Neutral Citation Number: [2011] EWHC 970 (Admin)

Case No: CO/2408/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/04/2011

Before:

Mr Justice Blair

- -

Between:

THE QUEEN on the application of MR RAJIV PURI	**Claimant**
- and -	
BRADFORD TEACHING HOSPITALS NHS FOUNDATION TRUST	**Defendant**

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- -

Mr Giles Powell and Ms Nicola Newbegin (instructed by **Radcliffes LeBrasseur**) for the **Claimant**
Mr John Bowers QC and Mr Mark Sutton (instructed by **Beachcroft LLP**) for the **Defendant**

Hearing dates: 28 and 29 March 2011

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Judgment

Mr Justice Blair:

1. This is a claim for judicial review of two decisions of the defendant, the Bradford Teaching Hospitals NHS Foundation Trust. The claimant, Mr Rajiv Puri, was employed by the Trust as a Consultant Urologist until his dismissal by letter dated 5 October 2009 on the grounds of misconduct. Essentially, the issue is whether Article 6 ECHR was engaged in the disciplinary proceedings that led to his dismissal, and if so whether the disciplinary panel of the Trust which decided to dismiss him was independent and impartial so as to comply with Article 6. The same issue arises as regards a decision of 26 November 2009 as to the composition of an appeal panel (though in fact an appeal has not yet taken place). The claimant seeks to quash the decisions, and substitute a decision by a new disciplinary panel which satisfies what he considers to be the requirements of independence and impartiality, in the alternative, the appointment of an independent and impartial appeal panel. The Trust, on the other hand, submits that Article 6 is not engaged, and if engaged the consequent rights were waived by or on behalf of the claimant, and if not waived, were not infringed. An issue also arises as to the adequacy of

reasons in respect of the composition of the appeal panel. Permission to bring these proceedings was given by Underhill J on 20 September 2010.

The Facts

2. The facts are as follows. The claimant is now in his early fifties. He received his qualifications in India and in this country. He took up his appointment as a Consultant Urologist with the defendant in July 2000, his current contract of employment being dated 1 April 2003. In recent years he has specialised in laparoscopic prostatectomy, a form of operation for prostate cancer, and a procedure which only a handful of surgeons in this country have the skills to carry out. The claimant's particular specialism therefore is as an urologist is in the oncology field.

3. There is evidence that the Trust raised certain concerns as to the claimant's behaviour with NCAS, the National Clinical Assessment Service, in 2007. (NCAS is a body within the NHS which provides case management services in connection with the practise of doctors, dentists and pharmacists endeavouring to bring disputes to a resolution reducing the need to use disciplinary procedures.) The claimant was not informed about this complaint until April 2010. The Trust's case is that the complainant asked that he was not informed of it. (This point comes from an agreed chronology—this was sent to the Court by the claimant's solicitors some time after the hearing and shortly before judgment was due to be handed down, but I have taken account of it.)

4. The allegations of misconduct in the present case stem from February 2009. On 18 March 2009, Dr C. L. Kay, the Medical Director of the Trust, wrote to the claimant informing him that he was commencing a formal investigation under the Trust's Disciplinary, Capability, Ill Health and Appeals Policy and Procedure for Doctors and Dentists. He said that the Chief Executive had appointed him as Case Manager. The investigation would be carried out by Dr S. Worrall, Clinical Director, Head and Neck Directorate.

5. Dr Kay notified the claimant that Dr Worrall would investigate three separate allegations. The first was a complaint regarding his conduct in theatre on 20 February 2009, when it was alleged that he was abusive to Staff Nurse Eguem and subsequently to other members of the theatre team. The second was that in a telephone call on 26 February 2009, he was aggressive, rude and discourteous to the Fast Track Clerk, Ms Sue Williams. The third involved concerns raised by Dr Ray Smith, Clinical Lead for Theatres, by letter of 10 March 2009 to the effect that the claimant displayed rude and inappropriate behaviour in the operating theatre environment on a continued and regular basis.

6. A fourth allegation was subsequently added, namely that the claimant made direct contact with two of the witnesses to the incident of 20 February 2009 despite a request not to do so in the letter of 18 March 2009, and that such contact was inappropriate and unsolicited.

7. Dr Worrall as Case Investigator carried out an investigation. He took the views of an "external speciality advisor", Professor David Neal, who is Professor of Surgical Oncology at the University of Cambridge. Professor Neal subsequently expressed the view that though he could not confirm, refute or support any of the allegations (that was not the reason he had been asked to review the documentation) his "view as a long standing Consultant Uro-Oncologist is that if these behaviours and incidents are proven

to be found by the inquiry then I would agree that they go beyond the bounds of what would be usual accepted behaviour, even in a very stressful environment within the NHS and in theatre".

8. Dr Worrall reported on 7 July 2009. The recommendation was that the Case Manager (in other words Dr Kay) consider making the claimant the subject of a misconduct hearing. The conclusion was expressed as follows:

> "We formed the opinion that Mr Puri is a perfectionist and constantly strives to do his best for his patients and to ensure as far as possible that they get the best treatment and outcome. He is intolerant of others working with him who fall short of his high expectations and lacks insight into how his behaviour and attitude is perceived by and affects other members of the team, particularly junior nursing staff who may misinterpret his demand for perfection at all times as personal criticism and harassment. His behaviour seems to go beyond the norm of what is usual, even in the stressful environment of theatre. Professor Neal's opinion supports this view. He also seems unaware of the effects his behaviour and demands have on the wider operating theatre environment and indeed feels that this is not his concern.
>
> We found no evidence that Mr Puri's attitude or behaviour adversely affected the clinical quality or outcomes of his surgery and have not been made aware of any complaints of a clinical nature against him. Several witnesses emphasised their admiration for his skill and competence as a surgeon and that he always has his patient's best interests at heart.
>
> It was clear during the course of the investigation that there was poor and ineffective communication at all levels concerning the staffing and running of Mr Puri's theatre lists. Requests by Mr Puri for clarity and personal meetings over his concerns about repeated late list starts went largely unanswered. It was also clear that there were not always preoperative checks on Mr Puri's lists. Had such a check, which is integral to the Trust's Correct Site Surgery policy, been followed on the morning of 20/02/09 then we believe the situation would have been avoided. We feel that these communication issues need to be addressed as a matter of priority.
>
> Not withstanding the excellent clinical service provided by Mr Puri, having considered the evidence both written and verbal presented to us during this investigation it is our belief that the practitioner's behaviour and attitude has contributed to the formation of a dysfunctional service and unacceptable stress and anxiety to hospital staff over a protracted period of time. Therefore it is our recommendation that the Case Manager considers making the practitioner the subject of a misconduct hearing."

9. On 19 August 2009, the claimant was given notice that four allegations of misconduct would be considered by a disciplinary panel consisting of Mr Miles Scott, Chief Executive of the Trust, Mr Keith Parsons, Consultant Urologist of Royal Liverpool Hospital and Ms Pat Campbell, Human Resources Director of the Trust. By letter dated 15 September 2009, the BMA, acting as the claimant's representative in the disciplinary proceedings, challenged the participation of the Chief Executive of the Trust on the disciplinary panel. The Trust acceded to this request by letter dated 22 September 2009,

and notified the claimant of its appointment of the Trust Chairman, Mr David Richardson, to chair the panel in his place.

10. The disciplinary hearing took place on 2 October 2009. The claimant admitted several of the allegations. Having heard from Dr Worrall, Dr Smith, Ms Berry and Ms Stevens for management (the latter being nurses speaking as to the first allegation), and the claimant and Ms Ursula Ross his BMA representative, and having considered a number of written statements, the panel decided to dismiss the claimant from his employment on three months' notice. The Chairman wrote to him by letter dated 9 October 2009 setting out the reasons, and notifying him of his right to appeal under the Trust's Disciplinary procedure.

11. By letter dated 19 October 2009, the claimant appealed against the decision to dismiss him. Following a request from his solicitors, the Trust accepted by letter dated 28 October 2009 that in the light of the *Kulkarni* case (see below) he would be permitted to attend the appeal hearing with a legal representative. By letter dated 26 November 2009, the Trust told his solicitors that his appeal would be heard on 22 December 2009. He was informed that the appeal panel would be constituted by Mr John Bussey, a Non Executive Director of the Trust, Dr Steve Lindsay, Clinical Director, Acute Medical Specialities and Mr Alistair Tinto, a staff side representative, who is based at Lyngfield Mount Hospital Bradford District Care Trust. The appeal panel would be advised by the Human Resources Director of Calderdale and Huddersfield NHS Foundation Trust.

12. On 7 December 2009, the claimant's solicitors wrote to the Trust, to the effect that the decision to dismiss was unlawful in that the disciplinary panel ought to have been independent so as to comply with the requirements of Article 6 ECHR, and that any further hearings would have to have an independent panel. The proposed hearing on 22 December did not go ahead. Judicial review proceedings were commenced on 19 February 2010.

13. There are two other sets of proceedings to refer to. By letter dated 19 October 2009, the Trust's Medical Director referred the claimant's case to the General Medical Council for them to consider an investigation under its Fitness to Practise procedures. On 8 March 2011, following an oral hearing (one not including evidence), the GMC's Investigation Committee, while recording that his actions had been 'inappropriate, unprofessional and a breach of [Good Medical Practice]', decided that no further action should be taken by the GMC in relation to the referral. It stated:

> "The Committee has considered the particulars of the allegation, contained within Annex A of the Rule 7 letter, and has found that in a number of instances you did raise your voice towards nurses, managers and your secretary, both in the past and in the most recent incidents in 2009. Furthermore the Committee considers that on the balance of probabilities you approached at least one witness involved with the Trust's investigations in an attempt to discuss the progress of said investigation, but was not convinced that you put your arm around her.
>
> The Committee does not consider that you were issued with a warning on 28 January 2005 in the formal sense and considers that you were only given advice regarding your actions. However, it is accepted that on 18 June 2007 and 30 July 2007 you were notified by the Chief Executive that any future questions of conduct and behaviour would be dealt with formally.

> The Committee notes that you have made a number of admissions relating to your actions, although not in the exact terms of the allegation, and that you accepted that your actions had been completely inappropriate.
>
> However the Committee accepts that you apologised to individuals shortly after the incidents and that you have demonstrated genuine insight into your actions. The Committee also accept that you have sought to remedy your failings and have sought to control your negative reaction to stress.
>
> The Committee considers your actions to have been inappropriate, unprofessional and a breach of GMP. However, while not condoning your actions, the Committee does acknowledge the work related stress you were under and does not consider your actions to be a significant departure from GMP.
>
> Therefore in the Committee's view, having taken all the circumstances into consideration, your actions did not meet the threshold for a warning as set out in paragraph 13 of the guidance on warnings. It would encourage you to take further steps to ensure that you always comply with paragraphs 41 and 46 of GMP to prevent any repetition of your actions.
>
> The Committee has also given consideration to the recent testimonials which speak highly of your clinical skills, team working and professionalism.
>
> The Committee is satisfied that a warning would not be an appropriate or proportionate response in this case and directs that no further action be taken."

14. The claimant has also brought proceedings in the Employment Tribunal on grounds of that his dismissal was unfair, happened because of public interest disclosure (whistle blowing) on his part, and race discrimination. Among other things, he seeks reinstatement. These proceedings are stayed pending this judicial review hearing.

The procedures

15. Until comparatively recently, disciplinary matters of this kind would have been dealt with under Department of Health Circular HC (90) 9 of 1990, which is described in the judgment of Lord Steyn in *Skidmore v Dartford & Gravesham NHS Trust* [2003] ICR 721 HL ([12] - [13]). I am told that there were concerns that these procedures resulted in doctors and dentists being suspended for unacceptably long periods. There was a view that the involvement of lawyers in the system was giving rise to delay and over-complication. This gave rise to new arrangements being negotiated.

16. A national policy framework called "Maintaining High Professional Standards in the Modern NHS" (MPHS for short) was first published by the Department of Health in 2003 (for the background see further *Mezey v South West London & St George's Mental Health NHS Trust* [2010] EWCA Civ 293, Ward LJ). By 2005, all its provisions were the subject of a collective agreement between the Department of Health, the NHS Federation (representing the employing authorities) and the British Medical Association (BMA) and the British Dental Association (representing practitioners). It contained a new system (to take effect contractually) by which issues relating to a practitioner's conduct, capability or professional competence were to be resolved through the employing authority's disciplinary or capability procedures.

These had to be consistent with the procedures set out in the MHPS framework. The new procedures were intended to replace the quasi-judicial disciplinary procedures which had previously applied to practitioners contained in HC (90) 9 and to address the problems with the HC (90) 9 system by providing for disciplinary issues to be resolved internally by employing authorities on a less formal basis than hitherto. NCAS plays an important role in the scheme which is aimed at enabling NHS Trusts to handle cases quickly and fairly reducing the need to use disciplinary procedures to resolve problems.

17. From 2005, each individual NHS authority was required to have in place its own disciplinary procedures, modelled on MHPS, and to implement those procedures. Pursuant to that requirement, the defendant Trust produced a document mirroring the national framework document called "Disciplinary, Capability, Ill Health and Appeals Policy and Procedure for Doctors and Dentists". It was agreed between the Trust (as employer) and the Local Negotiating Committee (representing practitioners) on 18 January 2007. The claimant was at the time a member of the committee but was not at the meeting. It was approved by the Board of the Trust on 28 February 2007.

18. For present purposes, the disciplinary procedures are contained in two places, of which the first is the Policy and Procedure document I have just mentioned. So far as conduct is concerned (this being a conduct and not a capability case) the Policy and Procedure document contains certain variations so far as doctors and dentists are concerned to the Trust's Disciplinary Policy. That disciplinary policy is set out in a 2007 document called "Disciplinary Procedure". No issue is raised in these as to whether the defendant properly applied these procedures in the various steps that I have described above. A concern is first registered with the Chief Executive of the Trust who will appoint a case manager (in this case Dr Kay). The case manager should explore the concern with NCAS and the Director of Human Resources. An investigation is then carried out, in this case by Dr Worrall. The procedure allows for the taking of the views of an "external speciality advisor", here Professor Neal. That led to the recommendation that the claimant be made the subject of a misconduct hearing, and the subsequent constitution of the disciplinary panel. The claimant's complaint is that, though constituted in accordance with the procedure, neither the disciplinary panel, nor the proposed appeal panel, are Article 6 compliant, because they are not independent and impartial, consisting largely of employees of the defendant Trust. No wider challenge is advanced, so that the point is a narrow, though important one.

19. Mr Giles Powell, counsel for the claimant, has identified four issues to be determined, and I shall take them in turn.

<u>(1) Is Article 6 engaged - were the disciplinary and appeal proceedings determinative of the claimant's civil rights and obligations?</u>

The law

20. The first step in the claimant's argument is that Trust's disciplinary and appeal hearings are a "determination of his civil rights and obligations" within the meaning of Art 6 ECHR, with the consequence that he "is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". The civil rights relied on are (1) the right to practise as a doctor, (2) the right to his professional reputation and (3) the right to his current employment. For its part, the defendant accepts

that a process that prevents a person practising in his profession is a determination of his civil rights, but contends that that was not at issue in the present case. It denies that the right to reputation, or the right to specific employment, is a civil right for these purposes.

21. It is not in dispute that a person's right generally to practise his or her profession is a civil right for the purposes of Article 6. This was established in *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1. This is not the same as that person's right to remain in his or her current employment. But although the two situations are conceptually different, the difficulty lies where a dismissal for misconduct leaves the right intact, but the person concerned practically unable to obtain another job in his or her profession, particularly where the possibility of re-employment is constrained by the nature of the profession, such as the employment of a doctor within the National Health Service.

22. The argument before me has centred on a few recent decisions of the Supreme Court and the Court of Appeal. I am told that an appeal in the last of these – *R (G) v Governors of X School* [2010] 1 W.L.R. 2218 – is due to be heard shortly by the Supreme Court. Understandably, neither party wanted to wait for the outcome, but the consequence is that this judgment is being given against a backdrop that may change.

23. The case of *R (on the application of Wright) v Secretary of State for Health* [2009] 1 A.C. 739 concerned the situation in which care workers employed in looking after vulnerable adults may be placed on a list of people considered unsuitable to work with vulnerable adults (the "POVA list"). The "effect of listing is to deprive the care worker of her employment as a care worker and to prevent her from getting any other such employment. … The question for us is whether this aspect of the scheme is compatible with the care worker's rights under articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms" (Lady Hale at [4]). It was held that the right to remain in employment or to be able to engage in a particular employment sector was a civil right within article 6(1) of the Convention. At [20] Lady Hale said, "… the scope of the concept of civil rights has been greatly expanded from the sorts of dispute which the original framers of the Convention had in mind. But since 1981 it has been held to include the right to practise one's profession (*Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1; see, for example, *Bakker v Austria* (2003) 39 EHRR 548). The right to remain in the employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one does not currently have one."

24. In the same context, the claimant placed reliance on the decision of the European Court of Human Rights in *Obermeier v Austria* (A/179) (1991) 13 E.H.R.R. 290. There, the court said at [67] that it was not contested that a dispute relating to the suspension of a disabled person concerned private law relations between employer and employee, and was thus a "civil" dispute for the purposes of Articles 6(1). The case concerned a specific factual situation, in which under Austrian law dismissal of disabled persons was subject to the authorisation of an administrative body known as the Disabled Persons Board. The labour courts had held that they could not examine the validity of a dismissal which had received the Board's authorisation, and there was, therefore, it was held, no effective judicial review available.

25. *Kulkarni v Milton Keynes Hospital NHS Trust* [2009] EWCA Civ 789 was similar to the present case, to the extent that Dr Kulkarni was a doctor employed by a hospital trust.

However the facts were very different. As a foundation year one doctor, he was provisionally registered on the medical register and the post to which he was appointed was part of the training necessary for him to achieve full registration. Arising from a previous employment at a different hospital, he had been prosecuted for an offence of sexual assault on a patient and had been acquitted. Shortly after his employment with the defendant Trust commenced, a patient made a complaint that Dr Kulkarni had sexually assaulted her. The issue was whether he was contractually entitled to have legal representation at a disciplinary hearing as a matter of construction of the trust's disciplinary procedure (which was based on MHPS as in the present case), and it was held that he was.

26. The Article 6 point that had been argued did not therefore arise for decision, but it was held (obiter) by Smith LJ (with whom the President of the Family Division and Wilson LJ agreed) that in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, Article 6 would not be engaged. However, where the effect of the proceedings could be to deprive an employee of the right to practise his or her profession, the article would be engaged. Article 6 would be engaged where an NHS doctor faces charges which are of such gravity that, if proved, he would be effectively barred from employment in the NHS (at [67]). In such circumstances Article 6 implies a right to legal representation because the doctor is facing what is in effect a criminal charge, although it is being dealt with by disciplinary proceedings. It was also said that there may be proceedings before the General Medical Council and/or an employment tribunal does not make the process Article 6 compliant ([71] – [73]). So far as the former is concerned, the process there undertaken cannot be described as "subsequent control by a judicial body" of the disciplinary proceedings, because the GMC is not a judicial body, does not conduct an appeal from the disciplinary proceedings by the employer, and the doctor cannot instigate the process. So far as the latter is concerned, the issues which the employment tribunal would have to consider (in a case where the dismissal has been by reason of misconduct) is not whether the employee was guilty of the misconduct, but whether, having conducted a reasonably thorough investigation, the employer believed that the employee was guilty of the misconduct alleged and dismissed him for that reason; also whether the employer acted reasonably in treating that misconduct as a sufficient reason to dismiss the employee. Thus, the employment tribunal does not decide the crucial question of fact for an employee in Dr Kulkarni's position; it is not a tribunal of full jurisdiction.

27. Essentially, the claimant's contention based on *Wright* is that his right to remain in the employment he held with the Trust was a civil right, and based on Kulkarni that article 6 was engaged because the effect of the disciplinary proceedings could be (and he says was) to deprive him of the right to practice his profession..

28. Other authorities featured in the argument. The decision in *Kulkarni* was considered by Swift J in *Hameed v Central Manchester University Hospitals NHS Foundation Trust* [2010] EWHC 2009 (QB). This was not a judicial review, but a trial of the doctor's claim against the Trust. As to the test to be applied, she commented at [89]:

> "I recognise the force of the submission made by [counsel for the claimant] that it appears unsatisfactory for the decision as to whether Article 6 applies to disciplinary proceedings against hospital practitioners to be taken on a case by case basis, depending on the gravity of the charge, the prospect of the proceedings resulting in dismissal and/or the evidence about the practitioner's chances of

> obtaining alternative employment in the event of dismissal. As he said, this would lead to inevitable uncertainty as to whether Article 6 was engaged in any individual case. It seems to me arguable that the wide range of individual circumstances covered by the disciplinary procedures militates against a finding that Article 6 is engaged in relation to disciplinary proceedings taking place pursuant to MHPS. In any event, I do not consider that the claimant's case falls within the type of exceptional circumstances envisaged by Smith LJ and I find that Article 6 did not apply."

The point being made is that if the question as to whether Article 6 applies to disciplinary proceedings against hospital practitioners has to be taken on a case by case basis, uncertainty will result. In the present case (which unlike *Hameed* is a judicial review), for example, there was considerable disagreement over the conclusions to be drawn from the evidence about the claimant's prospects of obtaining alternative employment, which is essentially a factual question.

29. The last of the three cases is *R (G) v Governors of X School* [2010] 1 W.L.R. 2218, in which both *Wright* and *Kulkarni* were considered. The facts were that the defendant school's disciplinary committee had dismissed the claimant teaching assistant for alleged sexual impropriety with a pupil. The defendants refused him the right to legal representation at the disciplinary hearing and subsequent appeal hearing against dismissal. The Governors were obliged by law to report the circumstances of the claimant's dismissal to the Secretary of State so that he might decide whether to include him on the register of persons prohibited from working with children. Like *Wright* therefore, this is a "barred list" type of case, in which the claimant's right to practise his profession was directly in point.

30. At [26], Laws LJ (with whom Wilson LJ and Goldring LJ agreed) said as follows:

> "… Now, little if any light is thrown on the case by the bare assertion that article 6 "civil" is engaged in the disciplinary process. It is necessary to be clear as to the precise nature of the claimant's civil right said to engage it. I apprehend that the governors and the Secretary of State would contend that the only civil right potentially in play was the claimant's contractual entitlement, so far as it went, to remain in his current employment at X School. If that is right, it is not I think suggested (and if it were, the suggestion would very likely be mistaken) that article 6 required that the claimant be allowed the opportunity of legal representation in the disciplinary proceedings."

Thus Laws LJ was concerned to identify the particular issue to be determined, which in that case was the opportunity of legal representation in the disciplinary proceedings, which would not, he said, be required by Article 6 if the only civil right potentially in play was the claimant's contractual entitlement to remain in his current employment at X School. He continued:

> "We are therefore concerned with the question—the first of the two questions I shall consider—whether the disciplinary proceedings were a determinant of a different civil right, namely the claimant's civil right generally to practise his profession as a teaching assistant. That this is a civil right for the purposes of article 6 is uncontroversial (it was established by *Le Compte, Van Leuven and De*

> *Meyere v Belgium* (1981) 4 EHRR 1), but it is clearly distinct from the claimant's entitlement to remain in his current employment."

31. An affirmative answer to the question whether the disciplinary proceedings were a determinant of the claimant's right to practise his profession for the purposes of article 6 of the Convention would involve, Laws LJ said at [28], a finding by the court that there existed, in some sense at least, a close nexus between the disciplinary process and the barred list procedures. He referred to a passage in *Kulkarni* ([66]) where the court noted the submission that, if the disciplinary charge was proved, "it is highly likely that the system of 'alert letters' would be operated in this case …. An alert letter is a letter warning other NHS employers not to employ the doctor named, who is regarded as presenting an unacceptable risk to patients". The *Wright* case, he said, was concerned with a different barred list system. He was treating all three cases therefore as "barred list" type of case.

32. He concluded at [37]:

> "In my view the effect of the learning … is that where an individual is subject to two or more sets of proceedings (or two or more phases of a single proceeding), and a "civil right [or] obligation" enjoyed or owed by him will be determined in one of them, he may (not necessarily will) by force of article 6 enjoy appropriate procedural rights in relation to any of the others if the outcome of that other will have a substantial influence or effect on the determination of the civil right or obligation. I do not mean any influence or effect which is more than de minimis: it must play a major part in the civil right's determination. I do not intend a hard and fast rule. Principles developed by the Strasbourg court for the interpretation and application of the Convention tend not to have sharp edges; as I have said, the jurisprudence is generally pragmatic and fact-sensitive. The nature of the right in question may make a difference. So may the relative authority of courts, tribunals or other bodies playing their respective parts in a case, such as the present, where connected processes touch a Convention right."

33. On the facts, he concluded that " … there is every likelihood that the outcome of the disciplinary process in a case like this, where there has been a finding of abuse of trust by virtue of sexual misconduct, will have a profound influence on the decision-making procedures relating to the barred list" ([47]). The "… outcome of the disciplinary proceedings, if (after the extant appeal) it remains unfavourable to the claimant, will have a substantial effect on the outcome of the barred list procedures which will then be applied to him. His right to practise his profession, which will be directly at stake in the barred list procedure, may (in the language of *Öcalan's* case 41 EHRR 985) be irretrievably prejudiced by the disciplinary proceedings. I conclude that the answer to the first question which I posed is in the affirmative: the disciplinary proceedings are a determinant of the claimant's right to practise his profession. Article 6 is accordingly engaged on the footing that that is the civil right in issue."

34. The current position on these authorities, therefore, is that though in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, Article 6 would not be engaged, it is engaged if the effect of the proceedings could be to deprive an employee of the right to practise his or her profession (*Kulkarni*). The question is whether the outcome will have a substantial influence or effect on the determination of that right (*R (G) v Governors of X School*). The latter case provides support for Swift J's

view in *Hameed* at [89] that *Kulkarni* envisages Article 6 applying in exceptional circumstances.

The law applied to the facts of the case

35. The claimant's case is that the effect of the Trust's approach is likely to lead to the end of any real possibility to his continued or future employment as a consultant urologist in the NHS. As the NHS is effectively a monopoly employer in the UK, his dismissal is akin to being struck off the register and barred from practice in the NHS. This has been demonstrated, it is submitted, by the claimant's experience. There was (in this regard) a considerable body of evidence as to his attempts to obtain, and his prospects of, alternative employment. It is important to be clear as to the basis on which such evidence was adduced.

36. I can summarise this evidence as follows. The claimant now undertakes private work at the Nuffield Hospital in Leeds, but there are no opportunities there for high level surgery such as laparoscopic prostatectomy that he specialised in when working within the NHS, and he says that he is rapidly de-skilling in this form of surgery. In his first statement made in October 2010, he gives details of unsuccessful attempts to apply for Consultant Urologist posts. At one, he was advised by a relevant member of staff that in view of his dismissal, it would be inappropriate even to apply for the post. In another, he was interviewed, but not appointed. He explains that he has investigated opportunities in Australia, New Zealand, the UAE and India. As regards New Zealand, once he sent a copy of the decision of the disciplinary panel to the authorities in Christchurch, his interview was withdrawn. He lists a number of other applications he has made, to which a reply has not been received.

37. Shortly before the hearing, the claimant put in a further witness statement to the effect that he had been applying for urology consultant posts with a special interest in oncology, but had been unsuccessful. He gives three specific examples of hospitals in different parts of the country, and says that his dismissal was a prime reason for his failure to obtain the posts. There is support for this view in the documentation in the form of a letter of 5 January 2011 from South Tees Hospitals NHS Foundation Trust which makes specific reference to the allegations made against him in the present case as affecting a key element of the specification in question, namely "commitment to good team working and relationships".

38. The defendant has sought to meet this evidence in a witness statement from Dr C.L. Kay filed in March 2011. He produced a substantial number of advertisements for the post of consultant urologist, and expressed the view that the claimant could apply for, and would be capable of doing, general urology jobs. He has (it is contended by Dr Kay) applied too narrowly in the uro-oncology field. Dr Kay says, and it is the defendant's case, that the claimant is in a position to obtain alternative employment in the NHS in the UK, notwithstanding his dismissal.

39. In his final statement, filed just before the hearing, the claimant says that of the 13 uro-oncology posts that Dr Kay says he might have applied for, he did in fact apply for four. He did so, because he knew people at each of those hospitals who might support his application despite his dismissal. Among the other possible posts, one was at Cambridge where Professor Neal works, and another was at Liverpool where Mr Keith Parsons works. As he puts it, the outcome of the four applications he did make did not encourage

him to make more and thereby damage his reputation further. The time sequence of these various applications is further set out in the chronology.

40. I express my conclusions as follows. The claimant has demonstrated, at least to my satisfaction, that it is difficult for him to find within the NHS or elsewhere a post of the seniority, and speciality, of the post that he held at the defendant Trust. Part of the difficulty, the evidence suggests, is not connected with the circumstances of his dismissal (to take an example, when he sent his CV to a contact at Singapore General Hospital in March 2010 he was informed that there were no vacancies). But part of the difficulty clearly is so connected (see the examples of the hospital in Christchurch, New Zealand in December 2009, and the South Tees Hospital NHS Trust in November 2010). If he is short-listed for a post, he will have to disclose the outcome of the disciplinary hearing, and this, to put it colloquially, puts potential employers off. There is no issue as to his clinical skills, but he faces doubts raised by the grounds of his dismissal as to his teamwork abilities. He has made real attempts to obtain an alternative consultancy post within the NHS, but feels, understandably in my view, constrained as to the jobs for which he applies, and has no wish to apply to places where the chances of success are effectively nil, as in Cambridge and Liverpool, given that doctors from the hospitals in question were involved in the disciplinary process against him.

41. On the other hand, it is important to note that the claimant's contract of employment is as a Consultant Urologist, and is not restricted to uro-oncology. His specialism appears to have come about in response to various institutional changes from 2006 onwards. The defendant submits (in my view correctly) that this answers the claimant's submission that even if he can practise, he can only do so at a lower, or different, level than at the defendant Trust. This was referred to in his argument as a "partial cessation" of his right to practise. The claimant advanced the "partial cessation" argument because the fact is that he is currently practising as an urologist, albeit in the private sector, and without the opportunity to practice his particular skills in laparoscopic prostatectomy. He is and remains a practising doctor. As I see it, the evidence shows that it would be difficult for him to return to a position in the NHS, but I do not think that it would be impossible in the light of the determination of the GMC's Investigation Committee on 8 March 2011, which resulted in no warning being made against him.

42. Though I am sympathetic to his position, I conclude, therefore, that this is not a case in which the effect of the disciplinary proceedings has been to deprive him of the right to practise his profession, within or outside the NHS. Further, there are important distinctions between the present case and *Kulkarni*. The most obvious distinction lies in the nature of the disciplinary charges. The charges against Dr Kulkarni would if proved, have constituted a criminal offence, and no such issue remotely arises in the case of the claimant. This is not, in my judgment, a case where an NHS doctor faced charges which were of such gravity that, in the event they were found proved, he would be effectively barred from employment in the NHS (see [67]).

43. There are other important distinctions. Dr Kulkarni was a trainee doctor and as Smith LJ pointed out at [66], a doctor cannot complete his training in the private sector. If Dr Kulkarni was found guilty on this charge, he would never complete his training, and the nexus between the disciplinary process and the right to practise was plain. Further, the *Kulkarni* case proceeded on the basis that it was "highly likely" that the system of "alert letters" would be operated if he were found guilty. An alert letter is a letter warning other NHS employers not to employ the doctor named, who is regarded as presenting an

unacceptable risk to patients. The evidence in this case makes it plain that Dr Kay did not at the time of the claimant's dismissal, or subsequently, consider that an alert notice was necessary, and envisaged no circumstances arising in the future where this may be appropriate, because he did not have concerns about the claimant's clinical practice.

44. As Smith LJ observed, the difficulty is to know where to draw the line [66]. However, in my judgment the effect of the proceedings against the claimant could not be to deprive him of the right to practise his profession, and the outcome would not have a substantial influence or effect on the determination of that right. Though its decision cannot affect the point of principle, which must be decided as at the time of the disciplinary proceedings, the GMC's Investigation Committee has now decided that his actions did not meet the threshold for a warning, and directed that no further action be taken. As already indicated, because his contractual employment is as a Consultant Urologist, I reject the submission that a different result follows because, even if he can practise, he cannot practise in the field of laparoscopic prostatectomy (the "partial cessation" argument). Applying the above authorities, I conclude that Article 6 was not engaged in the disciplinary and appeal proceedings in this case.

45. The claimant also advances a case based on the effect on his reputation. He relies among other things on the fact that as a result of his dismissal he was removed from his position as chair of the International British Urological Society, and lost his post as an honorary senior lecturer at Leeds University. He contends that Article 6 is engaged where such a decision impacts upon a person's professional reputation. The contention is advanced on the basis of the decision of the European Court of Human Rights in *Werner v Poland***,** Application no 26760/75, 15 November 2001. No other authority has been cited in support, because as the claimant puts it, nobody has yet run cases on this basis.

46. In *Werner v Poland*, the applicant had been appointed as judicial liquidator of an insolvent company, a post from which the insolvency judge subsequently requested that he be dismissed. The dismissal decision was made by a court composed of three judges, one of which was the insolvency judge. The applicant argued that his reputation, and so ability to earn a living, had been harmed. The Court agreed with the Commission that the applicant's function could not be assimilated to a status of a civil servant, that his dismissal related to his interests which were of a pecuniary character, and that the proceedings could also be deemed to have had a bearing on his good reputation. The Court said that the right to enjoy a good reputation, and the right to have determined before a tribunal the justification of attacks upon such reputation, must be considered to be civil rights within the meaning of Article 6.

47. The defendant relies on the principle that Article 6 does not provide a cause of action, but procedural guarantees for the determination of rights. There were no substantive rights to which Article 6 could attach in the present case, it is submitted, because (1) there is no general right to reputation, and (2) the subject matter of dispute to be dealt with by the disciplinary panel involved no determination of the claimant's right to a good reputation.

48. I accept the submissions of the defendant in this respect. As the claimant acknowledges, *Werner v Poland* was not considered in the cases I have referred to above. Putting the argument on the basis of loss of professional reputation rather than loss of the right to practise does not in my view affect the result as determined in those cases.

(2) If Article 6 was engaged, was the disciplinary panel/proposed appeal panel independent and impartial so as to comply with Article 6?

The parties' contentions

49. If (contrary to the above) Article 6 was engaged, the claimant's case is that the disciplinary panel and proposed appeal panel were not independent and impartial so as to comply with Article 6. It is submitted that neither the disciplinary panel nor the proposed appeal panel satisfied the requirements of being both independent and impartial because (1) the disciplinary panel was chaired by the Chairman of the Trust and predominantly made up of Trust members and employees, and (2) the proposed appeal panel would be entirely made up of Trust members or employees.

50. These contentions are made on the basis that the Chairman of the Trust and Trust members or employees would have apparent bias towards concluding the hearing in the way the Trust (which initiated and prosecuted the proceedings) would favour. Even if drawn from separate lines of management, NHS employees are likely to show affinity with their employer who is 'prosecuting' the misconduct charges. The presence of a single external figure (the Consultant Urologist from Liverpool Mr Parsons) does not provide a sufficient guarantee of impartiality, as a minority influence, he could not realistically neutralise the inevitable bias of the Trust members and employees on the panel. It is the impartiality of the panel as a whole that must be looked at. Real independence, it is submitted, is required in terms of, for example, appointment, tenure, payment and accountability. The panel clearly fails the test of 'whether the body presents an appearance of independence' (*Bryan v United Kingdom* [1995] 21 EHRR 342 ECtHR). The Trust's disciplinary procedure provides for the appeal panel to be constituted of "at least one executive or non-executive directors ... one general manager/director, and one staff side representative". All three are internal NHS Trust members or employees. The allowance for an external HR Director to advise the appeal panel is, it is submitted, wholly inadequate for guaranteeing impartiality. Further, it does nothing to make the panel independent in any way. It would therefore be neither impartial nor independent.

51. On behalf of the defendant it is submitted that the Trust is not required, in order to satisfy any right the claimant may have to an independent and impartial tribunal, to constitute a disciplinary panel wholly comprised of persons external to the Trust as he asserts. Not only would such a requirement run counter to the manner in which disciplinary complaints are determined in all areas of employment, whether in the private or public sector, it is submitted that it is not required to satisfy the Art.6(1) right to an 'independent and impartial tribunal' as interpreted in the authorities. The fact that the certain of the members of the disciplinary panel are employees/officers of the Trust does not cause their role to be infected by bias. In order for that to happen, there must be further specific prior knowledge of the facts to be investigated at the disciplinary hearing or a predisposition not to believe the employee. To find otherwise, and hold that it is incumbent upon the Trust to find non-employees/non-officers to sit on disciplinary panels would have, it is submitted, profound effects for employers up and down the land. They would suddenly find themselves unable themselves to manage their own employees (a key feature – control – going to the essence of the employment relationship) and have to subcontract that role to others. That cannot it is submitted be the right result and would result in overjudicialisation of proceedings. There is no evidence before the court of any

specific knowledge of the subject matter of the investigation on the part of any member of the panel.

Discussion and conclusions

52. I have set out the composition of the panels (actual and proposed) above. I was not entirely clear how far it is contended by the claimant that, to comply with Article 6, the panels have to be completely independent of the defendant Trust. Mr Powell's written argument is to the effect that the disciplinary panel chaired by the chairman of the Trust and predominantly made up of Trust members and employees was neither impartial nor independent, and the appeal panel would be made up entirely of trust members or employees. Since one of the members of the disciplinary panel was a Consultant Urologist employed by a different trust (Liverpool), it is inherent in this argument that it does not suffice that one of the three panel members is from outside the trust. Mr Powell accepted in oral argument that there may be circumstances in which an employee of the Trust may be a member of a disciplinary or appeal panel, contending that this was not such a case, because of the serious consequences to the claimant inherent in the nature of the allegations made against him. Mr Powell did make it clear that he was not contending for a return to the HC (90) 9 of 1990 procedures, which were replaced in 2005 as I have described above. That does leave open how (in the claimant's submission) these panels should be constituted.

53. In view of my conclusion as to the applicability of Article 6, I will express my views relatively briefly.

(1) I accept the claimant's submission that the Trust's Policy and Procedure modelled on MHPS makes it plain that decision making should be impartial and fair. Any other result would plainly be unacceptable. (As the claimant points out, the involvement of NCAS is an aspect of this, since NCAS is not concerned to take sides in the matter.)

(2) A key aspect (as indeed the claimant's argument emphasises) relates to the perception of bias. In this regard, it has been held that the common law test of bias as set out in *Porter v Magil*l [2002] 2 AC 357 and the requirements under Article 6 are the same. In *Lawal v. Northern Spirit Ltd* [2003] IRLR 538, the House of Lords held at [14]:

> " … Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious" (Lord Steyn).

(3) In *Ali v Belfast Health and Social Care Trust* [2008] NIQB 143, a case involving a consultant cardiac surgeon, the issue was the right to legal representation. At [66], McCloskey J referred to the golden rule which must be observed at every stage of the process as being that of fairness. He said: "….any tendency to overlook, or undervalue, the independence, professionalism, integrity, experience and expertise of the members of the Disciplinary Panel in this kind of case must be firmly resisted". This is consistent with authority that a connection with, or even employment by, a party to the proceedings does not necessarily disqualify a decision maker by virtue of apparent bias:

see *R (on the application of PD) v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311, approved by the House of Lords in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781.

(4) The claimant submits that the presence of one independent member of the panel is not enough to negate the inevitable bias created by the majority internal members. Reliance is placed on *R (*Beeson*) v Dorset County Council* [2002] HRLR 15 where at [71] Richards J said: "It is common ground that the impugned decision was not taken by an independent and impartial tribunal within the meaning of Article 6(1). The complaints procedure by itself was inadequate to secure the requisite degree of independence and impartiality. There was only one independent member of the panel, the other two members of the panel being members of the defendant council." However, it is to be noted that on appeal at [2002] EWCA Civ 1812, [2003] HRLR 11, Laws LJ said at [30]:

> "In this present case we have seen no evidence that the panel could not or would not arrive at a fair and reasonable recommendation. It is by no means to be assumed that the two Council members would have entertained, even subconsciously, a disposition towards the protection of Council funds. To this Mr Drabble's reply … is in substance that actual bias is not required to show a violation of Art.6. That is of course right; but it seems to us to miss the real point in issue here, namely whether, given the quality of the first-instance process such as it is, the addition of judicial review satisfies Art.6. If there is no reason of substance to question the objective integrity of the first-instance process (whatever may be said about its *appearance*), it seems to us that the added safeguard of judicial review will very likely satisfy the Art.6 standard unless there is some special feature of the case to show the contrary. Here there is not."

(5) The reference in this passage to "the added safeguard of judicial review" is demonstrated as regards the procedures adopted in this case. The Chief Executive stood down from the disciplinary panel when asked to do so by the claimant, and was replaced by the Chairman of the Trust. The court can require such action where appropriate. In *Mezey v SW London and St Georges Mental Health NHS Trust (2)* [2008] EWHC 3340 (QB), Underhill J made it clear that (given the erroneous terms of a letter that had been written by him) the Chief Executive in that case should not sit on a disciplinary panel on the basis of apparent bias. In the present case, on 28 October 2009 the Trust wrote to the claimant's solicitors confirming that legal representation would be permitted at his appeal hearing, in line with the decision of the Court of Appeal in *Kulkarni*. (No request had been made for legal representation before the disciplinary panel, before which the claimant was represented by the BMA.)

(6) The disciplinary panel included among its three members a doctor who was not associated in any way with the defendant Trust (Mr Keith Parsons, Consultant Urologist at the Royal Liverpool Hospital). A further source of independent input came from that aspect of the procedure which allowed for an "external speciality advisor" (Professor David Neal, Professor of Surgical Oncology at the University of Cambridge). His task was not a fact finding one, but to comment on what would be usual accepted behaviour should the allegations be proved.

(7) Finally, and significantly in my judgment, the MHPS procedures followed in this case were (as described above) relatively recently put in place following a collective

agreement between the Department of Health, the NHS Federation (representing the employing authorities) and the British Medical Association and the British Dental Association (representing practitioners). The new procedures which have gone into effect across the country are intended to address perceived injustice to practitioners that had apparently resulted from the previous system. The BMA is (as has been pointed out) a powerful body, and it can be inferred that the system which has been put in place has been carefully balanced so as to give proper protection to doctors, who need such protection not least because of their vulnerability to vexatious or ill informed complaints. The court should be slow to hold that a system of this kind fails to comply with Article 6 in the fundamental respect advanced by the claimant in this case.

54. For these reasons, had I held that Article 6 was engaged, I would not have held compliance required a disciplinary panel comprised of persons external to the Trust, nor that the panel in the present case was non-compliant by reason of its composition. It is to be noted that permission to apply for judicial review was originally refused as to the disciplinary proceedings on the basis that the claim was issued out of time, but given in relation to the issue of the composition of the appeal panel. When giving permission on the renewal application to bring this claim in respect of both panels, Underhill J said (at [2010] EWHC 2523 (Admin) at [14]) that "although at first blush it would seem that the conclusion in relation to an appeal panel would apply equally to a first-instance panel, it is not impossible that distinctions could be sought to be drawn". One such distinction is that, unlike the disciplinary panel, the appeal panel proposed in this case consists solely of Trust members or employees. Mr John Bowers QC, counsel for the Trust, points out that one of these is a staff side representative, and that the appeal panel would be advised by the Human Resources Director of a different Trust. But it is not apparent, on the face of it, why fairness requires outside membership in the case of the disciplinary panel, but not in the case of the appeal panel. Had I found for the claimant on the first question, there may have been reason to debate that issue, which would seem readily capable of remedy.

55. There is a further point to deal with at this stage. I have referred to the role of Professor Neal as "external speciality advisor". It is necessary to record that (through no fault of Professor Neal) something went wrong with the procedure in his case. There had to be, and was, contact between Professor Neal and Dr Worrall, the Case Investigator. On 17 June 2009, an email disclosed by the defendant Trust shows Dr Worrall providing further information to Professor Neal beyond the allegations which the claimant faced. It seems to me that if the procedure is to work properly, the communications between the Case Investigator and an outside adviser such as Professor Neal must be transparent, at least to the extent that matters are not put to the external adviser of which the doctor who is the subject of the proceedings is unaware. That would be capable in certain circumstances of amounting to a breach of natural justice, with consequences for the integrity of the overall outcome. However, for reasons which are understandable, such an argument has not been advanced by the claimant on the facts of this case, the challenge being solely to the composition of the panel, and I need say no more about it.

<u>(3) If Article 6 is engaged and the disciplinary panel did not comply with Article 6, did the claimant waive his right to Article 6 compliant disciplinary panel?</u>

56. The defendant points out that the claimant was on the committee which negotiated the collective agreement which sets out the constitution of the panels to determine dismissal and appeal stages. Those negotiating the agreement must have intended that the agreed

procedures provided sufficient procedural protection in the case of both dismissal and appeal. Further when the issue of the constitution of the disciplinary panel arose, the BMA challenged (successfully) the standing of the Chief Executive, but did not take the points that he now takes. I agree with these points as factual statements, but the question is whether (as the defendant submits) they give rise in law to a waiver. The claimant submits that there can have been no waiver because the MHPS is a disciplinary framework imposed by the Secretary of State and adopted by the Trust. It was not a policy freely and voluntarily entered into by him unequivocally waiving his right to an independent and impartial panel. Further, the right to such a panel is not something that can be waived without the provision of some other safeguard to ensure such right is safeguarded. No other safeguard has been put in place.

57. The test that applies to waiver in such circumstances has been discussed recently in *Stretford v Football Association Ltd* [2007] Bus. L. R 1052, in which the Strasbourg case law is analysed. (The issues were different, the question being not as to the impartiality or independence of the tribunal, but as to waiver of Article 6 rights in the context of an arbitration agreement.) The court held that for a waiver to operate, (1) the parties must be acting voluntarily and not under compulsion, (2) to permit waiver must not run counter to any important public interest, and (3) it must be made in an unequivocal manner. In this case, I do not consider that this test is satisfied. The fact that the claimant was on the committee that approved the disciplinary procedure (albeit not at the relevant meeting) cannot amount to a waiver. The main point (and it has considerable force) is that this challenge to the composition of the panel is made ex post facto, in circumstances where the claimant was represented by his professional association at the hearing, and where objection had been specifically taken to the chair of the panel, but to no other member (which objection was acceded to). Notwithstanding, I would not have held that waiver applied in this case. Waiver must be treated with caution in Article 6 cases. Applying *Stretford*, I doubt that this is a case in which, in submitting to his hospital's disciplinary procedures, the claimant was acting "voluntarily" in a real sense. If (contrary to the above) therefore I had found his Article 6 rights to have been infringed, I would not have held that the claimant had waived them.

(4) Did the Trust give adequate reasons for its decisions?

58. The claimant contends that the Trust has given no reasons or no adequate reasons for the make-up of the original panel or the appeal panel. Mr Powell candidly accepted that this was not his strongest point. In brief, I am satisfied that where, as here, the nature of the decision under review relates to the composition of a disciplinary panel, or an appeal panel, there is no duty upon an employer to offer "reasons" for the selection of a proposed panel member, where such selection conforms to the requirements of a negotiated disciplinary procedure.

Conclusion

59. For the above reasons, the claim is dismissed. I am grateful to the parties for their assistance.