then dismiss her. Mr Hendy, of course, argued that summary dismissal was not necessarily inevitable and that even if it was, the payment of salary until the appeal process was exhausted it was a real benefit for Dr L.

46. ***Gunton's*** case is authority for the proposition that the courts will not order specific performance of a contract of personal service (see paragraph 48 of the judgment of Brightman LJ). The breach of contract on the part of the employer in that case gave rise to a remedy in damages. It was also held that the contract remained in existence until the repudiation was accepted by the employee but only in respect of those terms that do not require the relationship of employer and employee to be maintained. Thus, if ***Gunton*** is correctly decided Dr L cannot seek specific performance of the contract of employment in the sense that she can seek to have the court impose the relationship of employer and employee on the Trust.

47. Two points need to be made about ***Gunton*** . First, it was decided before ***Johnson*** and thus at a time when it was believed that a remedy in damages for

wrongful dismissal remained available to an employee. Secondly, it was decided before a line of relatively recent authority that establishes that circumstances may exist where an employee may restrain an employer by injunctive proceedings from dismissing him. An example is ***Jones v Gwent CC*** **[1992] IRLR 521** where Chadwick J made a declaration that a letter of dismissal was not effective and issued a permanent injunction restraining the Council from dismissing the employee pursuant to its dismissal letter. Another is ***Irani v Southampton HA*** **[1985] ICR 590** where Warner J issued an interlocutory injunction restraining the Health Authority from implementing a termination notice other than in accordance with the procedure laid down in the Whitley Council's Conditions of Service.

48. Mr Hendy sought to argue that ***Gunton*** is inconsistent with such decisions and should be restricted to its own facts. Mr Hillier argued that the court should only grant a declaration that a purported notification of dismissal was a nullity where the procedural requirement constituted an essential pre−condition to the dismissal being effective, for example where there had been a complete failure to provide a hearing.

49. In my judgment the only basis upon which a court can or should grant a declaration or injunction that has the effect of preserving the relationship of employer and employee is where the court can find that a basis of mutual trust and confidence has survived between the employer and employee. In ***Jones*** there was no finding of misconduct on the part of the employee whom the Council wished to dismiss. The Council wished to dismiss in part because of the publicity that surrounded the events in question and partly because it believed that a decision to allow the employee to return to work would cause an irrevocable breakdown in relationships. Chadwick J held that *"The belief that some future event may cause an irrevocable breakdown in relationships cannot*

be a misconduct by the plaintiff. At most, such a belief could form the basis for a decision to terminate the employment" [para 38, my emphasis]. In ***Irani*** there was no complaint made as to the plaintiff's conduct or professional competence. The purported reason for dismissal was irreconcilable differences between him and his consultant. Thus, Warner J was able to hold that whether or not the Health Authority was correct when it submitted that it could dismiss an employee irrespective of the terms of the Whitley Council Conditions and that the employee's remedy was in damages, at the interlocutory stage he could issue an injunction restraining the Health Authority from implementing the termination because (a) that was where the balance of convenience lay (b) it was at least arguable that a permanent injunction could be ordered in the circumstances of that case and (c) there was no suggestion that mutual trust and confidence had broken down as a consequence of the employee's competence or conduct.

50. It may be that given the inability of the courts to give a claimant a remedy in damages following a wrongful dismissal as a consequence of the decision in ***Johnson*** , the courts may be more willing to give injunctive relief in circumstances where trust and confidence has not been demonstrated to have broken down. Thus it may be that the courts will look upon ***Gunton*** in a more restrictive way now that damages cannot be awarded to a claimant who has been wrongly dismissed. But I am satisfied that a condition precedent for the granting of this remedy is that there must be a finding that trust and confidence has not, or may not, have broken down. Such a conclusion is consistent with the view taken by the court in ***Ali v Southwark LBC*** **[1988] ICR 567**.

51. For the reasons I have already given I am satisfied that the relationship of trust and confidence has broken down in this case. I consider that I am not restricted to looking at the facts available to the Trust at the time of the dismissal. I am,

when determining the appropriate remedy, entitled to look at the facts as they are now known. I am satisfied that although Dr L was wrongly prevented from putting forward her explanation for her conduct the explanation she has given in evidence in this court goes nowhere near to justifying her conduct. Indeed, if anything the attempt to suggest that Dr Dodds condoned her conduct, an allegation that I have found was untrue, has placed it beyond argument that the relationship of trust and confidence has broken down. Accordingly, if I have power to grant the relief sought I consider it is only in circumstances where the relationship of trust and confidence is intact. It is not intact in this case and accordingly I do not believe I can grant the relief sought.

52. If I am wrong in my analysis contained in paragraphs [49−51] of this judgment nonetheless Mr Hendy accepts that a declaration or injunctive relief is equitable relief and as such is discretionary. In the exercise of my discretion I am entitled, indeed bound, to consider the conduct of the claimant. In the written submissions made by counsel for Dr L following the conclusion of the case it was argued that she had not been guilty of bad faith. It was put as follows:

> *Accordingly it is submitted that Dr Lakshmi's reticence is not bad faith such as to vitiate the possibility of an equitable remedy. For the short period from 18th September to 3rd November 2007 she adopts an understandable reticence in light of the matters above. After that point matters were out of her hands, and pending the outcome of the criminal proceedings, she was in danger of self incrimination.*

53. For the reasons I have already given I do not believe that her ‘reticence' was justifiable. After she had been interviewed by the police I consider that she could and should have told the Trust what she had told the police. Moreover, I consider that the failure on her part to disclose in her witness statement in the interlocutory proceedings the fact that she had signed the Cremation Act forms without seeing the bodies and had done so on no less than 46 occasions is

evidence of bad faith. I do not accept the argument made at paragraph 10 of those additional submissions that Dr L was acting properly in attempting to prevent the Trust from obtaining the police interviews. I consider that the fact of the admissions to the police was relevant to the application for injunctive relief restraining procedural breaches. Accordingly, notwithstanding the absence of a remedy in damages (which has caused me to look particularly carefully at whether I should grant injunctive relief) I have concluded that in the exercise of my discretion I should not grant a declaration or injunction.

CONCLUSION

54. It follows that I consider that the Trust was in breach of contract in declining to delay the disciplinary process. I award damages for that breach equivalent to a month's net pay. I consider that the Trust was in breach of contract in summarily dismissing Dr L when it did. The loss flowing from the dismissal is within the ***Johnson*** zone of exclusion and consequently I make no award of damages in respect of this breach. I find that there are circumstances when a wrongful dismissal can be declared a nullity and where injunctive relief can be provided by the court. This, however, is not one of those cases. Accordingly, I grant no such relief.

55. I invite the parties to agree an Order reflecting this judgment and dealing with the consequential matters that arise. If they fail to do so the matter will be re−listed before me for further argument.