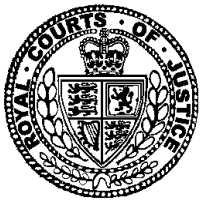

Neutral Citation Number: [2014] EWCA Civ 1031

Case No: A2 2013 1717

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
His Honour Judge Hegarty QC
[2013] EWHC 1504 QB

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 21/07/2014

Before :

LADY JUSTICE GLOSTER
LORD JUSTICE UNDERHILL
and
LORD JUSTICE FLOYD

- -

Between:

Elizabeth Joan McMillan	**Claimant/ Respondent**
- and –	
Airedale NHS Foundation Trust	**Defendant/ Appellant**

Mark Sutton QC and **Ben Cooper** (instructed by **DAC Beachcroft**) for the **Appellant**
Mary O'Rourke QC and **Nicola Newbegin** (instructed by **Ryan Solicitors**) for the **Respondent**

Hearing date: 5 June 2014

Approved Judgment

Lord Justice Floyd:

Introduction

1. The respondent Elizabeth Joan McMillan ("Miss McMillan") is employed as a consultant obstetrician and gynaecologist by the appellant NHS Foundation Trust ("the Trust"). In 2011 the Trust initiated disciplinary proceedings against Miss McMillan based on an allegation that she had given inconsistent accounts about what had occurred at an adverse incident in June 2010. The incident concerned a patient who had encountered complications in the course of successfully giving birth by caesarean section. By a decision letter dated 16 November 2011 a disciplinary panel constituted under the Trust's internal disciplinary procedure upheld two complaints of misconduct against Miss McMillan. She was issued with a final written warning. Miss McMillan appealed against the sanction thus imposed to an internal appeal panel which again upheld the complaints, and proceeded to take steps to reconvene to consider the appropriate sanction. Before the appeal panel could decide upon the sanction, however, two events occurred. Firstly, Miss McMillan purported to withdraw her appeal. Secondly, Miss McMillan commenced the present proceedings for an injunction to prevent the Trust from reconvening the hearing to consider sanction.

2. With that introduction I can explain the issues in this appeal. The first issue is whether, on Miss McMillan's appeal against sanction, the appeal panel was permitted under her contract of employment to impose a sanction which was more severe than the final written warning imposed by the first instance panel, and in particular whether it could terminate her employment with the Trust. The second issue is whether, Miss McMillan having at least purported to withdraw her appeal, the appeal panel could proceed to consider sanction consistently with her contract of employment.

3. In a judgment of great thoroughness dated 5 June 2013, HHJ Hegarty QC sitting as deputy judge of the Queen's Bench Division, found against the Trust on both these issues. By his order dated 21 August 2013 he granted a permanent injunction restraining the Trust from reconvening an appeal panel to consider the issue of sanction or any further matters under the appeal in question.

4. The Trust appeals from that judgment and order. The case for the Trust was argued by Mark Sutton QC with Ben Cooper. Miss McMillan's case was argued by Mary O'Rourke QC with Nicola Newbegin.

The facts in more detail

5. Miss McMillan's appeal to the Trust's internal appeal panel was initiated by a letter from her solicitors dated 30 November 2011. The following account of what occurred subsequently borrows heavily, and gratefully, from the judgment of the learned judge.

6. On 1st February 2012, Miss Steele, the Trust's Director of Organisational Development and Workforce wrote to Miss McMillan and her solicitors informing her of the date on which her appeal would be heard. The panel was to consist of Mr Ronald Drake, a non-executive director of the Trust, Miss Steele herself and Mr Dilly Anumba, a senior clinical lecturer and consultant in obstetrics and gynaecology at the University of Sheffield. Mr Drake was a solicitor and part time Employment Judge.

7. The letter from Miss McMillan's solicitors of 30th November 2011 set out the principal grounds of appeal in summary form. It challenged the findings and reasoning of the disciplinary panel, and made allegations about the manner in which the investigation into her conduct had been carried out and the manner in which the case had been presented by a Dr Catto for the Trust. The grounds were later supplemented by a much more detailed statement.

8. In the meantime, there was an exchange of correspondence between Miss Steele and Miss McMillan's solicitors. On 16th February 2012, Miss Steele wrote to Miss McMillan and her solicitors stating that it was proposed to address the majority of the points raised in her solicitors' letter of 30th November 2011 by way of a re-hearing. Miss Steele's letter went on to say that it was proposed that the appeal panel would consider the evidence and would be entitled to determine its own outcome "*in terms of the sanction applied*". This would mean that the panel would have the full range of options available to it as would have been the case at the original disciplinary hearing, namely to uphold the original decision, to reduce the penalty, to increase it or to clear Miss McMillan of misconduct and remove the allegations from her record. The letter concluded by asking Miss McMillan to respond with her concerns, if she had any issues with what the appeal panel proposed to do "*in terms of procedure, witnesses or process*" and to put forward any further requests for consideration by the panel.

9. Miss McMillan's solicitors replied on her behalf on 17th February 2012, specifically expressing their agreement with the approach proposed by the panel that the appeal be dealt with by way of re-hearing, but no specific reference was made to the statement made by Miss Steele that the appeal panel would, amongst other things, have the power to increase the penalty imposed by the original disciplinary panel.

10. The appeal hearing itself took place on 1st March 2012. At the outset the chairman pointed out that, in view of the breadth and range of the criticisms of the decision below and the approach adopted in reaching it, the panel had considered it necessary to have a re-hearing of the evidence. He added that this approach had been agreed by Miss McMillan's representatives, but he asked for formal confirmation from Mr Rowley to that effect. Mr Rowley made it clear that he did agree; and added that he thought that such a procedure would be in the interests of all parties.

11. The chairman then made it clear that this would mean that the panel would have to consider all of the evidence and reach its own conclusions. He went on to say that, if the outcome of the process was that the allegations were unfounded, that would be the end of the matter. If, on the other hand, the panel were to find that the allegations were made out, it would then have to consider what, if any, disciplinary action should be taken. In those circumstances, there would, in effect, be a two-stage process, with questions of sanction being considered separately at a later stage. He directed one further observation at Mr Rowley, saying, "*The range of steps that we have power to take are wide, as you are aware*."

12. The hearing continued for most of the day. It took evidence, including that of Miss McMillan. The hearing concluded with submissions from Mr Rowley, whereupon the panel stated that it would reserve its decision.

13. Having reached its decision, the panel set out its reasons in an 18 page document, affirming the findings of misconduct. Miss McMillan was informed of the outcome.

In view of its findings, the panel took the view that it should go on to decide what sanction should be imposed. Both parties were invited to make any written submissions on sanction within ten days.

14. Miss McMillan's solicitors sent a long letter to Miss Steele, criticising the manner in which the appeal hearing had been conducted and the reasoning on which the panel's decision was based. The letter asserted that, in view of these alleged deficiencies, there had not been a proper re-hearing and it formally asked for a full re-hearing of the appeal.

15. The Trust did not accede to this request for a substantive re-hearing of Miss McMillan's appeal. The oral hearing on the issue of sanction was fixed for 27th June 2012. A few days prior to this hearing, the Trust wrote to Miss McMillan's solicitors enclosing a copy of the submissions received by the panel on the issue of sanction from Dr Catto on behalf of the Trust. In this document it was contended that the conduct of Miss McMillan amounted to a breach of trust which was fundamentally incompatible with her continued employment as a consultant obstetrician and gynaecologist with the Trust. It asserted that, as a result of this episode, consultant colleagues and professional clinical leaders had lost trust and confidence in her and that the relationship between Miss McMillan and her colleagues had fundamentally and irrevocably broken down. In effect, therefore, it called for her dismissal.

16. In the light of this letter, further consideration was given by Miss McMillan and her legal advisers as to how they should proceed. A further letter was sent by Miss McMillan's solicitors to the Trust on the morning of 27th June 2012 reasserting the criticisms set out in their earlier letter of 18th May 2012 and stating that the request for a substantive re-hearing would be renewed by leading counsel on behalf of Miss McMillan, who would also ask that the panel should recuse itself so that a fresh appeal panel could be convened. If the panel refused to recuse itself, the letter stated that Miss McMillan would then withdraw her appeal and would commence proceedings against the Trust for breach of contract. In any event, Miss McMillan and her advisers would not engage in any further submissions on sanction before the appeal panel as presently constituted. The letter also indicated that, if necessary, immediate injunctive relief would be sought on behalf of Miss McMillan if the Trust or the appeal panel sought to continue with the hearing and dismiss her from her post.

17. At the hearing which took place later that morning Miss O'Rourke QC, on behalf of Miss McMillan, renewed her criticisms of the conduct and reasoning of the appeal panel and invited the panel to conclude that the proper course would be for a substantive re-hearing before a different panel. This was challenged by leading counsel on behalf of the Trust, who contended that the panel should not recuse itself and that, in any event, it had no jurisdiction to review its substantive decision. He invited the panel to proceed to consider the question of sanction.

18. After a brief adjournment, the chairman informed Miss O'Rourke that the panel had decided not to recuse themselves and gave brief reasons for the decision. He offered Miss O'Rourke the opportunity to take instructions in the light of this decision but she declined the offer and made it plain that Miss McMillan's appeal was now withdrawn. In her submission, the panel had no further jurisdiction to consider the question of sanction. Miss McMillan and her advisers then withdrew and took no further part in

the hearing. Counsel for the Trust then made his submissions on sanction and the panel adjourned to consider its decision and, if necessary, take independent advice.

19. On 5th July 2012 Miss McMillan's solicitors were informed that, in the light of the advice which they had received, the panel had concluded that it was open to it to proceed to consider the question of sanction. On 9th August 2012, Miss Steele informed Miss McMillan's solicitors that the panel would reconvene for this purpose on 16th August 2012.

20. On 14th August 2012, the present proceedings were commenced seeking an injunction to restrain the Trust from reconvening the appeal hearing to consider issues of sanction and, further or alternatively, to restrain the Trust from increasing the disciplinary sanction on any such hearing. The claim form also included a claim for damages. Particulars of Claim were served with the Claim Form, though they were subsequently amended on 5th September 2012.

21. Miss McMillan also sought immediate interim injunctive relief. Her application came on for hearing, on short notice, before His Honour Judge Raynor QC on 15th August 2012, when it was disposed of by way of undertakings under which the Trust undertook, until trial or further order, not to reconvene an appeal panel hearing to consider issues of sanction or any further matters under the appeal initiated by Miss McMillan and not to seek to terminate her contract of employment.

Application to adduce further evidence

22. On this appeal, Miss McMillan has applied to adduce fresh evidence concerning the merits of the misconduct alleged against her. We read the evidence for the purposes of considering its admissibility, but Miss O'Rourke made no use of it in the course of her submissions to us. I consider that we should not allow Miss McMillan to adduce the further evidence: the merits of the misconduct alleged have no relevance to the outcome of this appeal, or any issue which it raises. It is for that reason that I have not dealt with the merits of the allegation of misconduct above.

Miss McMillan's contract of employment and the Trust's disciplinary procedures

23. Clause 3 of Miss McMillan's contract provided for mutual co-operation in the following terms:

> "Whilst it is necessary to set out formal employment arrangements in this contract the Trust recognises that you are a senior and professional employee who will usually work unsupervised and frequently have the responsibility for making important judgments and decisions. It is essential therefore that you and the Trust work in the spirit of mutual trust and confidence. You and the Trust agree to the following mutual obligations in order to achieve the best for patients and to ensure the efficient running of the service:
>
> - To co-operate with each other;
>
> - To maintain goodwill;

- To carry out our respective obligations in agreeing and operating a Job Plan;

- To carry out our respective obligations in accordance with appraisal arrangements;

- To carry out our respective obligations in devising, viewing, revising and following the organisation's policies, objectives, rules, working practices and protocols."

24. Clause 3 gives effect to a term which in employment law is called the mutual obligation of trust and confidence. In the absence of such an express term, a term to like effect will normally be implied. Clause 18, which is headed "Disciplinary Matters", provides as follows:

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

25. The judge held that clause 18 was effective to incorporate the Trust's disciplinary procedures and appeal arrangements into Miss McMillan's contract of employment, and there is no appeal from that finding.

26. The Trust's disciplinary procedures were set out in two documents. The first, entitled "*Procedures for Handling Concerns Regarding Medical and Dental Staff Conduct and Capability*", which I will refer to as "the procedures", dealt with formal disciplinary procedures at Part III and Part IV. Part III of the procedures was directed to misconduct on the part of any employee of the Trust, including medical staff, whereas Part IV was concerned with issues as to the professional capability of doctors and dentists only. It is common ground that the complaints against Miss McMillan were treated by both parties as relating to conduct alone, and therefore within Part III. Although Part III is headed "*Conduct of Hearings and Disciplinary Procedures*", it does not, in fact, set out details of the procedure to be adopted in such hearings. It sets out guidance on what does and does not amount to gross misconduct.

27. The capability provisions in Part IV of the procedures, by contrast, do contain detail about the conduct of hearings and appeals, although they are not relevant to Miss McMillan's case. An argument pursued before the judge by the Trust that one could "read across" from the Part IV provisions relating to appeals into the provisions applicable for a Part III case was not pursued before us. With one exception, it is therefore unnecessary to consider them further. The exception is paragraph 47 in Part IV which provides:

> "Where the employee leaves employment before disciplinary procedures have been completed, the investigation must be

> taken to a final conclusion in all cases and capability proceedings must be completed wherever possible, whatever the personal circumstances of the employee concerned."

28. Paragraph 47 was argued by the Trust to be of general application, as well as an indication that the Trust might continue appeal proceedings, once started, notwithstanding the non-co-operation of the employee.

29. The details of the procedure to be applied in a Part III misconduct case are contained in the second document, entitled "Disciplinary Policy" and to which I will refer as "the code" or "the Trust's code". The first page of the code indicates that it has been approved by the Airedale Partnership Group, which is a negotiating body. Under "*Associated Policies & Procedures*" it includes the "*ACAS Code of Practice on Disciplinary and Grievance Procedures*" ("the ACAS code of practice") and a document entitled "*Maintaining High Professional Standards in the Modern NHS*" ("MHPS"). I should explain what these are.

30. The ACAS code of practice is also referred to in the body of the Trust's code at paragraph 3.1, which states that the policy of the Trust's code complies with the ACAS code of practice. The ACAS code of practice is a statutory code issued under section 199 of the Trade Union and Labour Relations (Consolidation) Act 1992. Employment Tribunals are required to take it into account when considering matters to which its provisions are relevant and there are provisions allowing such tribunals to adjust awards up or down by limited amounts when employers or employees disregard its guidance. The ACAS code of practice itself refers in terms to a further ACAS document entitled "*Discipline and grievances at work: the ACAS guide*" ("the ACAS guide"). Unlike the code of practice, employment tribunals are not required to have regard to the ACAS guide. The ACAS code of practice explains that the ACAS guide "*provides more detailed advice and guidance that employers and employees will often find helpful both in general terms and in individual cases*".

31. Consistently with this approach, the ACAS code of practice, which contains only 45 paragraphs, has a general section at paragraphs 25-28 headed "*Provide employees with an opportunity to appeal*". Those paragraphs recommend, amongst other things, that an employee who feels that disciplinary action is wrong or unjust should appeal and that appeals should be heard without unreasonable delay. They also provide that, wherever possible, the appeal should be heard by a manager who has not previously been involved in the case; that the employee has the right to be accompanied to appeal hearings and that employees should be informed in writing of the result of his or her appeal as soon as possible. By contrast the ACAS Guide is more than 80 pages long and covers all aspects of discipline in the workplace. Its approach is to set out relevant extracts from the code of practice and then expand upon them. In relation to appeals, after setting out in full paragraphs 25 to 28 of the ACAS code of practice, it continues:

> "The opportunity to appeal against a disciplinary decision is essential to natural justice, and appeals may be raised by employees on any number of grounds, for instance new evidence, undue severity or inconsistency of the penalty. The appeal may either be a review of the disciplinary sanction or a re-hearing depending on the grounds of the appeal.

> An appeal must never be used as an opportunity to punish the employee for appealing the decision, and it should not result in any increase in penalty as this may deter individuals from appealing."

32. The judge's reliance on the second paragraph of this extract from the ACAS guide is one of the criticisms of the judgment made by the Trust on this appeal.

33. MHPS is the framework introduced in 2003 to replace the former Circular HC 90(9) which governed disciplinary process for health workers for many years. We were not taken to its terms in any detail.

34. The Trust's code contains fairly detailed provisions about investigation of complaints and the first hearing. It details the various sanctions which can be imposed at the hearing which are: (a) first written warning, (b) final written warning, (c) dismissal and (d) alternatives to dismissal including demotion.

35. Paragraphs 4.23 to 4.26, which deal with appeals are central to the issues before us:

> "4.23 An employee can appeal against a written warning or dismissal. They should do so in writing within ten working days of receiving notification of the outcome of the disciplinary meeting to the Chair of the meeting, setting out the grounds for their appeal. In exceptional circumstances this period can be extended.
>
> 4.24 A sub-committee of the Foundation Trust Board will hear the appeal (one executive director and one non-executive director). They will be supported by a member of the HR team.
>
> 4.25 The employee will be invited to an appeal meeting normally within seven working days of receipt of their letter and given five working days notice of the meeting.
>
> 4.26 There will be no further right of appeal."

36. Appendix A to the code contained what it described as exceptions to the procedure. Paragraph 1 of Appendix A said that it did not apply to independent contractors. Paragraph 2 commences "*Nothing in this agreement affects*...". Two matters are then listed. The first is the arrangements set out in MHPS and certain other procedures. The second is "*The statutory right of any employee to appeal*".

The judgment of HHJ Hegarty QC

37. The judge defined the first issue as "*Is there a contractual power to increase sanction on appeal*?" He said that it was plainly correct that there was no express power either in the procedures, or, more pertinently, in paragraph 4.23 to 4.26 of the code, to increase sanction on appeal. He rejected the Trust's argument that one could detect an express power by a process of reading across from the provisions of Part IV of the procedures. He did so, firstly, because those provisions did not, as a matter of interpretation, themselves confer any power to increase sanction and also because it was wrong to read such provisions across, particularly when they were "*different*

codes directed to different circumstances in which different circumstances might well apply."

38. The judge continued that there were other powerful factors which militated against reading in a power to increase sanction. These were three in number. Firstly, it would be contrary to the authoritative guidance given in the ACAS guide. Secondly it might well result in an increased sanction where there could be no further appeal. Thirdly it would in effect give the Trust a right of appeal which is not recognised in the code itself. He concluded that, in the absence of any express power to increase sanction on appeal in a conduct case, there was no implied power to do so.

39. The judge defined the second issue as "*Was Miss McMillan entitled to withdraw her appeal*?" As Underhill LJ pointed out at the outset of the argument before us, this is probably not the most helpful description of the issue. The answer to the question posed in that way does not dispose of the real issue between the parties, which is not so much Miss McMillan's entitlement to withdraw her appeal, as the consequences of that purported withdrawal for the further conduct of the appeal proceedings. In particular, the critical issue is whether Miss McMillan's purported withdrawal of her appeal meant that thereafter the Trust could not reconvene the hearing to consider sanction without a breach of contract.

40. The judge approached this issue on the assumption that there was, contrary to his clear finding on the first issue, a power to increase sanction on appeal. He pointed out that the only right of appeal under the code was given to the employee: the Trust would have no right to appeal if it considered that the employee had got off too lightly. Given that the right of appeal was conferred for the employee's benefit, and the employee has entire control over whether to launch an appeal or not, he could see no justification for limiting his or her power to withdraw it at a later stage. The judge gave no explicit separate consideration to the question whether, where the employee has purported to withdraw the appeal, the appeal panel could nevertheless proceed to consider sanction. Understandably, because this was the way the matter was argued before him, the judge appears to have proceeded on the basis that if the employee had the right to withdraw the appeal, that fact alone would deprive the employer of jurisdiction to determine the appeal, even in a case such as the present where the appeal panel had, at least on the Trust's case, conducted a proper rehearing.

41. The judge also rejected an argument advanced by the Trust based on paragraph 47 of Part IV of the procedures, holding that that provision applied to capability proceedings, was not of general application and could not be read across to Part III. Moreover paragraph 47 had no obvious application to a case where disciplinary proceedings had already been brought to a conclusion by the findings of a first instance panel. If an employee left the employment of the Trust in those circumstances and refused to continue to co-operate, the original findings would remain in place. A right of the employee to withdraw an appeal would not therefore cut across the proper operation of paragraph 47.

42. The judge also had to consider further issues, which he identified as issue 3 and issue 4. Issue 3 was whether there was a binding agreement reached in the course of the appeal proceedings conferring a power to increase sanction on appeal. Issue 4 was whether, on the understanding that there was such an agreement, the Trust had repudiated it by not affording Miss McMillan the rehearing on appeal which such a

contract would have provided for. So far as issue 3 was concerned, the judge rejected the contention that there was any form of binding agreement created between Miss McMillan and the Trust conferring a power on the Trust to increase sanction, whether by way of procedural agreement or by way of variation of her contract of employment. He also held, following an extensive review of the appeal hearing, that it had not been the sort of rehearing that the parties must be regarded as having bargained for, and, on the assumptions that there was such a contract the Trust was in serious breach of it. He left unresolved the question of whether it was now open to Miss McMillan to complain about that breach, or whether she had waived the breach or affirmed the contract.

The first issue: power to increase sanction

43. On the first issue, Mr Sutton submits, in essence, that there was nothing in Miss McMillan's contract of employment which precluded an appeal panel from increasing the sanction imposed at first instance. An increase in sanction was a matter which fell properly within the discretion of the appeal panel. The procedure to be adopted was left to be decided if possible by agreement with the employee, but in default of agreement it could be imposed by the panel. The only constraint on the Trust's power to determine the procedure was the mutual obligation of trust and confidence, either as implied at common law or embodied in clause 3 of the contract.

44. Mr Sutton accepted that there could be circumstances where the imposition of a power to increase sanction would be a fundamental breach of the obligation of trust and confidence. He gives the example of an appeal by way of review in which the only challenge is to the severity of the sanction, and where the only point is that the employee contended that relevant testimonial evidence was overlooked. In the circumstances of this case, including in particular the exchanges in correspondence and at the hearing, and where it was agreed, at least as an operational matter, that the appeal should be by way of rehearing, it fell within the appeal panel's legitimate discretion to proceed on the basis that they would have the power to increase sanction.

45. Mr Sutton also submitted that the judge erred in importing into the contract the ACAS guide, because it was not admissible in court proceedings as evidence; it was not expressly referred to in the procedure; it was not a collectively negotiated document; and it was in the nature of generic guidance which may assist in the operation of many disciplinary contexts, but not necessarily all.

46. Finally, Mr Sutton submitted that the judge was wrong to conclude that there would be no right of appeal against a decision to impose a sanction of dismissal for the first time on appeal. He had therefore wrongly treated the restriction on further appeals as relevant to the construction of the contract. Properly understood, there was a right to a second appeal in those specific circumstances.

47. Miss O'Rourke submitted that the judge had been right to conclude that the contract did not allow the appeal panel to increase sanction. In her written submissions she submitted that any implied power to increase sanction would be "*directly contrary to the provisions of the contract itself*". She submitted that the contract provided for the employee alone to have the right of appeal and it was entirely up to the employee whether to exercise that right. To allow for an increase in sanction on appeal would be allow the Trust to usurp the employee's express right. Applying well established

principles of construction of contractual language, and having regard to the admissible factual matrix, the contract could not be sensibly interpreted as allowing the employer to increase sanction.

Discussion

48. The starting point must be the proper construction of the contract against the relevant background. Part of that background is the function and purpose of disciplinary procedures in the employment context in general.

49. In *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 at 181, Lord Reid explained the common law position of an employer in relation to the dismissal of an employee:

> "At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."

50. As Lord Hoffmann explained in *Johnson v Unisys* [2001] UKHL 13; [2002] ICR 480 at paragraph 54, the statutory system for dealing with dismissals which were unfair was set up by Parliament to deal with recognised deficiencies of the law as it stood at the time of *Malloch v Aberdeen* (above). Likewise the implied duty of mutual trust and confidence which is implied into contracts of employment is a protection which the courts have developed in part in order to protect employees from the acknowledged power of the employer to act capriciously which would otherwise exist: see the analysis of Lord Nicholls of Birkenhead in *Eastwood v Magnox Electric plc* [2004] UKHL 35; [2004] ICR 1064 at paragraphs 4-6.

51. Against this background, it is wrong to regard the internal disciplinary process of an employer as if it was an adjudicative process concerned with the determination of legal rights, such as occurs in a court or tribunal. Elias LJ described its function in *Christou v Haringey LBC* [2013] EWCA Civ 178; [2013] ICR 1007 at paragraph 48 in the following terms:

> "In the employment context the disciplinary power is conferred on the employer by reason of the hierarchical nature of the relationship. The purpose of the procedures is not to allow a body independent of the parties to determine a dispute between them. Typically it is to enable the employer to inform himself whether the employee has acted in breach of contract or in some other inappropriate way and if so, to determine how that should affect future relations between them. It is true that sometimes (but by no means always) the procedures will have been contractually agreed, but that does not in my judgment alter their basic function or purpose. The employer has a duty to act fairly and procedures are designed to achieve that objective. The degree of formality of these procedures will vary enormously from employer to employer. But even where they provide a panoply of safeguards of a kind typically found in

> adjudicative bodies, as is sometimes the case in the public sector in particular, that does not alter their basic function. It is far removed from the process of litigation or adjudication, which is in essence where this doctrine bites."

52. Mr Sutton also reminded us of what Elias LJ has said in another context in *Mattu v University Hospitals Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 641; [2013] ICR 270. The issue in that case was whether an employer's disciplinary proceedings engaged Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Elias LJ said at paragraph 101:

> "The decision to dismiss pursuant to a disciplinary process involves a claim by the employer that he is lawfully exercising a contractual right. He is not purporting to act like a judge; he is protecting his own interests under the contract, albeit that this necessarily involves finding facts and interpreting the scope of the contract. He is asserting a right rather than determining it. Likewise in the case of an employee who resigns in response to what he alleges is a repudiatory breach of contract by the employer. In my judgment, it is fanciful to suggest that he is thereby determining the employer's rights. Furthermore, to require an independent body to determine the contractual rights before the parties have decided what positions they will adopt with respect to a particular issue undermines the autonomy of the parties which contract is designed to confer."

53. Against this background, there are, at least in theory, three possible conclusions which one might draw about the meaning of the language of paragraphs 4.23 to 4.26 of the code (i) it authorises the Trust, either expressly or by a process of implication, to increase sanction on appeal (ii) it is silent on whether the Trust can or cannot increase sanction, leaving the parties to agree on appropriate procedures, which might include increasing sanction and (iii) it prevents the Trust from increasing sanction on appeal. Neither side now contends for the first of these meanings. The second meaning represents the Trust's position. The third meaning is that contended for by Miss McMillan. Whilst the judge rejected meaning (i) he did not expressly articulate whether he was choosing meaning (ii) or (iii). However, given his view that it required a variation of the contract to confer a power to increase sanction, he seems to have accepted that meaning (iii) was the correct one.

54. If the meaning of the contract were that which I have called meaning (ii), and left completely open the procedure to be adopted, then I would accept Mr Sutton's argument that the rules to be adopted would be those agreed by the parties, or in default of agreement imposed on the employee, subject only to the constraints imposed from other sources, such as by the obligation of mutual trust and confidence. In those circumstances the contract would not have imposed any material restriction on the employer's underlying ability to dismiss his employee. I am, however, unable to accept that the code, properly construed against the relevant background, including the hierarchical nature of the employer-employee relationship, did give the parties this open-ended remit. My reasons follow.

55. Firstly, and most importantly, paragraph 4.23 of the code grants the employee a right of appeal *against* a written warning or dismissal. That phrase marks the entire extent of the appeal introduced by that paragraph. Such an appeal, if launched by the employee, is aimed at demonstrating that it was wrong for the employee to be warned or dismissed as the case may be. The appeal is given to the employee for his or her benefit, and is not intended to benefit the employer. It is not intended that the appeal should be a continuation of the disciplinary process, leaving all options open. It is therefore no part of the purpose underlying paragraph 4.23 that the result of such an appeal should be the elevation of a warning to a dismissal.

56. Secondly, paragraph 4.26 states in the clearest possible terms that there is no further right of appeal. Mr Sutton recognises that paragraph 4.26 is an obstacle to the Trust's construction: if an employee who was dealt with by a written warning at first instance can be dismissed for the first time on appeal, then the employee would have no right of appeal against this most serious sanction. That would be a surprising result: the employee is given a right of appeal against the modest sanction of a written warning, but none at all against the decision of his employer to relieve him of his employment altogether. Given that disciplinary procedures of this nature are intended to give the employee protection against capricious action by the employer, it would be fair to say that their purpose would not have been fully achieved.

57. The Trust accepted before the judge that there was no right of further appeal if the employee were to be dismissed for the first time on appeal. Since then the industry of counsel has uncovered two possible arguments as to how there might in fact be a further right of appeal in the specific circumstance of a dismissal sanction being imposed for the first time on appeal: I will call these "the Appendix A argument" and "the construction argument". On this appeal Mr Sutton has put forward the construction argument as his primary case, but does not formally abandon the Appendix A argument. Although Mr Sutton presented these new points as a "concession", they are not properly described as such. Miss McMillan's case is that there is no right of appeal in these circumstances and Mr Sutton's points are free-standing attempts to create one. Nevertheless, as the points are essentially legal ones, I can see no objection to our considering them on appeal.

58. The Appendix A argument is this. Paragraph 2 of Appendix A provides, as I have said, that nothing in the code is to affect the statutory right of any employee to appeal. Mr Sutton submits that there is a statutory right to appeal independently of the contract because paragraph 21 of the Code of Practice provides that the employee who is dismissed should be informed as soon as possible of, amongst other things "their right of appeal".

59. I have no hesitation in rejecting the Appendix A argument. The fact that there is statutory guidance recommending the availability of an appeal (and which is admissible in tribunals for certain limited purposes) is not in my judgment a statutory right to appeal. Quite what the authors of the Trust's code had in mind by referring to a statutory right to appeal is not clear, but it is possible that they intended to refer to the repealed statutory dismissal and disciplinary procedures introduced by the Employment Act 2002, which provided, by virtue of section 29 and Schedule 2 Part 1, for an internal appeal. In the absence of anything properly described as a statutory right to appeal, paragraph 4.26 of the code is unaffected by paragraph 2 of Appendix

A. It follows that the Appendix A argument does not create a right for a second appeal when an employee is dismissed for the first time on appeal.

60. The construction argument, raised for the first time in oral argument before us, is that paragraph 4.23, by using the words "*appeal against … dismissal*" does create a second appeal, at least against the sanction, even if the decision to dismiss is imposed for the first time on the first appeal. The appeal would be against the sanction only and not against the underlying findings of misconduct. In those circumstances, the ban on *further* appeals imposed by paragraph 4.26 does not bite on any appeal against a first sanction of dismissal. It would, for example, bite on a written warning upheld on appeal, or a dismissal upheld on appeal, or an attempt to appeal the underlying findings.

61. Ingenious though this argument is, I am unable to accept it. By paragraph 4.7 the chair of the first disciplinary meeting is to be an appropriate manager within the employee's line management chain. By paragraph 4.9, if dismissal is a potential outcome of the meeting, a manager with the appropriate dismissal authority is to be involved in the meeting. The decision is taken by notifying the employee in writing – paragraph 4.13. The appeal against dismissal created by paragraph 4.23 is initiated by giving notice to the chair of the meeting within ten working days of receiving notice of outcome of the disciplinary meeting. The appeal so created is to a sub-committee of the Foundation Board of the Trust (one executive director and one non-executive director).

62. If, as Mr Sutton submits, it is contemplated that the sub-committee of the Foundation Board may make a dismissal decision for the first time (rather than simply affirm a previous decision), then the employee may be dismissed without the involvement of anyone in his line management chain. If he is to appeal from his dismissal there is no guidance as to the person to whom he should give notice of his appeal: should he give it to the chair of the disciplinary meeting as paragraph 4.23 states, or should he give it to the sub-committee of the Foundation Board, the body from whom he wishes to appeal? If the latter, who will hear the appeal from the sub-committee of the Foundation Board? Would it be another sub-committee of the Foundation Board or some other body and if so what body?

63. In my judgment when paragraph 4.23, refers to "*appeal against … dismissal*" it is referring to appeals against a dismissal decision arrived at under the earlier provisions of the code, and not to appeals against a dismissal under paragraph 4.23 itself. That construction avoids the complexities I have referred to above: complexities which are only introduced because the Trust wishes to contend that Miss McMillan's employment contract includes an appeal procedure which allows the Trust to increase sanction on appeal. If the Trust is wrong about that argument, and the term "*appeal against written warning or dismissal*" precludes the imposition of an increased sanction on appeal, the position could not be simpler. There will never be a situation when the ultimate sanction of dismissal is imposed for the first time on a paragraph 4.23 appeal. It is entirely sensible and appropriate in those circumstances to provide that there should be no further right of appeal, and none of the other difficulties introduced by the Trust's construction arise.

64. Thirdly, Miss McMillan's construction is supported by the contents of the ACAS guide, which is, in my judgment part of the admissible factual matrix for construing

the agreement. It is true that the ACAS guide is not statutory guidance, but it is referred to in, and fills in the gaps in, the ACAS code of practice. It is true that it is not incorporated into the contract (the judge did not hold that it was). However, the ACAS code of practice is expressly referred to in paragraph 3.1 of the Trust's code and thus the ACAS guide is reasonably available to all parties. Against that background, given the contents of the ACAS guide, the phrase "*appeal against … written warning or dismissal*" would be understood to be introducing an appeal process which cannot result in an increased penalty on appeal.

65. Fourthly, I do not think that the parties' decision to treat the appeal as a rehearing is of significance. It is common ground that the Trust's code allows for appeals by way of rehearing as well as by way of review. However it does not necessarily follow from the fact that an appeal may be by way of rehearing that the panel may increase sanction. The ACAS guide, for example, recognises that appeals may be of one or other type, depending on the grounds of appeal, but immediately goes on to point out that appeals should not result in any increase in sanction. It does not follow, therefore, that it is implicit in the choice of a rehearing that the appeal panel should have a power to increase sanction.

66. A rehearing may, of course, result in more serious, as well as less serious, findings of misconduct. Further evidence may emerge on appeal surrounding the gravity of the misconduct alleged. It may be said, in favour of the Trust's construction, that it would be convenient in those circumstances for the appeal panel to have the power to consider, and impose, a more serious sanction, and more than inconvenient for the employer to have to initiate a new disciplinary procedure. But an inconvenient consequence of one of the possible types of appeal permitted by the code does not seem to me to be a powerful argument in favour of the Trust's construction. As Underhill LJ points out in paragraphs 72 and 73 of his judgment, there may in any event be other ways in which the employer can act on the appeal panel's findings, without returning to square one.

67. Accordingly, I would conclude that Miss McMillan's contract of employment provided her with an appeal which could not result in an increase in sanction. That position was not affected by the procedural agreements (if such they were) reached in the course of the disciplinary process. They were ineffective to amount to a binding variation of Miss McMillan's contract, as the judge held. In those circumstances the imposition of an increased sanction on appeal would amount to a breach of the Trust's contract with Miss McMillan. Given that it is common ground that the only practical purpose of the reconvened hearing to consider sanction would be to increase it, the judge was justified in granting the injunctive relief which he did.

The second issue: sanction following withdrawal

68. In view of my conclusion on the first issue, it is not necessary to express a conclusion on the second issue. We would, in any event, have to decide it on the artificial assumption that Miss McMillan's contract of employment permitted an increase in sanction on appeal, in a case where the judge has not addressed the issue in the way in which it has emerged on appeal. I would prefer to leave a decision on the effect of the withdrawal of an appeal in such circumstances to a case where the point arose directly.

Conclusion

69. I would therefore dismiss the appeal.

Lord Justice Underhill:

70. I agree that this appeal should be dismissed, for essentially the reasons given by Floyd LJ. I only wish to say a little more on three points.

71. First, Mr Sutton submitted that where a point about how contractual disciplinary procedures are to operate is left unspecified the choice of what procedure to adopt will normally be a matter for the employer's discretion. He submitted that that followed from what Elias LJ describes in *Christou* as the "hierarchical" nature of the employment relationship: see the passage quoted by Floyd LJ at para. 51 of his judgment. In general I would accept that submission. But I do not think that that approach can be applied to the particular question of the power of an appeal panel to impose a more serious sanction than was imposed first time round. I believe that the general understanding among both employers and employees is that an employee's right to appeal against a disciplinary sanction is conferred for his or her protection, so that its exercise will not leave them worse off; and that view is strongly reinforced by the terms of the ACAS Guide. (It is also reflected, though not made explicit, in the phraseology of para. 4.23 of the Code, as Floyd LJ points out at para. 55.) I do not believe that it is legitimate to construe the Code, or to imply a term, so as to produce a result which is inconsistent with that understanding. If an employer wishes to have the right under its disciplinary procedures to increase the sanction on appeal it must be expressly provided for. There are, I believe, some employments in which such an express power is indeed conferred, and I can see nothing wrong with that in principle; but it is not the case here.

72. Secondly, I was troubled in the course of the argument by the point referred to at para. 66 of Floyd LJ's judgment – that is, that it is possible to envisage circumstances in which it would lead to "inconvenient" results (Mr Sutton would I think use a stronger word) if following an appeal an employer was absolutely precluded from dismissing an employee who first time round had only been given a warning. Suppose the following case. An employee is found guilty of misconduct and receives a warning. In accordance with a contractual disciplinary procedure an appeal panel conducts a full re-hearing and finds the charge once again proved. But the evidence comes out differently at the re-hearing – say, further witnesses are called or new documents discovered, or the employee gives different answers when questioned. As a result, the misconduct, albeit the same as charged, is shown to be much more grave than had previously emerged – say, a breach of safety procedures was now shown to be not merely careless but positively reckless or even deliberate. I see the force of the argument that it cannot be right that the employer should have, as Miss O'Rourke submitted, to go back to square one and go through the whole process again – at least where, as is the case here, the (contractual) procedures do not provide for a further appeal. We are dealing with the practical realities of the employment relationship and not a ritual dance.

73. However, I do not think that the route to a sensible result in such a case (which, though perfectly conceivable, will be unusual) lies in adopting a construction of the terms of the procedure which they do not naturally bear: after all, the same problem

could arise in a case where the contract unequivocally forbade increasing the sanction on appeal and there was no room for creative interpretation. Rather, it is necessary to appreciate that the fact that the employer has not followed the terms of a contractual disciplinary procedure will not automatically entitle a dismissed employee to a legal remedy, whether by way of a statutory claim for unfair dismissal or by an action for breach of contract. So far as unfair dismissal is concerned, the issue whether a dismissal is fair within the meaning of section 98 of the Employment Rights Act 1996 depends not, as such, on whether the employer has acted in breach of contract but on whether (in short) he has acted reasonably, "in accordance with equity and the substantial merits of the case". As for breach of contract, an employee threatened with dismissal in disregard of a contractual procedure can seek an injunction preventing the employer from proceeding unless the terms of the procedure are duly followed (even though he or she would have no claim in damages: see *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22). However, such relief is discretionary. In the case posed above, if the Court was satisfied that the circumstances truly justified the employer in acting outside the terms of the procedure, and that substantial fairness had been observed – for example (though I need not express a concluded view about whether this would be necessary in every case), if the employee had been offered a form of further appeal or review – I do not believe that it would be obliged to grant relief. Neither the Court nor the Employment Tribunal determines legal rights in cases of this character exclusively by reference to formal compliance with procedures.

74. Thirdly, while I agree with Floyd LJ that it is unnecessary for us to decide the issue about the effect of Miss McMillan's withdrawal of her appeal, I would emphasise the point to which he refers at para. 39 of his judgment. As Elias LJ pointed out in *Christou*, disciplinary proceedings are not a form of civil adjudication but are essentially concerned with informing decisions to be taken by the employer. Accordingly, the focus of any challenge must always be on the act of the employer, actual or threatened, which it is sought to impugn.

Lady Justice Gloster:

75. I agree with both judgments.