Neutral Citation Number: [2011] EWHC 2178 (QB)

Case No: HQ10X04938

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/08/2011

Before:

THE HONOURABLE MRS JUSTICE SLADE DBE

- -

Between:

Dr Lim	**Claimant**
- and -	
Royal Wolverhampton Hospitals NHS Trust	**Defendant**

- -
- -

Mark Sutton QC and Betsan Criddle (instructed by **Radcliffes le Brasseur**) for the **Claimant**
Giles Powell and Nicola Newbegin (instructed by **Hill Dickinson**) for the **Defendant**

Hearing dates: 31st March, 1st April and 4th April 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Mrs Justice Slade:

1. Dr Lim is a consultant anaesthetist who has been employed by the Royal Wolverhampton Hospitals NHS Trust since 1st December 2003. The claim brought by Dr Lim concerns a proposed capability and conduct hearing to be held by the Defendant which was originally to begin on 4th January 2011. The Claimant seeks an injunction to restrain the Defendant from holding a capability hearing unless and until an assessment panel of the NCAS (National Clinical Assessment Service) has determined that his professional performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic prospect of success. He also seeks to restrain the Defendant from proceeding to hear and determine allegations of misconduct which were alleged to have taken place more than four years ago. The Claimant also seeks damages.

2. Rafferty J on 25th March 2011 ordered a split trial. The issues to be determined at the hearing before me are whether the Defendant is in breach of contract by reason of the matters set out in paragraphs 28.1 and 28.2 of the Particulars of Claim. The breaches of express and/or implied terms asserted in those paragraphs are that:

> "28.1 Before convening a capability hearing, the Defendant has failed to comply with the provisions of paragraphs 1.22 and 23 of Policy HR 27 Attachment [the Defendant's Capability Procedure Document], and with its implied obligation to operate such procedure in accordance with the mutual trust and confidence term. In particular, the Defendant is required to facilitate a referral of the Claimant's case to NCAS in order that an assessment panel can determine whether any deficiencies in his practice can be addressed by way of an educational or organisational action plan.
>
> 28.2 By seeking to revive allegations of misconduct some three years after the occurrence of the events on which the allegations were based, the Defendant has failed to comply with the express provisions of its disciplinary procedures requiring it to conduct its disciplinary processes fairly and speedily."

Relevant Background Facts

3. By a letter of appointment signed by the Claimant on 28th November 2003 he was appointed to work as a Consultant Anaesthetist at the Defendant. His employment commenced on 1st December 2003. By paragraph 14 of his letter of appointment it was provided that in matters relating to professional conduct and competence he would be subject to the procedures set out in circular HC(90)9.

4. Following a review of restrictions on practice and exclusion from work and disciplinary procedures in the NHS, new procedures were to be introduced by the Restrictions of Practice and Exclusion from Work Directions 2003 which required NHS bodies to comply with Parts I and II of 'Maintaining High Professional Standards in the Modern NHS' ('MHPS'). They were to notify compliance with the framework by 1st April 2004.

5. The Claimant entered into a new undated contract ('the contract'). Counsel agree that the new contract was agreed in 2004. Paragraph 17 of the 2004 contract provided:

> "Wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures. However, should we consider that your conduct or behaviour may be in breach of Disciplinary Policy, or that your professional competence has been called into question, we will resolve the matter through our disciplinary or capability procedures, subject to the appeal arrangements set out in those procedures."

6. Directions on Disciplinary Procedures 2005 directed all NHS bodies to implement the framework in Parts III to V of MHPS by 1st June 2005.

7. On 20th March 2009 the Defendant formally adopted HR28 which was the local implementation of the MHPS disciplinary procedure. HR28 attached policies under reference HR27 titled: 'Appropriate Procedures for dealing with certain matters. Attachment 1:- Flowchart – Action when Concern Arises; Attachment 2:- Restriction of Practice and Exclusion from Work; Attachment 3:- Conduct and Disciplinary Matters; Attachment 4:- Procedure for dealing with Issues of Capability.' These procedures were adopted to implement the MHPS provisions on these matters. The Defendant stated that it would apply the relevant provisions of the MHPS from the date it was required to implement them up to the date of adoption of the relevant local procedures.

8. The introduction to the MHPS stated that:

> "3 The new approach set out in the framework builds on four key elements:
>
> …
>
> - the advisory and assessment services of the NCAA [now NCAS] aimed at enabling NHS Trust to handle cases quickly and fairly reducing the need to use disciplinary procedures to resolve problems;
>
> …

> - abandoning the 'suspension culture' – by introducing the new arrangements for handling exclusion from work set out in Part II of this framework."

9. A letter in January 2007 from a staff nurse in the critical care outreach team triggered an investigation into the Claimant's conduct. She complained of incidents between 21st and 23rd December 2006. Prior to this, senior managers had received two other complaints about the Claimant's behaviour in June 2006 and December 2006. Complaint was made that the Claimant had used abusive language and bullied a junior doctor and a nurse, the incidents of which the nurse herself later complained. Further it was alleged that on 26th January 2007 the Claimant had behaved inappropriately towards another doctor. Dr Churchill, Associate Medical Director of the Defendant carried out an investigation. In his report of May 2007 Dr Churchill concluded that the Claimant had been in breach of the Defendant's policy on 'prevention of bullying and harassment'. His first recommendation was for formal disciplinary action to be taken. He observed:

> "Dr Lim has, in admitting to these incidents, shown a great degree of remorse and expressed a desire to apologise for his behaviour."

10. In June 2007 the Defendant raised with NCAS the conduct complaint and a professional capacity concern about the Claimant. NCAS wrote on 22nd June 2007 that they would keep the case open until the Defendant's investigation into the medical practice incident had been concluded.

11. On 29th November 2007 the Claimant was involved in the care of Patient P. Patient P died. Concerns were raised about the pre-operative, intra-operative and post-operative care given by the Claimant to Patient P. The death of Patient P was treated as a serious untoward incident.

12. In late 2007 an investigation was commenced by Dr Janet Anderson into the pre-operative, intra-operative and post-operative care of Patient P.

13. The Claimant was excluded from duty on 7th December 2007.

14. Following the Claimant's exclusion, the Defendant's medical director, Mr Millar, contacted the NCAS. By letter from the NCAS dated 17th December 2007 headed:

> "Re: NCAS advice summary and follow up arrangements".

Dr Grainne Lynn, NCAS adviser, recorded a discussion between her and Mr Millar on 11th December 2007. It appears that discussion concerned the existing conduct complaints and the new capability concern. She wrote:

> "You told me that you would value help from NCAS in assessing the situation. We discussed that, once this investigation has been concluded and the report submitted to the case manager, if it is concluded that there are capability concerns then this may be further explored with NCAS. If there are issues of conduct and capability then this is usually considered under capability (paragraph 8 Part IV MHPS) and prior to capability proceedings NCAS assessment must be considered."

15. Dr Fischer provided a report dated 22nd April 2008 on Patient P's care and Dr Anderson gave her report dated 25th April 2008 to the Medical Director, Mr Millar.

16. Mr Millar sought further expert advice before deciding what action to take. Professor Wildsmith provided a report on 30th June 2008 on Patient P's case and an addendum on 4th August 2008. Dr Fischer wrote an addendum to his report on 17th July 2008. All reports were critical of the Claimant.

17. On 5th September 2008 Mr Millar wrote to the General Medical Council referring the Claimant for possible investigation by the GMC's Fitness to Practice Directorate.

18. Mr Millar informed Dr Lynn of the NCAS that legal advice was to be taken to decide whether the case concerning the Claimant's treatment of Patient P should be referred to the police. Dr Lynn wrote on 8th September 2008:

> "On the information currently available, the Trust had concluded that there was a case to answer but has now deferred a decision on how to proceed until the other issues have been investigated. We discussed that if there are issues of capability, then prior to considering capability procedures, consideration must be given to NCAS assessment and NCAS consulted about this (paragraph 13-16, Part IV MHPS). If the case covers issues of conduct and capability then usually this is combined under capability procedures (paragraph 8, Part IV MHPS).
>
> …
>
> Please follow procedures laid down in relevant national guidance and locally agreed policies…"

19. On 24th September 2008 the Claimant's case was referred to West Midlands Police.

20. At a meeting on 19th November 2008 the GMC's Interim Orders Panel decided to impose an Interim Suspension Order on the Claimant. The Interim Suspension Order remains in place.

21. Mr Millar kept in touch with NCAS. By letter dated 15th December 2008 Dr Lynn repeated the advice she gave in her letter of 8th September 2008 and added:

> "Dr 3800's continuing exclusion, and now his I0P suspension, may create some difficulties as any assessment could probably not take place until these restrictions are lifted.
>
> **Options, further steps and anticipated outcomes for referring body**
>
> If the matter were ultimately to be referred to NCAS for consideration of assessment, the test that NCAS applies is whether an assessment, if appropriate, would be likely to add significantly to the understanding of the case. So that NCAS would be in a position to make an informed and demonstrably fair decision, we would then need to know from you broadly the nature of the allegations and evidence you would propose to put before a capability panel, and we will discuss that further nearer the time if those circumstances arise."

22. On 4th January 2009 Professor Aitkenhead produced a report on Patient P's case. On 9th September 2009 he reported on a review he made of the record of 512 of the Claimant's patients.

23. Following the receipt of the report from Professor Aitkenhead on cases other than that of Patient P, Mr Millar wrote to Dr Lynn at NCAS on 3rd July 2009 informing her that:

> "In respect of the specific case this is a matter that, notwithstanding the outcome of the wider review of cases, I believe has to be taken to a capability hearing. The failings identified by Professor Aitkenhead and the other investigations are deep-seated, wide-ranging and affect the fundamentals of independent practice as a Consultant.
>
> In these circumstances I do not believe that a clinical assessment is required prior to the capability hearing. This is given the information that is already available to be presented to the panel.
>
> After detailed consideration and speaking on behalf of the Trust as Case Manager it is my preliminary view that it is necessary for the issues concerning Dr 3800's capability to be assessed at a formal capability hearing within the MHPS process. Further that in the circumstances of this case, [and as discussed] there does not need to be an NCAS assessment before this takes

> place. To that end I seek your comments and advice in accordance with MHPS.
>
> …
>
> Whilst it is appreciated that a formal NCAS assessment will include some processes that have not been carried out to date the essential, I would argue crucial, aspect of whether there are significant concerns has already been addressed more than adequately."

Mr Millar referred to the additional unresolved conduct matters relating to alleged harassment and bullying which he was of the view could be considered at the capability panel hearing. He set out his preliminary view

> "that there are intractable problems for which it is unsure how training or an assessment will provide any amelioration."

Mr Millar wrote that he awaited comments and advice from NCAS.

24. By letter dated 10th July 2009 Dr Lynn of NCAS wrote in response to Mr Millar's letter of 3rd July and a conversation with him on 8th July 2009:

> "NCAS' position is that both the general and specific requirements of MHPS led to the presumption that NCAS will normally be asked to carry out an assessment prior to a capability hearing; this is unless the referring body has agreed with NCAS that it is not necessary in the particular circumstances of the case. The involvement of NCAS in the pre-hearing process (paragraphs 14-16 Part IV MHPS) is designed to help the Trust to decide if there appears to be sufficient evidence to hand, for the case to proceed to a panel hearing. Where NCAS offers to undertake an assessment at this stage that assessment will be directed to inform that decision."

25. The NCAS appears to have changed its view of the necessity for it to carry out an assessment before a capability hearing took place. By letter dated 23rd November 2009 Dr Lynn wrote to Mr Millar referring to a discussion with him on 17th November:

> "We discussed the letter of 6 November 2009, which I had sent to you outlining that: following a review by NCAS of its procedure to reflect our experience with other cases, practitioner's representatives, and recent

> court judgments, NCAS were now of the view that, if a Trust was challenged because there had not been an NCAS assessment, the court may well interpret the relevant paragraphs of 'Maintaining High Professional Standards in the Modern NHS' (MHPS), as normally requiring an NCAS assessment prior to a capability hearing."

Dr Lynn wrote that if

> "…the Trust now wishes to request an NCAS assessment prior to proceeding to capability, please let me know and the forms will be sent out for completion by the Trust and Dr 3800."

26. In November 2009 the Crown Prosecution Service decided not to prosecute the Claimant.

27. By letter dated 21st January 2010 Mr Millar wrote to the Claimant inviting him to a meeting to receive his comments on the investigations that had been completed into the circumstances surrounding the death of Patient P. Additionally the Defendant had now received expert opinion as to his wider practice. Mr Millar also mentioned that there were also the previous issues about his conduct. He informed the Claimant that his preliminary view was that, notwithstanding the possibility of an NCAS assessment, a capability hearing would always be necessary. He was minded to write to NCAS to tell them of his view.

28. The Claimant and his Medical Protection Society representative Dr Godeseth made it clear that the doctor wanted an assessment by the NCAS.

29. Mr Millar informed Dr Lynn of NCAS by letter dated 7th May 2010 that he remained of the view that an NCAS assessment was not necessary in the circumstances of the Claimant's case. He wrote:

> "As raised with Dr 3800 the Trust has concerns not only as to the circumstances surrounding the death o f [Patient P] but also about his wider practice. Additionally there are the earlier issues of conduct and capability. I have considered all of these in determining what the appropriate course of action is.
>
> Specifically the issues of capability identified relate to aspects of basic anaesthetic, medical practice and competence. These are, therefore, fundamental to the performance of Dr 3800's contractual duties and go to the heart of his clinical judgment."

Mr Millar considered that a capability hearing was necessary and was likely to remain so whatever an assessment produced. He wrote:

> "I invite your comments and in so doing consider that I formally refer this case to you prior to a capability hearing being arranged."

Mr Millar enclosed an NCAS completed pre-hearing information form which included an answer to the request in paragraph 5 to state why the Trust considers further assessment is not appropriate:

> "The Trust's rationale was set out clearly [by] my letter to the appointed NCAS Adviser dated 3 July 2009…"

30. By letter dated 18th August 2010 Dr Lynn of NCAS wrote to Mr Millar:

> "As you know, NCAS' broad view is that proceeding to a capability hearing without a prior NCAS assessment may normally place a Trust at risk of challenge, although where a practitioner is not undertaking the full range of duties or as in this case has been excluded for a significant time, NCAS recognises that this is likely to place constraints on any assessment which may limit its usefulness. Dr 3800's current GMC suspension may add further constraints to the process.
>
> It is for the Trust to decide whether the evidence it has is sufficient to support putting Dr 3800 before a capability panel, and NCAS cannot therefore weigh the overall evidence on which the Trust had based its decision, as that is a matter for the Trust. If there is any specific aspect of the evidence which you would like NCAS to comment on please let me know.
>
> I note that the Trust has set out its reasons for the decision to proceed without requesting an assessment and that this is based on a range of evidence including an external report. In the event of any challenge, the rationale for the Trust's decision will therefore be available for scrutiny."

31. By letter dated 12th November 2010 the Defendant notified the Claimant of the decision to proceed to a disciplinary hearing to commence on 4th January 2011. A Statement of Case was set out in a letter of 10th December 2010.

32. At a hearing on 31st December 2010 the Claimant applied for an injunction to restrain the Defendant from proceeding with the planned disciplinary hearing. The Defendant undertook not to hold a disciplinary hearing in respect of allegations in their letter of 10th December 2010 until trial or further order. Kenneth Parker J (in an order sealed on 12th January 2011) ordered the Claimant's solicitors to notify the NCAS and the Department of Health of these proceedings and their ability to make representations at the trial of this claim. Neither the NCAS nor the Department of Health have done so.

Submissions of the Parties

33. Mr Mark Sutton QC for the Claimant contended that if concerns about the capability of a doctor cannot be resolved routinely by management, the matter must be referred to the NCAS before it can be considered by a capability panel. The reference to the NCAS is for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan.

34. It was contended that at the material time the Defendant's disciplinary policies and procedures were incorporated by reference into the Claimant's contract of employment. Employing authorities were required from 2005 to have in place disciplinary procedures consistent with the MHPS framework document.

35. HR 28 published by the Defendant set out the agreement reached between them and the Local Negotiating Committee ('LNC') outlining the employer's procedure for handling concerns about doctors' and dentists' conduct and capability. The agreement superseded HC(90)9. Attached to it were specific procedures which included Attachment 4 – Procedure for Dealing with issues of Capability.

36. It was submitted by Mr Sutton that Attachment 4, HR 27 makes it clear in paragraph 1.2 that:

> "If the concerns about capability cannot be resolved routinely by management, **the matter must be referred to the NCAS before the matter can be considered by a capability panel** [unless the practitioner refuses to have his or her case referred]."

Before instigating procedures, paragraph 1.17 requires the Defendant to take advice from NCAS. Mr Sutton relied upon paragraphs 1.22 and 1.23 of Attachment 4 HR 27 to contend that before conducting a capability hearing, the Defendant is required to refer the matter to NCAS for it to consider whether an assessment should be carried out. Further, a capability hearing cannot be conducted until the NCAS assessment has been carried out if the NCAS decide to undertake one.

37. Mr Sutton contended that paragraph 1.19 of HR 28 cannot be relied upon by the Defendant as enabling them to place a complaint before a capability panel if the case manager decides that there are intractable problems. Such an interpretation would be inconsistent with the procedure in Attachment 4 HR

27 and the provisions of MHPS. It was submitted that, relying on **Prenn v Simmons** [1971] 1 WLR 1381, MHPS forms part of the factual matrix against which HR 28 and Attachment 4 HR 27 are to be interpreted. MHPS requires a reference to the NCAS before a capability panel is convened.

38. Mr Sutton submitted that the relevant provisions of HR 28 and HR 27 are of contractual effect. It was said that they are apt for incorporation. Reliance was placed on paragraph 13 of the speech of Lord Steyn in **Skidmore v Dartford & Gravesham NHS Trust** [2003] ICR 721 as establishing that the predecessor disciplinary procedure, HC (90)9, was part of the contract of employment of almost all NHS hospital doctors. **Skidmore** was relied upon by Swift J in **Hameed v Central Manchester University Hospitals NHS Foundation Trust** [2010] EWHC 2009 to find that the majority of the provisions of that Trust's disciplinary procedures, those which were sufficiently certain, were incorporated into the doctor's contract of employment. Mr Sutton drew attention to the importance of Part IV of MHPS referred to by Smith LJ in **Kulkarni v Milton Keynes Hospital NHS Trust** [2010] ICR 101 at page 114 paragraph 48.

39. It was contended that Part IV of MHPS imposes a requirement on an employing authority to refer concerns about a doctor's capability to the NCAS before conducting a capability hearing. Mr Sutton relied upon paragraph 58 of the judgment of the Court of Appeal in **Mezey v South West London & St George's Mental Health NHS Trust** [2010] IRLR 572 in support of this argument.

40. Mr Sutton contended that the argument advanced on behalf of the Defendant that paragraph 1.22 of Attachment 4 merely requires the Trust to refer a concern about a doctor's capability to the NCAS but not to agree to assessment or to an action plan would reduce this substantive procedural protection to a mere formality. In addition he submitted that refusing to allow an assessment to take place if the NCAS considered one appropriate would be a breach of the implied term of trust and confidence. Further, refusing to agree to an action plan for a doctor proposed by the NCAS would be a breach of the express term in paragraph 1.23 of Attachment 4.

41. Although the NCAS pre-hearing information form was completed, Mr Millar stated in his letter of 7th May 2010 that the Defendant's view was that an assessment was not appropriate in the Claimant's case. Accordingly it was said that the NCAS letter of 18th August 2010 cannot be relied upon as notification of a decision by the NCAS that there should be no assessment. All that the letter of 18th August 2010 did was to acknowledge the Defendant's decision that it did not want an assessment to take place and had decided to proceed to a capability hearing without one. As was recognised by the NCAS, the Defendant's purpose in submitting material to them relating to the investigations into the Claimant's capability and his treatment of Patient P and others was to support their decision to go to a capability hearing without an NCAS assessment.

42. Mr Sutton acknowledged that the opinions of the NCAS following an assessment do not bind the Defendant one way or another. Their advice does

not address the terms and conditions of employment of the doctor whose case is referred to them. Nor does it affect any assessment of the doctor's performance made by the GMC. However he contended that the express and implied terms of the Claimant's contract require the Defendant to take four steps:

i) to refer competence concerns to the NCAS;

ii) to agree to an assessment and to be supportive in enabling it to be carried out;

iii) to agree an action plan if one is recommended by the NCAS;

iv) to support the action plan.

These are necessary steps for the Defendant to take. Further, failure to take such steps would affect the reasonableness of any decision taken at a capability hearing if such were to take place.

43. Mr Sutton made it clear that the basis of the complaint made against the Defendant for reviving the misconduct allegations was not that the allegations had been abandoned but that there had been gross and inordinate delay in pursuing them. Mr Sutton made no complaint of delay up to November 2009 when the CPS decided not to prosecute the Claimant. He understood that the Defendant wished to combine the consideration of the conduct and the capability allegations. However by November 2009 there was no reason not to progress the conduct complaints. At that point there was an absolute obligation to proceed.

44. Mr Sutton contended that, in accordance with HR 28, disciplinary matters should be dealt with speedily. Delay undermines the requirement that they be conducted fairly.

45. Although it may be contended that delay has caused no prejudice because whether the incidents of bullying and harassment occurred may not be in issue, how those incidents were perceived by those involved and whether such perception was reasonable may well be in issue. Mr Sutton contended that these issues may be difficult to determine after the lapse of time which has occurred.

46. Dr Lim gave evidence. He was interviewed on 2nd May 2007 about allegations that he had bullied and harassed hospital nurses and junior doctors. A report was prepared. He stated that he was not aware that the Defendant was proposing to consider these matters at a hearing until he received the letter of 10th December 2010 informing him that a Capability Panel would consider them at a hearing starting on 4th January 2011. In relation to the complaints of misconduct against him he said that he felt that after a period of time that aspect of things had lapsed. He mainly focussed on the issue of capability. He had admitted the basic facts of the misconduct alleged against him. By May 2007 he recognised that his behaviour was wrong and apologised.

47. Ms Denise Harnin of the Defendant gave evidence. In relation to the allegations of misconduct against Dr Lim, she agreed that a doctor should be given the opportunity to engage with allegations when they can still remember the details. As for capability issues, she emphasised that the NCAS performs an advisory function. Expert opinions on capability can be accessed through other routes than an NCAS assessment.

48. Ms Harnin agreed that a speedy resolution of complaints about conduct is a fundamental ingredient of fairness and that justice delayed is justice denied. She also agreed that assessing conduct in hospital is likely to involve taking a fairly broad view of the circumstances and consideration of departmental relationships.

49. Mr Giles Powell for the Defendant submitted that once MHPS was imposed by direction on an NHS Trust, its implementation was complete. MHPS provides a parameter or set of parameters from which an NHS Trust does not have power to depart. He submitted that the relevant provisions were in place in 2005. The adoption in 2009 of procedures by the Defendant was irrelevant.

50. Mr Powell submitted that paragraph of Part I of MHPS gave the case manager considering a complaint against a doctor the discretion to decide whether there were intractable problems and that the matter should be put before a capability panel.

51. Mr Powell agreed that on their face paragraphs 14 and 15 of Part IV of MHPS require a Trust to refer to the NCAS capability concerns about a doctor. He submitted that the Defendant complied with this obligation and that the NCAS gave their response in their letter of 18th August 2010. The Defendant was therefore not in breach of contract. He contended that it must be open to a Trust to say that even if the issue is referred to the NCAS an assessment would be of no value. Mr Powell submitted that there was no contractual obligation to agree to carry out an assessment.

52. It was submitted that in this case three independent experts had conducted investigations into the Claimant's work and produced reports. They all concluded that his performance fell well below the standard to be expected of a consultant anaesthetist. In the light of such conclusions an assessment would serve no purpose.

53. Mr Powell questioned the appropriateness of an assessment in extreme cases. He asked rhetorically 'what if a doctor was guilty of manslaughter or the subject of group litigation yet found by NCAS to be capable of remediation?'

54. Mr Powell contended that if the Defendant was under contractual obligation to refer a capability issue to NCAS and to co-operate with an assessment, in this case the Defendant did refer issues to the NCAS. They simply stated they did not consider an assessment appropriate. They did not state that they would not co-operate in an assessment.

55. Mr Powell submitted that there was uncertainty about the extent of the Defendant's contractual obligations. This indicated that these provisions of

MHPS were not of contractual effect. He contended that a doctor would not be left without a remedy as they would have power to seek a judicial review of the NCAS for their failure to carry out an assessment.

56. As for the complaints of breach of express and implied terms in the alleged delay in pursuing the misconduct allegations, it was contended on behalf of the Defendant that the investigation into the complaints took place sufficiently speedily. It was reasonable to deal with the conduct complaints at the same time as the capability complaints. The latter have necessarily taken longer to progress. The Claimant had admitted the misconduct allegations. No express or implied contractual term required a misconduct hearing to take place before determination of the capability issues.

Discussion and Conclusion

57. The statutory basis for the effect of MHPS on contracts of employment of medical practitioners employed by the Defendant and other NHS Trusts originates in the National Health Service and Community Care Act 1990. Section 16 provides:

> "(4) Subject to sub-paragraph (5) below, an NHS Trust may-
>
> (a) pay its staff such remuneration and allowances, and
>
> (b) employ them on such other terms and conditions, as it thinks fit.
>
> (5) An NHS Trust shall-
>
> (a) in exercising its powers under sub-paragraph (4) above, and
>
> (b) otherwise in connection with the employment of its staff
>
> act in accordance with regulations and any directions given by the Secretary of State."

58. The power of the Secretary of State to give such directions is derived from the National Health Service Act 1977 Section 17. In December 2003 the Secretary of State issued Directions on Restriction of Practice and Exclusion from Work 2003 ('the 2003 Directions') which came into force on 5th January 2004. By paragraph 2, all NHS bodies were required to comply with the MHPS Framework in the document annexed to the 2003 Directions. These formed Part I: Action when a concern arises; and Part II: Restriction of Practice and exclusion of the final MHPS document. NHS Trusts were required by paragraph 3 of the 2003 Directions to notify Strategic Health Authorities of the action they had taken to comply with the framework by 1st April 2004.

59. On 11th February 2005 the Secretary of State issued Directions on Disciplinary Procedures 2005 ('the 2005 Directions') which came into force on 17th February 2005. By paragraph 2 all NHS bodies were required to comply with

the MHPS Framework in the document annexed to the 2005 Directions. These formed Part III: Conduct hearings and disciplinary matters, Part IV: Procedures for dealing with issues of capability; and Part V: Handling concerns about a practitioner's health. All NHS bodies were required to implement the framework by 1st June 2005. Paragraph 4 provided that, for the avoidance of doubt, three circulars, one of which was HC(90)9, were withdrawn. Parts III, IV and V were agreed by the Department with the British Medical Association and the British Dental Association. It is not suggested that Parts I and II were not so agreed.

The material provisions of MHPS

60. Introduction:

> "…
>
> - there is a single process for handling capability issues about practitioners with professional competence closely tied in with the work of the National Clinical Assessment Authority;
>
> …
>
> - The employing Trust is squarely responsible for the disciplining of its medical and dental staff – not outsiders;
>
> …
>
> - The same disciplinary procedures will apply to all doctors and dentists employed in the NHS."

Doctors' and Dentists' disciplinary framework: introduction and explanatory note explains that local procedures must be in accordance with the MHPS framework.

> "Part I
>
> ***1. ACTION WHEN A CONCERN ARISES***
>
> **…**
>
> **SUMMARY OF KEY ACTION**
>
> …
>
> - Discuss with the NCAA what the way forward should be;
>
> …

> - If a formal approach under the conduct or capability procedures is required, appoint an investigator;
>
> - If the case can be progressed by mutual agreement consider whether an NCAA assessment would help clarify the underlying factors that led to the concerns and assist with identifying the solution.
>
> …
>
> 10. Having discussed the case with the NCAA, the case manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. Where an informal route is chosen the NCAA can still be involved until the problem is resolved. This can include the NCAA undertaking a formal clinical performance assessment when the doctor, the NHS body and the NCAA agree that this could be helpful in identifying the underlying cause of the problem and possible remedial steps. If the NCAA is asked to undertake an assessment of the doctor's practice, the outcome of a local investigation may be made available to inform the NCAA's work.
>
> 11. Where it is decided that a more formal route needs to be followed (perhaps leading to conduct or capability proceedings) the Medical Director must, after discussion between the Chief Executive and Director/Head of Human Resources, appoint an appropriately experienced or trained person as case investigator."

61. By paragraph 17, the report of the investigation should give the case manager sufficient information to make a decision whether:

> - "there is a case of misconduct that should be put to a conduct panel;
>
> …
>
> - there are concerns about the practitioner's performance that should be further explored by the National Clinical Assessment Authority;
>
> …
>
> - there are intractable problems and the matter should be put before a capability panel."

62. By paragraph 19, the focus of the NCAA's work is therefore likely to involve performance difficulties which are serious and/or repetitive. That means:

> "performance falling well short of what doctors and dentists could be expected to do in similar circumstances and which, if repeated, would put patients seriously at risk."

IV: PROCEDURES FOR DEALING WITH ISSUES OF CAPABILITY

INTRODUCTION & GENERAL PRINCIPLES

> "4. …If the concerns about capability cannot be resolved routinely by management, **the matter must be referred to the NCAA before a capability panel** (unless the practitioner refuses to have his or her case referred)."

Capability Procedure

> "14. The case manager should decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner has made and the advice of the NCAA. The case manager will need to consider urgently:
>
> - whether action under Part II of the framework is necessary to exclude the practitioner; or
>
> - to place temporary restrictions on their clinical duties.
>
> The case manager will also need to consider with the Medical Director and head of Human Resources whether the issues of capability can be resolved through local action (such as retraining, counselling, performance review.) If this action is not practicable for any reason the matter must be referred to the NCAA for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The case manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments.
>
> 15. The NCAA will assist the employer to draw up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment. The Trust must facilitate the

> agreed action plan (which has to be agreed by the Trust and the practitioner before it can be actioned). There may be occasions when a case has been considered by the NCAA, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the case manager must make a decision, based upon the completed investigation report and informed by the NCAA advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary."

National Clinical Assessment Service

63. In February 2010 the NCAS issued a policy statement on MHPS Part IV, paragraphs 13-17 which provides:

> "8. Part IV, para 6 of MHPS states that: "Wherever possible, employers should aim to resolve issues of capability…through ongoing assessment and support." There is a general requirement to take advice from NCAS and a specific requirement (para 14) for referring bodies to refer the questions of whether an NCAS assessment should be carried out.
>
> 9. NCAS will normally offer to carry out an assessment prior to a capability hearing. NCAS' position is that both the general and specific requirements of MHPS lead to the presumption that a capability hearing would follow an assessment only when the assessment concluded that the practitioner's performance was so fundamentally flawed that no educational and/or organisational action plan had a realistic chance of success. This is, however, a matter for the employing organisation to make a decision on."

The Claimant's letter of appointment and its replacement

64. Paragraph 14 of the letter of appointment accepted by the Claimant on 23rd November 2003 provided:

> "2. The terms and conditions of the employment offered are set out in the Terms and Conditions of Service of Hospital Medical and Dental Staff (England and Wales) and General Whitley Council Conditions of Service as amended from time to time…
>
> …

> 14. In matters of personal conduct you will be subject to the General Whitley Council agreements on disciplinary and dismissal procedures. The agreed procedures for …[text missing] General Whitley Council Handbook and paragraph 100 of the Terms and Conditions of Service of Hospital Staff. A copy of the Trust's disciplinary procedure is enclosed.
>
> In matters relating to professional conduct or competence you will be subject to the procedures set out in circular HC(90)9."

65. A new undated contract was provided by letter by the Defendant to the Claimant. It was agreed by counsel that this was issued in early 2004 ('the 2004 contract'). The 2004 contract contained the following express provisions:

> "3 General mutual obligations
>
> …It is essential therefore, that you and we work in a spirit of mutual trust and confidence. You and we agree to the following mutual obligations in order to achieve the best for patients and to ensure the efficient running of the service:
>
> …
>
> - to carry out our respective obligations in… following the organisation's policies, objectives, rules, working practices and protocols.
>
> …
>
> 17 Disciplinary matters
>
> Wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures. However, should we consider that your conduct or behaviour may be in breach of Disciplinary Policy, or that your professional competence has been called into question, we will resolve the matter through our disciplinary or capability procedures, subject to the appeal arrangements set out in those procedures.
>
> …
>
> 33 Entire terms
>
> This contract and the associated Terms and Conditions contain the entire terms and conditions of your employment with us, such that all previous agreements, practices and understandings between us (if any) are

> superseded and of no effect. Where any external term is incorporated by reference such incorporation is only to the extent so stated and not further or otherwise."

The Defendant's implementation of MHPS

66. Ms Harnin, the Defendant's Director of Human Resources, gave evidence that the MHPS provisions relating to disciplinary procedures were implemented by the Defendant in 2008. She stated that the Defendant had been using MHPS when matters relating to medical staff had arisen but no procedure had been formally adopted. The Minutes of the meeting of the Local Negotiating Committee on 13th June 2008 record at paragraph 5:

> "Ms Harnin introduced this item in recognition of the need to formally endorse and approve the application of the national framework for all medical staff. Confirmation was received that the group was content, accepted the need to, and agreed to work within the framework. For the purposes of clarity she outlined 5 main points of importance for the LNC to consider. means in practice;
>
> 1. The Maintaining High Professional Standards framework is applicable to all medical staff irrespective of contract type. Therefore, where applicable the provision in **all** doctors and dentists' contracts for the application of HC (90) 9 is varied and withdrawn;
>
> 2. this means that the current Terms and Conditions of all Doctors and Dentists as detailed in previous correspondence from the Trust are varied by this agreement.
>
> 3. this collective agreement is legally binding.
>
> 4. the provisions of the procedure, or subsequently, a local Trust version of the Framework themselves not incorporated into individual contracts.
>
> This was agreed by the LNC subject to any final points of clarification from the BMA full-time officer to provide a legal perspective."

Minutes of the LNC meeting of 12th September 2008 show that a first draft of the localised policy in line with MHPS was presented and that it was recognised that further work was needed to develop the policy. The group agreed that 'whilst the local policy was being developed the MHPS National

Framework would continue to be adopted.' A draft Disciplinary Procedure was presented to the 12th December 2008 LNC meeting.

67. The Minutes of a meeting of the Management Team on 20th March 2009 record:

> "REPORT OF THE DIRECTOR OF HUMAN RESOURCES
>
> 09/161 Disciplinary Policy and Procedure for Medical and Dental Staff
>
> The Policy was attached to the report and followed extensive consultation and ratification through the LNC. The Policy was based on the national framework which had been drawn up by the BMA.
>
> AGREED that
>
> i) the Disciplinary Policy and Procedure for Medical and Dental staff be ratified, and
> ii) the report of the Director of Human Resources be noted."

The policy agreed between the Defendant and the LNC for the procedure for handling concerns about doctor's conduct and capability was set out in HR28 titled:

> "Disciplinary Policy and Procedure for Medical and Dental Staff."

The date of implementation of HR28 was March 2009, the month of the Management Committee Meeting.

68. HR28 provides:

> "Introduction
>
> This is an agreement between Royal Wolverhampton Hospitals NHS Trust and the Local Negotiating Committee [LNC] outlining the employer's procedure for handling concerns about doctors' and dentists' conduct and capability. It implements the framework set out in 'Maintaining High Professional Standards in the Modern NHS', issued under the direction of the Secretary of State for Health on 11 February 2005.
>
> This agreement supersedes HC[90]9, HC[82]13, HSG[94]49. Since then the National Framework has been formally adopted within the Trust in the absence of a local version. This policy and procedure provides that local version for implementation.

This procedure may be amended to reflect any future national advice or guidance but only by agreement with the LNC. The operation of this procedure will be reviewed after 3 years from the date indicated at the top of the document.

The aim of this procedure is to ensure that when concerns are raised, the Trust will ascertain quickly what the nature of the concern is and the reasons behind the concern, identify ways to reduce/manage the risks arising, put in place a robust and speedy process to tackle any underlying problems and ensure that doctors and dentists are treated fairly.

…

Identifying if there is a problem

1.11 Having discussed the case with the NCAS, the case manager must decide whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed. Where an informal route is chosen the NCAS should still be involved until the problem is resolved.

1.12 Where it is decided that a more formal route needs to be followed [perhaps to conduct or capability proceedings] the Medical Director must, after discussion between the Chief Executive and Director of Human Resources, appoint an appropriately experienced or trained person as case investigator. The seniority of the case investigator will differ depending upon the appropriate level of experience required.

…

1.19 The case investigator should complete the investigation within 4 weeks of appointment and submit their report to the case manager within a further 5 working days [where possible]. The report of the investigation should give the case manager sufficient information to make a decision whether:

…

- There are concerns about the practitioner's performance that should be further explored by the NCAS;

…

> There are intractable problems and the matter should be put before a capability panel."

69. The attachments to HR28 at HR27 are described in paragraph 2 as 'Appropriate Procedures'. Attachment 2 deals with 'Restriction of Practice and Exclusion from Work', Attachment 3 'Conduct and Disciplinary Matters' and Attachment 4 'Procedure for Dealing with Issues of Capability'.

70. Attachment 4 provides:

> "1.2 If the concerns about capability cannot be resolved routinely by management **the matter must be referred to the NCAS before the matter can be considered by a capability panel**…
>
> …
>
> 1.5 It is inevitable that some cases will cover both conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. It is for the Trust to decide upon the most appropriate way forward having consulted the NCAS and their own employment law specialist.
>
> …
>
> 1.17 The procedures set out below are designed to cover issues where a doctor's or dentist's *capability* to practice is in question. Prior to instigating these procedures, the employer will consider the scope for resolving the issue through counselling or retraining and will take advice from the NCAS.
>
> …
>
> 1.22 The case manager should decide what further action is necessary, taking into account the findings of the report, any comments that the practitioner has made and the advice of the NCAS. The case manager will need to consider urgently:
>
> - Whether action under Attachment 1 is necessary to exclude the practitioner;
>
> or
>
> - To place temporary restrictions on their clinical duties.

> The case manager will also need to consider with the Medical Director [if he/she is not acting as the case manager] and Human Resources Director whether the issues of capability can be resolved through local action [such as retraining, counselling, performance review]. If this action is not practicable for any reason the matter must be referred to the NCAS for it to consider whether an assessment should be carried out and to provide assistance in drawing up an action plan. The case manager will inform the practitioner concerned of the decision immediately and normally within 10 working days of receiving the practitioner's comments.
>
> 1.23 The NCAS will assist the Trust in drawing up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment. The Trust must facilitate the agreed action plan [which has to be agreed by the Trust and the practitioner before it can be actioned]. There may be occasions when a case has been considered by the NCAS, but the advice of its assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success. In these circumstances, the case manager must make a decision, based upon the completed investigation report and informed by the NCAS advice, whether the case should be determined under the capability procedure. If so, a panel hearing will be necessary."

71. Paragraphs 1.11 and 1.12 of HR28 reproduce with some minor changes provisions of MHPS Part I paragraphs 10 and 11. Paragraph 1.19 of HR28 reproduces MHPS Part I paragraph 17. HR28 paragraph 1.21 reproduces part of MHPS Part 1 paragraph 19.

72. Paragraphs 1.22 and 1.23 of HR27 Procedure for Dealing with Issues of Capability reproduce paragraphs 14 and 15 of Part IV of MHPS.

73. Both Part I and Part IV of MHPS require the Trust to refer a concern about a doctor's capability to the NCAS for their views and advice. If the matter proceeds to the investigation stage, Part IV refers to Part I for the relevant provisions of the MHPS relating to the report of a Trust investigation (Part IV paragraph 13). Under both Parts, the report of the investigation is submitted to the case manager. At this stage the procedures outlined in the two parts diverge. Pursuant to Part I the case manager decides between options including whether:

- There are concerns about the practitioner's performance that should be further explored by NCAS; or

- There are intractable problems and the matter should be put before a capability panel.

74. Paragraph 17 of Part I provides that it is for the case manager to decide on the category into which the capability concern falls. If they decide that there are intractable problems, Part I paragraph 17 does not require the matter to be 'further explored' by NCAS and it can be put before a capability panel.

75. However Part IV ascribes a somewhat different role to the case manager in the pre-hearing process. Pursuant to paragraph 13 the case manager must give the practitioner the opportunity to comment in writing on the factual content of the report of the case investigator. The case manager decides what further action is necessary taking into account the report, the practitioner's comments and the advice of the NCAS. If the case manager with the Medical Director and Head of Human Resources consider that issues of capability cannot be resolved by local action, the matter must be referred to the NCAS for it to consider whether an assessment should be carried out. If the assessment panel of the NCAS advise that

> "the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has a realistic chance of success, the case manager must make a decision based upon the completed investigation report and informed by the NCAS advice, whether the case should be determined under the capability procedure."

76. In my judgment, Part IV requires reference to the NCAS for it to consider whether an assessment is to be carried out and the advice of their assessment panel that no action plan would have a realistic chance of success before the case manager may decide whether to proceed to a capability hearing.

77. In my judgment, this conflict between the provisions of MHPS Part I and Part IV must be resolved in favour of the relevant provision of Part IV. I reach this conclusion for two principal reasons. First, Part IV was introduced two years after Part I pursuant to a later enactment. It was drafted having regard to the provisions of Part I as can be seen for example by the reference in paragraph 13 to 'a report of the Trust investigation (as in Part I)…' If the draftsmen had intended the powers of case managers considering capability concerns to be the same as those considering restriction of practice and exclusion from work they could have so provided. Second, Parts I and II of MHPS were made pursuant to powers in the 2003 Directions. These were to be referred to as 'The Restriction of Practice and Exclusion from Work Directions 2003'. Part II MHPS deals with restriction of practice and exclusion. The 2005 Directions withdrew HC(90)9 and required NHS bodies to comply with Parts III, IV and V of MHPS. HC(90)9 was not withdrawn until the enactment of the 2005 Directions. Therefore HC(90)9 applied alongside the 2003 Directions which required NHS bodies to implement Parts I and II of MHPS. The disciplinary procedures in HC(90)9 which were applicable to cases involving professional competence as well as personal and professional conduct were unaffected by the provisions of Part I MHPS at issue in these proceedings. Part IV

introduced pursuant to the 2005 Directions replaced HC(90)9. In my judgment Part IV should be regarded as the framework in accordance with which NHS Trusts must formulate their procedures for dealing with cases involving professional capability. Part IV MHPS requires local implementation of capability procedures in accordance with Part IV of the MHPS framework. Such local procedures would require advice from the assessment panel of the NCAS that no action plan would have a realistic chance of success before the Trust can proceed to a capability hearing.

78. Lord Steyn in **Skidmore** observed at paragraph 13 that the terms of Circular HC(90)9 became 'part of the employment contract…of almost all NHS hospital doctors.' The 2003 and 2005 Directions require NHS bodies to comply with the MHPS framework. Compliance with the framework in MHPS requires local implementation.

79. The contact of employment of the Claimant agreed in early 2004 provided by paragraph 17 that:

> "should we consider that your conduct or behaviour may be in breach of the Disciplinary Policy, or that your professional competence has been called into question, we will resolve the matter through our disciplinary or capability procedures…"

80. On the evidence the Defendant did not formally adopt HR28 and its HR27 annexes implementing MHPS until March 2009. Until that time it appears from the memorandum produced by Denise Harnin dated 13th June 2008 that the parties to the LNC would work within the MHPS Framework. Ms Harnin stated in paragraph 4:

> "The provisions provided for within the Framework are not explicitly incorporated into the contract of employment."

81. Despite Ms Harnin's memorandum the Defendant had decided, as they were obliged to do by the 2003 and 2005 Directions, to apply the MHPS framework. In my judgment until the adoption of HR28 and HR27, the relevant provisions of Part IV of MHPS applied to the way in which concerns about the Claimant's capability were to be dealt with as the Defendant had agreed to work within MHPS procedures. Once HR28 and HR27 were adopted, their terms which were apt for incorporation were incorporated by reference into the Claimant's contract of employment. Paragraph 17 of the contract of employment of the Claimant is consistent with paragraph 189a of the Standard Terms and Conditions of Service of doctors employed in the NHS published in September 2002 referred to in **Dr Waheeda Hameed v Central Manchester University Hospitals NHS Foundation Trust** [2010] EWHC 2009. Paragraph 189a provides:

> "…issues relating to a practitioner's conduct, capability or professional competence should be resolved through the employing authority's disciplinary or capability

> procedures (which will be consistent with the 'Maintaining High Professional Standards in the Modern NHS' [MHPS] framework…"

82. Attachment 4, HR27 is the Defendant's procedure for dealing with issues of capability. It is consistent with MHPS Part IV. If a capability concern cannot be resolved through local action paragraph 1.22 requires the matter to be referred to the NCAS for it to consider whether an assessment should be carried out. It is only in circumstances in which the advice of the NCAS assessment panel is that the practitioner's performance is so fundamentally flawed that no educational and/or organisational action plan has any realistic chance of success that the case manager may decide that the case should be determined under the capability procedure.

83. Mr Powell's arguments that construing the reference to the NCAS as a mandatory obligation would be onerous and potentially unworkable are powerful. It may be said that a reference to the NCAS for assessment of a doctor who in the opinion of independent experts had been guilty of gross negligence would be fruitless. Continued employment of such a doctor may expose an employer to negligence claims. However, the terms of HR27, which are consistent with Part IV of MHPS, are clear. The Defendant cannot proceed to a capability hearing of concerns about the Claimant before they have referred the matter to the NCAS for assessment and the NCAS assessment panel has advised that no action plan has a realistic chance of success.

84. In my judgment the letter of 18th August 2010 from the NCAS to Mr Millar relied upon by the Defendant as establishing compliance with the requirements of HR27 and Part IV is not advice from an NCAS assessment panel that no action plan for the Claimant would have a realistic chance of success. The letter states that proceeding to a capability hearing without a prior NCAS assessment may put the Defendant at risk of challenge. The NCAS notes that the Defendant has set out its reasons for so acting. The letter does not establish that an assessment panel has advised that the Claimant's performance is so fundamentally flawed that no educational and/or organisational action plan would have a realistic chance of success. Absent such advice the Defendant cannot proceed to a capability hearing.

85. With respect to the writer of the letter of 18th August 2010, in my judgment MHPS Part IV does not require that the NCAS carry out an assessment before a complaint can proceed to a capability hearing. What is required is that an NCAS assessment panel advises that the practitioner's performance is so fundamentally flawed that no action plan has a realistic chance of success.

86. Accordingly the Defendant would be in breach of contract if it were to proceed to a capability hearing of the Claimant's case before an NCAS assessment panel has advised in terms set out in HR27 paragraph 1.23.

Misconduct

87. The allegation of breach of contract in relation to the misconduct allegations is that the Defendant has failed to comply with the express provisions requiring it to conduct its disciplinary procedure fairly and speedily.

The Contentions of the Parties

88. Mr Sutton QC on behalf of the Claimant contended that policy HR28 was incorporated into his contract of employment and that the Defendant was in breach of the term in HR28 that disciplinary matters should be dealt with speedily.

89. Mr Sutton contended that delay of four years since the events complained of in itself is unfair. To this effect he relies on the unfair dismissal case **Royal Society for the Prevention of Cruelty to Animals v Crudden** [1986] IRLR 83. He also contended that there was a risk of prejudice arising not from whether the Claimant had carried out the misconduct alleged (that was in the main admitted at the time of the investigation) but from the need of those involved to remember the context and perception of events. The disciplinary panel would also have to decide whether the conduct complained of was deliberate. Mr Sutton contended that none of these matters could be properly and fairly weighted after the passage of such a length of time.

90. Mr Powell submitted that the words of HR28 apparently relied upon are in a preamble. They are too vague to be incorporated into the contract of employment of the Claimant. In any event, the preamble does not preclude revival of misconduct complaints nor is it alleged on behalf of the Claimant that it does. Further there has been no revival. The Claimant was made well aware not least from letters to the Claimant dated 21st January 2010 and to the NCAS of 7th May 2010 copied to the Claimant's representative that the misconduct allegations were being pursued.

91. It was submitted on behalf of the Defendant that the investigation into the misconduct allegations had taken place sufficiently speedily and that the Claimant largely admitted the allegations against him. He was not prejudiced by the delay.

Discussion and Conclusion

92. As already decided, in my judgment provisions of the Defendant's disciplinary and conduct policies which are apt for incorporation are expressly incorporated into the Claimant's contract of employment. In order to have contractual effect a provision must be sufficiently certain and be intended to have such effect. The Claimant relies in his Particulars of Claim upon an express not an implied term that the Defendant conduct its disciplinary processes fairly and speedily.

93. It is no doubt an implied term of contracts of employment that disciplinary processes be conducted fairly and without undue delay. The effect of such an implied term depends on the circumstances of the particular case. Whilst the derivation of the express term relied upon in HR28 is not identified, it is likely to be in the Introduction which refers to the Defendant putting

> "in place a robust and speedy process to tackle any underlying problems and ensure that doctors and dentists are treated fairly."

HR28 sets out overarching provisions dealing with action when there is a concern about a medical practitioner. The appropriate procedures for dealing with various matters including Conduct and Disciplinary matters are set out in Attachment 3. In my judgment the generic words in the Introduction to HR28 cannot be relied upon to found an obligation that conduct proceedings must be completed within a certain time. HR27 dealing with Conduct and Disciplinary matters does not contain specific time limits.

94. Even if the words in the Introduction to HR28 that there should be speedy and fair processes to deal with concerns about a medical practitioner were to be regarded as contractual, the effect of such provisions depends upon the circumstances. **Crudden** cannot be relied upon as establishing a rule that delay in disciplinary proceedings necessarily leads to a finding of unfairness in unfair dismissal proceedings. Each case is fact sensitive. So too is the application of the implied term of proceeding fairly and without undue delay to the Defendant's procedures.

95. The Defendant investigated the allegations of misconduct thoroughly and without undue delay. The Claimant admitted most of the allegations. He was not told that the allegations had been dropped. Other very serious concerns about his capability, not least the incident regarding the death of Patient P, supervened. In 2010 it was made clear to him that the misconduct allegations were being pursued.

96. On the facts of this case even if there is an express (as there would be an implied) requirement on the Defendant to deal with cases fairly and without undue delay, in my judgment the Defendant was not in breach of any such requirement, express or implied.

Conclusion

97. (1) The Defendant would be in breach of contract in failing to comply with paragraphs 1.22 and 1.23 of Policy HR27 Attachment 4: Procedure for Dealing with Issues of Capability;

(2) The Defendant is not in breach of any contractual obligation in pursuing allegations of misconduct against the Claimant.