Neutral Citation Number: [2012] EWHC 1999 (QB)

Case No: HQ12X00577

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 19th July 2012

Before :

HIS HONOUR JUDGE CURRAN QC
(sitting as a Judge of the High Court)

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Between :

SIAN KERSLAKE	**Claimant**
- and -	
NORTH WEST LONDON HOSPITALS NHS TRUST	**Defendant**

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Martin Forde QC and Martin Downs (instructed by **Hill Dickinson**) for the Claimant
Mark Sutton QC and Betsan Criddle (instructed by **Capsticks**) for the Defendant

Hearing dates: March 26, 27, 28, 29, 30, **2012**

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Approved Judgment

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

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Judge Curran:

Introduction

1. The Claimant in this case, Miss Sian Kerslake, is a Consultant Obstetrician and Gynaecologist. She seeks declarations, injunctions, and damages for breach of a contract of employment. It is not an action for wrongful dismissal: the Claimant has not been dismissed. She is fearful that a procedure set in train by the Defendant Trust in order to deal with differences which are said to have arisen between her and her colleagues at work may, if allowed to continue, result in her being dismissed in breach of the terms of her contract of employment.

2. The case was opened by leading counsel for the Claimant upon the basis that it is "all about process." The processes involved deal with an investigation into the extent of the differences between the Claimant and her colleagues, and the holding of a hearing to consider the results of the investigation and the potential for resolution of those differences, and to reach a decision upon those matters and upon the action to be taken. The primary point in the case is whether or not the matters being enquired into are matters relating to Miss Kerslake's capability or conduct, or to both.

3. A central question is whether the Defendant Trust is in breach of policies which were formulated by the Trust to give effect to a framework scheme known as *Maintaining High Professional Standards in the Modern NHS* ("MHPS") first issued by the Department of Health in December 2003. At that stage MHPS consisted of two parts: (I) concerning action when concern arises over the conduct or capability or performance of a doctor; and (II) dealing with restrictions and exclusion from practice. Subsequently three further parts were agreed with the British Medical Association ("the BMA") dealing respectively with (III) conduct hearings and disciplinary matters; (IV) procedures for dealing with capability issues; and (V) dealing with concerns over a practitioner's health. It is common ground that MHPS is incorporated into the Claimant's contract. The issue is whether or not its terms are engaged as a result of the events which have occurred.

4. In the briefest summary, the primary case for the Claimant is that, in the circumstances which have arisen, the procedures for investigations and hearings provided for by MHPS should be followed, as the matter involves conduct or capability, and the Defendant Trust is in breach of express terms of the contract of employment for deciding not to do so. As a secondary case, the Claimant asserts that if there is no breach of an express term, on the basis that MHPS is not strictly engaged, then the term of trust and confidence

necessarily implied into her contract of employment requires that she should have the same degree of "protection" in terms of equivalent features of investigatory procedure, and equivalent formal safeguards in respect of a hearing, as are provided for by MHPS. The Claimant also submits that, whether the Defendant's procedure is regular or irregular, she has been informally excluded from work, which is prohibited by MHPS.

5. The case for the Defendant Trust, again summarised very briefly, is that the relevant events, the investigation into the extent of the differences between the Claimant and her colleagues, and the holding of a hearing to consider the results of the investigation, do not, on its proper construction, engage MHPS. They say they have already followed the procedure laid down by MHPS for investigating the Claimant's conduct and capability, and have accepted a finding that she is entirely competent and blameless. The events with which they are concerned do not involve the conduct or capability of the Claimant, but a breakdown of working relationships between her and consultant colleagues.

6. As to the alternative case, the Defendant Trust says that the implied term of trust and confidence cannot be prayed in aid in order to create a set of procedural safeguards equivalent to those provided for by MHPS, which is expressly limited in scope, and the agreed scope cannot be extended by implication. The Defendant Trust does not concede that there has been an informal exclusion from work, or, if there has, that the Claimant is entitled to the remedies she seeks in respect of it.

Background

7. Miss Kerslake is a very experienced medical practitioner. She qualified as a doctor in 1978. She obtained Membership of the Royal College of Obstetricians and Gynaecologists in 1984. In 1985 she became a Fellow of the Royal College of Surgeons in Edinburgh. She was elected to Fellowship of the Royal College of Obstetricians and Gynaecologists in 2003.

8. On the 1 February 1996 Miss Kerslake took up appointment as a Consultant Obstetrician and Gynaecologist at the Central Middlesex Hospital, which was then run by the Defendant Trust's predecessors. In about 1998 she sat on an appointments board which interviewed another gynaecological and obstetric surgeon, a Mr Louca, for a consultant post, and which appointed him.

9. In 1999 there was a re-organisation placing both the Central Middlesex and Northwick Park Hospitals under what eventually became the North West London Hospitals NHS Trust, the Defendant in this action, and they thereby

became Miss Kerslake's employers. In about 2003 Mr Louca became the Trust's Clinical Director for the Obstetrics & Gynaecology department at Northwick Park Hospital and at the Central Middlesex Hospital. In that post he was responsible for managing the whole clinical team in each of those departments, including the Claimant.

10. Between April 2002 and December 2003 a disturbingly high number of maternal deaths occurred: seven women who were patients in the care of the Trust died during or shortly after pregnancy, and there also appeared to have been a higher than expected number of neonatal infant deaths. None of these patients had been in the care of the Claimant. An internal review of its maternity services was conducted by the Defendant Trust in February 2004.

11. On 23rd March 2004 there was a routine annual appraisal of Miss Kerslake's professional practice and related matters by Mr Louca, as Clinical Director, which was entirely satisfactory. In respect of both 'Good Medical Care' and 'Maintaining good medical practice,' Mr Louca wrote '*Excellent records.*' Under 'Working relationships with colleagues' he wrote '*Excellent, well respected, trustworthy.*'

The Healthcare Commission investigation and the "AMD" case

12. In May and June 2004 two more maternal deaths occurred. Neither patient had been under the care of the Claimant. In July the Trust asked the Healthcare Commission to carry out an external review of the Trust's maternity services. While the Healthcare Commission was finalising its report, as noted in its Executive Summary, a further, tenth, maternal death occurred. The Claimant had had some involvement in the care of the tenth patient, who is referred to in the papers as "AMD".

13. On 11 April 2005 the Healthcare Commission carried out an unannounced visit. Their findings on that visit led to a recommendation by them under the Health and Social Care Act 2003 that 'special measures' be taken by the Secretary of State. As appears from their report (trial bundle v.2/542-543) they recommended that urgent steps be taken to increase capacity in the maternity services, in particular for elective caesareans to be undertaken elsewhere; that external clinical support be provided; and that support be provided to address

> "*… the serious difficulties that existed with working relationships between different clinical staff ….*"

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The recommendations were accepted and acted on by the Secretary of State, and steps were taken to implement special measures.

The 2005 internal investigation into the Claimant's clinical practice

14. In May 2005 Miss Kerslake was required by the then Medical Director not to undertake any work on the labour ward or any major gynaecological surgery, whilst a review of her clinical practice was undertaken. Towards the end of May 2005, a Mr Michael Burke became Medical Director, and he wrote to Miss Kerslake on 25th May 2005 (trial bundle v.1/112) setting out the reasons why she had been asked to refrain from labour ward practice:

    "*…criticisms of the handling of the surgical components of the [AMD] case had led the Trust to ask you to refrain from labour ward practice until a full investigation of the case had been completed.*"

    He said in the letter that that this was

    "*… to protect both the Trust and yourself from further risk.*"

15. These events, Mr Burke continued in the letter, had coincided with the receipt by him of "*anecdotal evidence*" that Miss Kerslake's practice in major gynaecological surgery "*… may not meet the standards required of a consultant in independent practice*." It is also recorded in the correspondence that at the request of her clinical director (Mr Louca) Miss Kerslake had agreed to refrain from gynaecological surgery whilst a separate internal investigation into the standard of Miss Kerslake's surgical practice was carried out by the Trust,

    "*…to assess whether there was any foundation for these concerns.*"

    Mr Burke conducted the investigation himself and concluded in August 2005 that he had not found "*any major problems with her gynaecological surgery.*" [trial bundle v.1/114.]

The Defendant Trust's policies in respect of (1) Conduct and Capability and (2) Investigations

16. On 1 June 2005 the Defendant Trust adopted a Policy entitled, *Conduct, Capability, Ill Health And Appeals Policies And Procedures For Medical And Dental Practitioners* ("the Conduct and Capability Policy.") In July 2005, the Defendant's Board ratified an Investigation Policy which had previously been negotiated and approved by the Human Resources, Training and Education

Committee, the Executive Team, and the Joint Staff Committee, "the Investigation Policy."

The Healthcare Commission's Report

17. In July 2005 the Healthcare Commission produced its report. Its findings included observations that there was a lack of clarity amongst staff about the consultants' duties, and that consultants criticised each other in front of other staff. It also found that within the department there was an "*inability to sustain*" working relationships between staff, including consultants.

18. On 3 February 2006 Mr Louca wrote in another annual appraisal that Miss Kerslake's maintenance of good medical practice was '*well above target'*. Under '*working relationships with colleagues*' he wrote '*felt unsupported*' although things were '*improving'* and that Miss Kerslake felt that there was a need for *'more social integration for the whole department.'*

19. On 7th April 2006 a consultant Obstetrician and Gynaecologist at Ealing Hospital wrote to Mr Burke to say that Miss Kerslake had attended several surgical sessions in his theatre and that he could confirm that she was '*perfectly able*' to carry out routine gynaecological procedures. Mr Burke accordingly wrote to Miss Kerslake informing her of this, saying that it,

> '*… supports my own view that you should be able to practise routine gynaecology without any restriction.'*

He wrote to Mr Louca informing him of the removal of restrictions. The correspondence is to be found at trial bundle v.3(ii)/1179-1181. The Trust was taken out of special measures in September 2006.

Restrictions on the Claimant's practice in 2007

20. However, on the 23 February 2007 Mr Burke again restricted Miss Kerslake's practice by preventing her from carrying out gynaecological surgery, as a result of concerns expressed to him about Miss Kerslake's competence in letters he had received from Mr Louca, and from another consultant in the department, Mr Alvin Priddy. The letters concerned Miss Kerslake's management of four gynaecological patients between August 2006 and February 2007 (one criticism of surgical competence and the rest criticisms of Miss Kerslake's diagnostic abilities.)

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21. Comments were made to Mr Burke by Mr Louca and Ms Karen Taylor which questioned Miss Kerslake's "… *practical or emotional ability to practise Consultant level operative surgery*…." Mr Burke investigated this and in due time received a report from Dr Pattani, Consultant Occupational Health Physician, on 27 February 2007 which stated that there were no medical or mental health issues in respect of Miss Kerslake which might impact upon the safety of patients, and that if the concerns expressed by Miss Kerslake's colleagues were to be pursued further, they would need to be clearly defined and understood.

22. After receipt of representations on her behalf from the Medical Protection Society ("MPS") Mr Burke agreed on 9 March 2007 that it was not necessary to restrict Miss Kerslake from performing all types of gynaecological surgery, and that the restriction should relate only to major procedures.

The Medical Director's decision in 2007 in respect of the Claimant's clinical practice

23. After conducting his own new investigation into clinical concerns, Mr Burke again concluded, on 29 March 2007, that there was no justification for continuing to restrict Miss Kerslake's gynaecological practice (or indeed taking any other action against her.) He said that the issues he had been asked to investigate did not arise from any lack of competence on the part of Miss Kerslake, but reflected inter-personal difficulties. He accordingly suggested a course of facilitated meetings between Mr Louca, Mr Priddy, and Miss Kerslake in order to improve those relationships. Miss Kerslake agreed to co-operate with this request. Mediation was undertaken by a trained mediator, Mr Lubtish, from the latter part of 2007 until mid-2008. It was not successful.

The Coroner's Inquest in the AMD case

24. In April 2008 a further restriction was imposed by Mr Burke preventing Miss Kerslake from carrying out work at ante-natal clinics. In a letter of 29 April 2008 (trial bundle v.1/124) reference was made to Miss Kerslake having been involved in one recent serious incident, but the main point Mr Burke made was that the restriction should remain in place until after the inquest into the death of Mrs AMD had been completed, which it was then anticipated would be in the near future. The inquest concluded in May 2008, and Miss Kerslake's part in the management of Mrs AMD was not criticised, either by the Coroner, or in the report of Professor Bennett, the expert asked by the Coroner to comment on Mrs AMD's care.

25. On 8 August 2008 Mr Burke had a meeting with Miss Kerslake in which he said that she would not be returning to obstetric work within the Trust. Dr

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Hooper, of MPS, wrote to Mr Burke on 21 August 2008 recording that he had told Miss Kerslake at this meeting that the reason was that,

> "*…she did not have the confidence of management or her colleagues.*"

26. Dr Hooper made it clear in this letter that if such a restriction was to be made, the Trust must be

> "*… seen to go through fair process.*"

In particular, Dr Hooper said that Miss Kerslake must be given written reasons and the opportunity to respond.

The 2008 Independent Review Panel's Report

27. The report of an Independent Review Panel, formally published on 16 September 2008, in fact contained no criticism of Miss Kerslake's obstetric practice, nor was there any suggestion that consultants who provided ante-natal care, but who did not work on the labour ward, posed a risk to patient safety or that this practice should be abandoned. Despite this, Mr Burke did not remove the restrictions on Miss Kerslake's practice. Correspondence in late 2008 (trial bundle v. 1/127-137) reflects mounting concern over this on the part of the Claimant and of those advising and assisting her, culminating in the threat of litigation against the Trust. Proceedings were not in fact issued at that time, however. The possibility was overtaken by a development which set matters on a quite different course, when Miss Kerslake initiated an internal process herself.

The Claimant's Grievance Procedure and the Walker Report

28. In February 2009 Miss Kerslake made a formal complaint under the Trust's Grievance Policy against Mr Louca and Mr Priddy, and also against Mr Burke. The complaints against the former were of bullying, interference with and unnecessary restrictions on work, and unprofessional conduct in a variety of ways. This was said to have occurred over the previous four years. The complaint against Mr Burke was that whilst he had made attempts to improve the interaction between Mr Louca and Miss Kerslake, such attempts had been inadequate and Mr Burke had failed to protect Miss Kerslake's clinical practice.

29. A distinguished independent practitioner in obstetrics and gynaecology, Professor Walker, was asked to investigate Miss Kerslake's grievance. In his

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report of 11 July 2009 (trial bundle v.2/618-648) he said, at p. 623, that whilst,

> '*Miss Kerslake and her representatives had made it clear that they did not want this investigation to be about her clinical practice or competence …'*

he had stated that such an approach would be impossible. Some assessment of Miss Kerslake's practice was in his view necessary, as, for example, one of the points he had to consider was whether '*unjustifiable steps had been taken to restrict her practice.*' Amongst his findings of fact were the following:

> '*6. There is no evidence that Mr Louca dislikes Miss Kerslake, in fact most think he likes her as a person but is concerned about her as a doctor.*
>
> *'7. Mr Louca has shouted at Miss Kerslake but there is no evidence that he bullied her or treated her any differently from anyone else.*' [at 626-627]

30. Prof Walker noted that Mr Louca was seen as a robust character who can '*get very emotional*' and, at times, raise his voice in frustration when stressed. However, he '*usually apologised*' and, '[*f*]ew *felt his behaviour was vindictive in any way.'* Prof Walker also mentioned the fact that, since the well-known Bristol Enquiry into standards of heart surgery, Clinical and Medical Directors are held responsible for the consultants under their management. He repeated that it was clear to him that Mr Louca did not dislike Miss Kerslake –

> '*…(in fact no-one does) and holds no malice against her. He was supportive of her at first but has gradually got more and more frustrated with her because of her refusal to accept her failings and he now finds her impossible to handle or manage.*'(trial bundle v.2/628).

31. Amongst Prof Walker's conclusions, rejecting Miss Kerslake's complaints, were that Mr Burke, in being relatively inactive when Mr Louca brought his concerns about Miss Kerslake to his attention, was attempting,

> '*…to be nice to Miss Kerslake. Mr Louca was desperate to come to a satisfactory solution (again agreed by Dr Hooper in a letter to the Trust) and would have been willing to compromise considerably but Miss Kerslake was unwilling to compromise in any way.'*

32. A much more serious development, from the Claimant's point of view and that of the Trust, was the conclusion which Prof Walker reached about her clinical competence: in brief, his opinion was that the Claimant was not fit to practise as an independent consultant surgeon in Obstetrics and Gynaecology.

That opinion was one which he felt entitled to report to the Trust, and, despite the fact that it was a result (albeit an unexpected one) of the formal grievance procedure which the Claimant had asked the Defendant Trust to undertake, it was a matter which obviously could not be ignored.

33. Since the chronology involved in the case may be most easily understood by reference now to the evidence of Professor Shaw, I propose to deal with it next, before dealing with the evidence for the Claimant.

The evidence of Prof Shaw

34. In July 2009 Professor Rory Shaw became the Medical Director at The North West London Hospitals NHS Trust. In his witness statement, which formed the main part of his evidence in chief, he said that he first became aware of the various issues which had arisen in relation to Miss Kerslake shortly after he joined the Trust. The Chief Executive of the Trust provided him with a copy of the Walker Report. Professor Walker was known to Professor Shaw as a senior member of the Royal College of Obstetricians and Gynaecologists, and as a clinician, and as the holder of the Chair in Obstetrics and Gynaecology at St James's University Hospital in Leeds. On receipt of the Walker Report, Professor Shaw said that he read through it and was alarmed at the nature and extent of concerns about Miss Kerslake's practice raised in it. A matter which caused him particular anxiety was a section of the report dealing with Professor Walker's observations on Miss Kerslake's clinical practice.

The Involvement of the National Clinical Assessment Service ("NCAS")

35. On receipt of the Walker report, the Trust's Chief Executive had decided that Miss Kerslake should be excluded formally whilst an external investigation was conducted into her practice. Prof. Shaw had had some input into this decision, with which he said he agreed, as Prof. Walker had given the opinion that Miss Kerslake could only practise at the level of an associate specialist. It was also necessary, Professor Shaw said, to ascertain whether the problems which existed within the Department were due to failings with Miss Kerslake's clinical practice.

36. Miss Kerslake was informed of these decisions at a meeting in July 2009 which was confirmed by letter. Initially, it had been proposed that the investigation would be conducted by the Royal College of Obstetrics and Gynaecology but they had said that they did not consider the case appropriate for review and suggested that the NCAS might be better equipped to deal with it. NCAS was formerly known as the National Clinical Assessment Authority, and had been established by the NHS to

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> "… *improve arrangements for dealing with the poor clinical performance of doctors*…"

(see the introductory note to MHPS trial bundle v.2/359.)

37. Professor Shaw wrote to Miss Kerslake on 21 August 2009 to confirm that the Trust had referred her case to the NCAS. On 28th August 2009, he received a letter from NCAS confirming that it had considered the papers in relation to Miss Kerslake and its position was that there was a presumption under MHPS that NCAS would carry out an assessment prior to a capability hearing unless it was agreed that this was not necessary. NCAS were supplied with the Walker Report, with the exclusion letter which followed the report at the end of July, the report sent to the then Chief Executive of the Trust in August 2009 regarding the extension of the exclusion, and the letter to Miss Kerslake confirming the same, and with the Trust's conduct and capability policy.

38. Professor Shaw said that an NCAS assessment will normally look at a doctor who is actually undertaking some clinical practice. As he had decided that Miss Kerslake should be excluded from the Trust, it was therefore necessary to find another Trust in which Miss Kerslake could undertake clinical work. The Medical Director at Ealing Hospital NHS Trust, in May 2010, agreed to Miss Kerslake having a supernumerary honorary placement there for this purpose.

39. On 1st June 2010, Miss Kerslake confirmed that she had started her attachment at Ealing. On 22nd June 2010, a meeting with NCAS took place as planned, and it was agreed with NCAS that a clinical assessment would be undertaken at the start of September 2010. The NCAS assessment was completed by 2nd December 2010.

The draft NCAS Report

40. Professor Shaw received a draft report from NCAS on 24th January 2011. In respect of the clinical assessment of Miss Kerslake, the report found that her assessment of patient conditions was satisfactory, as were other aspects of her practice including her performance in providing or arranging investigations, her clinical management of patients, her operative and technical skills, infection control, record-keeping, and her decisions about access to care. Miss Kerslake's performance in terms of communication with patients was said to be satisfactory, as was her performance in other matters, including '*working in teams*.' The draft report said that Miss Kerslake's sharing of information with

colleagues was satisfactory as was her ability to maintain good medical practice.

41. The conclusion NCAS reached in the draft report was that Miss Kerslake was performing at a satisfactory level for a consultant gynaecologist. It found that she was satisfactory in all areas assessed, with the minor exception of "*her use of resources*" which was "*inconsistent*." (Professor Shaw made it clear that this was an insignificant point so far as competence and capability was concerned.)

42. NCAS found, however, that there was a stark contrast between the 'ratings' given by her nominated colleagues, which were largely positive, and those given by colleagues nominated by the Trust, which were largely negative. It found that in her current supernumerary post at Ealing Hospital, Miss Kerslake was working in an environment she perceived to be supportive, whereas there were difficulties in her relationships with colleagues at the Trust and she recognised that reintegration into the Trust would be difficult. The report concluded that this was an area that would need to be addressed when devising a practical and appropriate action plan or reintegration programme.

43. After reading the draft report, Professor Shaw said that he was concerned that the assessment did not seem to differentiate between the performance expected of a clinical assistant or associate specialist, and that expected of a consultant. If Miss Kerslake were to return to work at the Trust, she would have to perform as a highly competent consultant and make rapid clinical decisions, sometimes in difficult and stressful situations without back-up or support. It was of great importance for this to be clearly understood. Professor Shaw said that he did not think that the draft NCAS report confirmed that Miss Kerslake had the degree of skill and technical competence to enable her to do so. Secondly, he was concerned that the report did not provide assurance that Miss Kerslake had a high degree of competence in emergency gynaecology. Again, if she returned to work at the Trust, she would be on a busy rota as the sole on-call gynaecologist with relatively little support. Miss Kerslake would need to be able to manage the assessment of emergency cases and, when required, to attend at short notice to operate, potentially in the middle of the night, on a full range of gynaecological emergencies.

44. Since Professor Shaw was not satisfied that in these two respects the draft report confirmed that she had the competence for this category of consultant work, he wrote to Dr Fitzpatrick at NCAS on 3rd February 2011 explaining his concerns and asking for clear guidance from NCAS as to whether it was safe for Miss Kerslake to return to the role of consultant at the Trust.

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45. Dr Fiztpatrick replied by letter dated 7th March 2011, in which he confirmed that, during the clinical assessment visit, Miss Kerslake had been assessed as a consultant gynaecologist undertaking the full range of gynaecological duties. He said that the NCAS assessment team included two consultants in obstetrics and gynaecology who were able to form a view as to whether she was performing at consultant level. The letter stated that the type of work which Miss Kerslake was undertaking was discussed throughout the planning of the assessment. Professor Shaw then received a final copy of the NCAS report a few days later, which was in terms identical to the draft.

The final NCAS report: the issues it required the Claimant and the Defendant to address

46. It is of some importance to consider the final conclusions of the NCAS report in terms of the issues which it suggested required resolution as a consequence of its conclusions, (a) by Miss Kerslake; and (b) by the Trust. Those are to be found at trial bundle v.2/723. A number of matters are set out as *'Issues for the practitioner to address'* including *'…the feasibility of her reintegration …'*. There is, however, only one point set out as an '[*i*]*ssue for the referring body to address.*' That is as follows:

> '*Given the breakdown in the relationship between Miss Kerslake and [the Trust] (as detailed by both parties), the Trust will need to consider the feasibility of Miss Kerslake's reintegration…. If return to [the Trust's obstetrics and gynaecology department] is not considered to be the best option, [the] Trust and Miss Kerslake should consider what alternative solutions are available. NCAS can advise.'*

The Defendant's acceptance of the NCAS assessment and the removal of restrictions

47. On 10th March 2011, Professor Shaw received a letter from Dr Hooper, of MPS, requesting confirmation that the Trust would lift the restrictions on Miss Kerslake's practice. The question was whether, having been found competent by NCAS, Miss Kerslake could return to independent private practice in gynaecology. The Trust has jurisdiction over this, Professor Shaw explained in evidence, since any doctor or surgeon restricted from NHS practice is not usually able to have private practice privileges. Within the new GMC regulations, Professor Shaw was also the Senior Responsible Officer responsible to the GMC for the revalidation of Miss Kerslake as a practising doctor. After discussion of the feasibility of lifting the restrictions on Miss Kerslake's clinical practice, Professor Shaw concluded that it would be appropriate to lift the restrictions on her, since nothing in the report gave rise to concern about Miss Kerslake's clinical skills. However, Professor Shaw made it clear that there remained a need for further consideration by the Trust of the issue raised in the NCAS report for it to consider, namely reintegration.

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48. On 10 March 2011 Dr Hooper wrote a further letter to Professor Shaw (trial bundle v.3(iv)/2261) noting that the conclusions of the final report were identical to those in the draft.

> '*Please confirm that you will now lift the restrictions …on Miss Kerslake's practice. The NCAS assessment report provides no justification for restriction of her practice. …. If the Trust does not intend to lift the restrictions, please clarify the reasons for this and provide evidence for the Trust's position, given the findings of the NCAS assessment.*'

49. A week later, in a letter of 17 March 2011 Professor Shaw (trial bundle v.3(iv)/2262) made reference to the '*further reassurance*' he had had from Dr Fitzpatrick of NCAS, and on 18 March 2011 Professor Shaw wrote to Miss Kerslake (trial bundle v.3(iv)/2263) saying,

> '*I write to you regarding the NCAS report that was produced as of 3rd March. In light of the conclusions and recommendations of the report I can confirm that the Trust has lifted the restrictions on your private practice.*'

50. Dr Hooper wrote again to Professor Shaw on 23 March 2011 (trial bundle v.3(iv)/2264) pointing out that as the NCAS report had made it clear that Miss Kerslake's clinical performance was satisfactory, and that there were no continuing patient safety issues, there should be no restriction on her NHS practice. On 24 March 2011 Professor Shaw wrote in reply to Dr Hooper (trial bundle v.1/170) to confirm that,

> '*Miss Kerslake is no longer under restricted practice. This refers to both the NHS and private practice.*'

Prof Shaw also made reference in his response to the issue of the Claimant's reintegration '*[g]iven the breakdown in the relationship*' between Miss Kerslake and her colleagues at the Trust. He said that it was far from clear whether it would be appropriate for her to return to work with those colleagues before the situation had been resolved.

The investigation procedure under challenge

51. Professor Shaw discussed the question of reintegration of Miss Kerslake with a non-medical colleague, Mr Nettel, who held the position of 'HR Business Partner' to the Trust, and they agreed that, as a first step,

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> "… *it would be necessary to investigate the question of whether the working relationships between Miss Kerslake and her consultant colleagues had broken down and, if so, what action should be taken*."

52. Mr Nettel requested from Mr Louca a list of the consultants with whom Miss Kerslake worked so that enquiries could be made. Mr Louca replied by setting out the names of the eleven consultants with whom Miss Kerslake worked.

53. Professor Shaw wrote to Miss Kerslake on Wednesday, 27th April 2011 to confirm that he had reviewed the NCAS report in detail. He said that first, since it '*identified*' that there had been a breakdown in relationships between Miss Kerslake and her consultant colleagues at the Trust and, secondly, since the report stated that she recognised that reintegration into the Trust would be difficult, a formal investigation would be undertaken to establish whether the relationship between herself and her consultant colleagues at the Trust had indeed broken down and, if it were found that it had, to consider what action should be taken.

54. This investigation was initially carried out by a Mr Skinner, a member of the Capsticks Human Resources ("HR") Advisory Team. Capsticks are the firm of solicitors from whom the Trust takes advice on employment law, and who act for the Trust in these proceedings. The 'HR Advisory Team' conducts its activities separately from the solicitors' side of the firm, although associated with it. (A challenge was made on behalf of the Claimant at one stage to the independence of the team, but this has since been withdrawn.)

55. Professor Shaw produced the terms of reference of the investigation (trial bundle v.3 (iv)/2268). They are as follows:

> "…. *Following an assessment of Miss Kerslake's practice … a report was issued by NCAS. This report identifies that there had been a breakdown in the relationship between Miss Kerslake and her consultant colleagues at [The Trust.] The report also highlights that Miss Kerslake recognises that reintegration into [The Trust's] Women's Department would be difficult. As a result a formal investigation will be undertaken to identify whether the relationship between Miss Kerslake and her consultant colleagues at [the Trust] has broken [down] beyond repair*."

(The document goes on to identify Mr Skinner as investigator, and Mr Nettel as his source of support for administrative purposes. Methodology is said to involve interviewing and taking statements from '*relevant parties.*' The time scale is expected to be 4-6 weeks. The '*Outcome*' is described as follows: '*A*

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full report of the investigation and key findings will be provided at a formal Trust meeting.')

56. Professor Shaw's evidence is that the purpose of this investigation was to establish whether, as a matter of objective fact, there had been a breakdown in relationships between Miss Kerslake and her colleagues, '*regardless of who (or indeed whether anyone) was to blame*' for this.

57. Professor Shaw received a letter dated 8th May 2011 from Miss Kerslake asking him to reconsider the proposed investigation, or at least to direct that it should take place after a meeting arranged for 17th May 2011 between NCAS, the Trust and herself, which had been arranged in order to discuss her reintegration. Prof Shaw responded to Miss Kerslake by letter dated 13th May 2011 making it clear that the need for the investigation was the consequence of the conclusion of the NCAS report and the issue for the Trust which the report had raised.

58. The meeting with NCAS took place on 17th May 2011 as planned. It was attended by Professor Shaw himself and Mr Nettel from the Trust, Miss Kerslake, Dr Hooper (MPS), Mr Kuku (Miss Kerslake's BMA representative), and Dr Fitzpatrick and Mr Bell (both of NCAS). The purpose of the meeting was to explore the options which could be taken following the NCAS assessment and to seek to devise an action plan based on recommendations set out in the report. The issue of the feasibility of Miss Kerslake being re-integrated into the Trust was discussed.

59. The outcome of the meeting on 17th May 2011 was, first, that the Trust made it clear that they would not be deterred from proceeding with the proposed investigation. Secondly, the Trust also made it clear that if on considering the material produced by the investigation, the Trust made a finding that relationships had broken down beyond repair, they might consider that to be grounds for termination of Miss Kerslake's contract. They also said that they would support Miss Kerslake if she decided to seek alternative employment, and that, until the investigation was complete, she would continue her supernumerary placement at Ealing Hospital.

60. Professor Shaw received a letter from the solicitors acting for the Claimant, Hill Dickinson LLP, on behalf of Miss Kerslake dated 27th May 2011 [trial bundle v.1/184-187], asserting that the proposed investigation was in breach of MHPS. It also contained the following observation:

> '*You will appreciate that your failure to accept the NCAS report and its findings as to our client's abilities, <u>and</u>* [original emphasis] *your insistence upon yet a further*

investigation, which you seem to suggest is already taking place, will only make our client feel less than confident in your bona fides.'

61. By a letter dated 6 June 2011 [trial bundle v.1/210 - 212] the Defendant Trust said that,

> *"The Trust acknowledges that MHPS is incorporated into your client's contract of employment. The Trust considers that its actions to date have been entirely consistent with the provisions of MHPS. However, you will no doubt be aware that recent case law has made it clear that issues relating to a breakdown of working relationships fall outside the remit of MHPS."*

(This was a reference to a decision of the Employment Appeal Tribunal in an unfair dismissal case: *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 EAT. The impact of that decision upon the issues in this case was discussed at length at the hearing. It is dealt with under a separate heading below.)

62. On 15 August 2011 [trial bundle v.1/229-230], the Defendant Trust responded to a complaint that the conduct of its investigation did not comply with MHPS by saying that,

> "*The Trust is following good practice throughout this investigation: no formal policy is being followed as the Trust does not have a formal policy to deal with potential breakdowns in working relationships*."

The letter informed the Claimant that she would not be provided with records of interviews or statements in advance of her own interview, and that she was not entitled to be legally represented. On 2nd September 2011 [trial bundle v.1/ 233] they said the investigation was,

> "*... not in line with a specific Trust policy as no specific policy exists to cover situations such as this. Instead we are being guided by usual good practice. MHPS does not apply to the current situation.*"

63. Mr Skinner had left Capsticks in November 2011, and the task of completing the first draft of the investigation report was put into the hands of a former colleague of his, Kelvin Cheatle, an HR Consultant and the Head of Capsticks' HR Advisory Service, who completed the draft in December 2011.

64. Professor Shaw was on annual leave at the time the draft report was being completed. A few days before he had gone away, he had been informed by the Medical Director at Ealing Hospital that the authorities there would not be extending Miss Kerslake's honorary contract beyond 31 December 2011 because she had been involved in a serious untoward incident ("SUI") there. (This unfortunate development is mentioned only for completeness. It is

accepted on all sides that it was irrelevant to the issues which the Defendant Trust were dealing with, and is quite irrelevant to the issues in this case.)

The Capsticks Report

65. The final version of the Capsticks Report was produced in January 2012 (trial bundle v.2/758ff). The report contained a list of all of the staff interviewed, which included most of Miss Kerslake's consultant colleagues, and set out a summary of each interview. The report contained the observation that there was '*a clear lack of trust and confidence*' in Miss Kerslake, '*across a number of people*,' and '*the personal relationships around her*' were very difficult. The report noted Miss Kerslake's comment that the issues were in the past and there was no problem with her returning to work, and noted that some others shared this view. However, it also recorded that others expressed serious concerns about Miss Kerslake, including Mr Louca and five other consultants.

66. Miss Kerslake's evidence was that there were between 15 and 17 consultants in the department at the time of the Capsticks investigation. The report (v.2/728ff.) lists 13 members of staff interviewed, excluding the Claimant. Of these 11 were consultant surgeons or physicians, and of the other two one was a Consultant Midwife and the other a Nurse Specialist in gynaecology.

67. The following extracts of matters recorded in the report give some indication of the varying shades of opinion expressed. (1) Mr Louca said that his direct observation of the Claimant's competence "left major question marks." He found her difficult to manage, in that she would not "engage properly" and would not accept feed-back and constructive criticism. (2) Mr Priddy told Capsticks' investigator that he did not have a personal problem with the Claimant, but quoted parts of the Walker report to the effect that she lacked insight and was in denial of her problems. For these reasons he said "there is a real fear of [her] return and that patients may be put at risk." He said he simply could not contemplate her return to work. (3) Ms. Pitkin expressed the view that "the current issues with [the Claimant] are deep-rooted and have been 'a disaster waiting to happen'." The essential problem in her view was that the Claimant does not cope under pressure and cannot deal with emergencies or high risk patients. If she returned "people will leave." (4) Another consultant, BD, expressed similar views for similar reasons. (5) Another, PS, expressed the most hostile views of all: he said that his relationship with the Claimant deteriorated when he became "caught up in the grievance procedure" the Claimant had raised. He criticised both her conduct and capability. (6) An anaesthetist, NL, whilst describing the Claimant as "a nice person" criticised her clinical competence and performance under pressure.

68. Of the other consultant surgeons, (7) DM said in his view the Claimant was a very anxious practitioner who required a lot of support. (8) NR said very much the same as DM, but added that the Claimant was "an incredibly nice person but her colleagues did not trust her and relationships were fraught." He said that the Claimant had a bad relationship with Mr Louca who "ruled with an iron fist." (9) RT was aware of colleagues' concerns about the Claimant but personally had no problem with her. (10) KI said much the same as RT "he personally likes her and … would have no difficulty in working with her if she returned." (11) AC said he had always had a good working relationship with the Claimant. He described her as straightforward, well liked by her patients and generally, enthusiastic, and talkative. He believed Miss Kerslake to be competent and had no issues with her.

69. Of the other two members of staff interviewed for the Capsticks Report, (12) TM, the Consultant Midwife, said the Claimant was very pleasant and hard working. She had no criticisms of conduct or capability. She could see no evidence of a breakdown in relationships and spoke highly of the Claimant. (13) GC, the specialist gynaecology nurse practitioner, spoke very highly of Miss Kerslake: she said that her clinic was "her favourite of the week." She had no concerns about her and believed in her integrity.

70. The report concluded that it was clear from the interviews that a significant body of clinical and managerial opinion had lost trust and confidence in Miss Kerslake and that, despite the external validation of her practice, the local concerns about working with her remained and were deeply felt. From the terms of the comments made by some of the consultants it was clear that one reason for the loss of trust and confidence was doubt over Miss Kerslake's clinical competence, although such doubts as were expressed were in the most general, non-specific, terms. (It should also be clear from the summary set out above that the views reported were by no means unanimous whether in respect of the Claimant's colleagues' opinions on her competence or in respect of the alleged breakdown in relationships.)

71. The author of the report went on to consider the procedure under which these concerns should be considered. He stated that in his view MHPS did not apply, since the issues to be considered did not involve conduct, capability or ill health. The report found, in effect, (a) that the issue of capability had been fully explored and excluded as a concern by NCAS, and (b) that there was nothing on the part of Miss Kerslake which could possibly be identified as misconduct. A suggestion was made that in those circumstances any possibility of dismissal could only be considered for '*some other substantial reason*' but that such a conclusion could only be reached if it were to be found that trust and confidence had irretrievably broken down. Before any such a

finding could be made, it was pointed out that the Defendant Trust would be expected as employers to have exhausted all reasonable options for seeking to resolve matters before reaching a fair conclusion at a hearing that dismissal was the only option.

72. The report concluded with a recommendation that there was an issue to be addressed at a formal hearing, namely whether there had *in fact* been an irretrievable breakdown in trust and confidence between Miss Kerslake and the Trust, resulting from irreconcilable differences in day-to-day working relationships between her and other key members of the department. The report asserted that this was distinct from the earlier concerns about conduct and capability dealt with by NCAS. It also recommended that, in the circumstances, the Trust would be justified in excluding Miss Kerslake from 'the workplace' until a hearing could be convened.

73. On the 11th January 2012, on Miss Kerslake's return from annual leave, the Defendant Trust wrote to her effectively, although informally, excluding her from work. As has already been noted, informal exclusion is expressly prohibited by the provisions of MHPS (Part II, paragraph 29.) Indeed one of the reasons for the introduction of MHPS was to bring an end to the practice of putting doctors on 'gardening leave.'

74. Professor Shaw said that by 24 January 2012, when he had had an opportunity to review the Capsticks report, he had sent a letter to Miss Kerslake enclosing a copy of the report. In it he said that since senior clinical colleagues, with whom she would need to work closely, had suggested that working relationships with her had broken down, he considered it appropriate to set up a meeting to consider whether or not she should return to work, or whether it might be necessary to terminate her employment for '*some other substantial reason*' on the basis that there had been a fundamental breakdown in working relationships. Professor Shaw said that the Interim Chief Executive would chair the meeting and he would be joined by a Clinical Director, and another HR Business Partner, not previously involved. Professor Shaw proposed that the meeting should take place on 14th February 2012.

75. The solicitors acting for Miss Kerslake wrote objecting to the meeting on 14th February 2012, for various reasons. It was submitted that the procedure the Trust was pursuing was in breach of Miss Kerslake's contract of employment and the policies of the Trust. The letter sought revocation of her informal exclusion from work, an assurance that the Trust considered itself bound by MHPS, and an agreement that the meeting set for 14th February 2012 would not go ahead. It also said that Miss Kerslake would be open to mediation.

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76. Professor Shaw said that he carefully considered the points raised by Hill Dickinson on Miss Kerslake's behalf, but did not agree that MHPS applied in this situation. He said that to him it was clear from the Capsticks report that the issue was whether relationships between Miss Kerslake and her colleagues had broken down as the result of the long-standing history of events in the department, and the attitudes of various individuals, and that it was not the result of misconduct or clinical shortcoming on the part of Miss Kerslake herself. He said he had taken the decision "*against a background of a long and protracted history of difficulties*" All appropriate avenues under MHPS had been exhausted and he had to make a decision as to how to proceed, balancing his obligations to Miss Kerslake against those owed to her colleagues and to the patients of the Trust to be treated in a clinically-safe environment. As the individual at the Trust with responsibility for clinical care, he did not consider that he had any other proper or responsible way to proceed.

77. Professor Shaw said that on Friday, 17th February 2012, after he had discussed with the Divisional General Manager, Ms Pitkin, and with Mr Louca, a proposal that Miss Kerslake might work in the Trust on an audit project, a number of senior consultants including both Ms Pitkin and Mr Louca, arrived at his office and made it clear "*in very strong term*" that they did not want Miss Kerslake back on the premises. Mr Louca said that if Miss Kerslake saw patients, he would resign. Ms Pitkin said that she could not allow Miss Kerslake to teach students. Another consultant, Mr Dragovic, also said that Miss Kerslake must not come back. They were unanimously against the possibility of Miss Kerslake working on a clinical audit project away from the department, as they stated that they did not trust any work she might do. Their views, Professor Shaw said,

> "*… carry a lot of weight since they are senior and well respected members of the team*."

He had never before witnessed a situation where such senior members of a Department held such a strong view about a breakdown in relationships. He said that in these circumstances he had serious concerns about the feasibility of Miss Kerslake returning to the team.

78. Having considered the representations made on behalf of Miss Kerslake by her solicitors, Professor Shaw said that he wished to ensure that the Trust continued to follow a fair and proper process, and the Trust had since given assurances that the procedure to be followed for the internal hearing will include the following matters.

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(1) Disclosure will be made of the full Capsticks investigation report, including the notes of all interviews undertaken, seven days before the internal hearing. (Indeed, this may already have been done.)
(2) The witness statements of any individuals giving evidence at the internal hearing will be served on the Claimant, seven days before that hearing, on the understanding that Miss Kerslake will agree for her part to serve any witness statements for witnesses to be called by her seven days before that hearing.
(3) Miss Kerslake will have the right to legal representation at the hearing, should she choose to exercise it.
(4) A three-person panel will consider the matter at the hearing (and at any appeal) comprising two internal members of the Trust and one external medically-qualified practitioner.

(Mr Forde QC, for the Claimant, said that the making of these revised arrangements amounted to 'significant concessions by the Trust': although he said they were not entirely satisfactory since they still differ in some respects from the procedures prescribed by MHPS -- in particular so far as they concern the composition of the panel and of any appeal panel. Mr Sutton QC refused to accept that the Trust's reasonable agreement to such matters amounted to a concession at all.)

79. Professor Shaw said that his primary concern is to ensure that departmental colleagues are able to work together in a manner that ensures an efficient and safe service to patients. If the Trust is not permitted to convene a meeting to decide whether Miss Kerslake's relationships with her colleagues have irretrievably broken down, this will impact not only on Miss Kerslake's colleagues (who have threatened to leave) but potentially upon the health and lives of the Trust's patients who rely on the services provided by the Department at the Trust.

80. In cross-examination, Professor Shaw was asked, '*Q Were the relationship difficulties based on Mr Louca's, and others' view of Miss Kerslake's clinical competence? A The Walker report spoke about a complicated mix of relationship difficulties and clinical concerns.*' Asked about a reference in a letter to Miss Kerslake dating back to November 2009 (trial bundle v.1/169) to "*reintegration*" he explained that that was about reintegration into clinical practice at another hospital. '*Q If that were successful would that or ought it to lead to reintegration into the Trust? A I was taking things one step at a time. I had not paid any attention to relationship difficulties. At that stage clinical competence was the problem I was dealing with.*'

81. Cross-examining counsel asked Professor Shaw to look at his letter of May 2010 (trial bundle v.3/1914) to the Medical Director at Ealing Hospital

confirming the areas to be the subject of the Claimant's clinical reintegration, which concluded with the words,

> "*… these are the clinical duties that Miss Kerslake would be assessed against by NCAS at the end of her reintegration. This assessment will determine whether Miss Kerslake has the appropriate qualities of efficiency, productivity, safety and communication to operate as a consultant.*"

Professor Shaw said, '*It was very important we all understood what we were doing. Q Had you consulted Mr Louca about these areas? A Yes – particularly because this discipline* [obstetrics and gynaecology] *sub-specialises so much. Q Did Mr Louca say, "OK, but no way is she coming back"? A I did discuss the list of areas with him – I was aware of him expressing a major relationship difficulty but I would have cut him off, because I wanted to be really clear that we do this in a proper dispassionate way and get an answer to this question* [*i.e.* is Miss Kerslake competent to act as a consultant?] *Q Did it occur to you to do any work with Mr Louca in respect of his relationship problems? A At the time we were concerned with Miss Kerslake's clinical competence.'*

82. '*Q Did you lay the ground for her reintegration into Northwick Park Hospital? A At that time we were getting on with the NCAS assessment: that was the important step to take. Q. One of the areas referred to in the letter of May 2010 to Ealing at trial bundle v.3/1916 is "Demonstration of ability to work as a team player" which obviously refers to her interpersonal skills, e.g. the need to exhibit a high standard of effective communications with colleagues? A. Yes. Q Do you agree that what almost invariably lies behind interpersonal difficulties is a failure in communication? A I think it's more complex than that. There are inter-related elements. In a modern clinical team people have to be very flexible. The way in which all patients will be dealt with must be the same – whoever the consultant is. It is essential that consultants are able to work closely together and co-operate in achieving this.'*

83. There then followed this exchange in cross-examination, which is of particular significance to the proposed hearing: '*Q How do you think the breakdown can be investigated at a hearing? A. We now know that there are no competence issues. We also know she can communicate perfectly well with colleagues at Ealing. So we are at a point where there can be no question that she can do the job of a consultant (including team working and all other competences.) So we now have to consider the question of feasibility of reintegration at Northwick Park Hospital - I need some information on the breadth, depth, and magnitude of the other consultants' views to assess that feasibility. I need to get a measure of whether reintegration will not be feasible, which could result in a dysfunctional team, and that in turn endangering patient safety. So for that reason we decided to embark on an investigation, not to measure <u>why</u> people held that view but to assess the extent of that view and to try to get a sense of whether that view was reversible.'*

84. Professor Shaw made it quite clear that, as the Defendant Trust's Medical Director, he accepted the NCAS report had found Miss Kerslake competent. That was that, so far as he and the Trust were concerned. The issue which now had to be resolved was whether the other members of the Department would agree to work with Miss Kerslake, or whether their differences with her were so entrenched and intractable that reintegration was a practical impossibility.

85. He was asked why, when the NCAS had offered to facilitate reintegration, he did not allow them to assist. His answer was that the Trust and the NCAS have different responsibilities. '*I have the responsibility of ensuring a safe service for the public from a properly functioning team. This was the only issue raised by NCAS for the Trust: see trial bundle v.2/ 723. We had to take one step at a time. Q But why not have NCAS facilitate rather than go straight to an investigation? A They have a mandate in respect of an individual's performance; we have to look at the team as a whole. Q Did you share the NCAS report with Mr Louca? A I shared the outcome, not the detail. I can't remember precise details of the meeting: we talked about the report and results. I think he was surprised, but I can't remember in detail. He certainly communicated a negative reaction and expressed a view that her return would not be something that he would support. Q What did you do to allay his fears or modify his views? A That was the idea of the investigation. Q To what extent did you enquire as to whether those views were rationally held? A I think there is a question for a hearing about the extent and strength of the views and the potential for a range of solutions on changing views and preventing the creation of a dysfunctional team. Q So why get the three clinicians with the strongest views to be called as witnesses?* [This was a reference to Messrs Louca and Priddy, and Ms Pitkin, who were named as witnesses from whom evidence would be taken orally at the hearing before the panel.] *A I need a hearing to weigh in the balance the views, and Miss Kerslake's reintegration, and patient safety. One outcome might be that such views were reversible. Mediation might be a solution. Q Why not go straight to mediation? A There is a very long history including mediation in the past. It had failed when it was tried then. It seemed important to me that we have a formal process to draw a line under the past and move forward.'*

86. Professor Shaw said that they needed to assess the feasibility of reintegration and '*… having measured that, and having come to an assessment of clinical risk from that, to go to a hearing to make a formal decision as to what the next step should be. … We need to proceed one step at a time. The individuals will be called as witnesses and we will discover then whether their views are reversible. The issue for us is a very practical one. It is not just an employment issue – it is a public safety issue: there has been a long history of disputes in the past, and if we take the wrong decision and there is a disaster in the future, people will look back at all this and ask were we reckless.'*

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The evidence of Miss Kerslake

87. Miss Kerslake in her witness statement, which was adopted by her in chief, said that,

> '*… bearing in mind the background to the matter, not least the fact that I had considered it necessary to take out a grievance against certain of my colleagues, of course I recognise that reintegration into the department cannot be assumed to be an easy process.*'

88. She pointed out that (1) that her grievance had been considered and dealt with; (2) as far as she was concerned those issues were '*historic*'; (3) she was a professional and responsible person and able to put such matters behind her; (4) there was no cause for relationship difficulties '*…other than aspects of my clinical practice…*' so that, having regard to the '*clean bill of health*' given to her in that respect by the NCAS report,

> '*… there is no longer evidence to show a valid basis for continuing relationship difficulties. These past issues should not be allowed to impede discussions with the Trust on my reintegration plan.*'

89. In response to a questionnaire sent to her by Mr Skinner of Capsticks, where she was asked whether she felt confident about returning to the Trust, she said she had answered,

> '*Yes. For the reasons set out above I am happy that I understand how past difficulties came to occur and am confident that they can be put firmly behind us.*'

90. Miss Kerslake also said that to the extent that there were any relationship issues which might obstruct her reintegration, those difficulties were not on her side, and, given proper management, that they should be capable of resolution. In respect of the Capsticks report, she made the following points: (1) although it is dated December 2011, she did not receive a copy until 24th January 2012; (2) she then discovered for the first time that Mr Cheatle had replaced Mr Skinner; (3) by the letter enclosing the report she was asked to attend a meeting with the Trust on 14 February 2012, which was only fifteen working days later, at which it might be decided to terminate her employment for '*some other substantial reason.*' (4) As to this, she said:

> '*Having regard to my position that, to the extent that there are personal issues with regard to my return, those are the issues of others, and should be*

capable of resolution, given proper management, I was frankly shocked to learn that I faced the prospect of dismissal, without any attempt whatsoever having been made, even to attempt a reintegration and my return to clinical duties.'

91. Miss Kerslake said in evidence in chief that so far as the question of 'reintegration' was concerned, that she understood that following the NCAS assessment of her clinical practice she would be returning to Northwick Park Hospital, and re-joining the team as a consultant.

92. In cross-examination, she agreed that the role of a medical director like Professor Shaw is to ensure that proper medical standards are maintained, and that he is personally responsible for this. She also agreed that it was evident from the report of the Healthcare Commission that they were concerned about the quality of the way consultants were inter-acting. When asked whether she agreed that clinical difficulties are often the product of difficulties in communication between practitioners, she said that that may occasionally be the case. Good team-work by consultants, she agreed, was essential.

93. She was asked whether she thought that her problems with Mr Louca had become entrenched and intractable. Her response was to say that *'… that is not something I'm not prepared to work with.'* In 2007, she said, she had been willing to go ahead with the facilitated meetings with Mr Louca which had been suggested: *'it was a constructive proposal.' 'Q But mediation did not work because you withdrew from the meetings? A I was advised by a BMA representative that I was not obliged to continue with the meetings because Mr Louca was shouting at me in them.*' She said that she realised that change can only come from within oneself but felt it was quite wrong to be shouted at. That was not a useful process. She had been accused of many things but she was willing to repair the process. Mr Louca kept raising issues which she felt had already been addressed by Mr Burke. She had still been willing to do what she could on her side. Mr Louca had continued to target her clinical work and if there was anything which was imperfect he would raise that very quickly. He was criticising her clinical work by bringing up things from the past as well as things which had just arisen.

94. She was asked about her observations as to how to resolve her grievance in August 2008, which included the following suggestion on her part:

> "*I would like to see … [s]ome form of warning to Mr Louca and Mr Priddy that if these behaviours recur they will face some action and possible termination of their employment.*" [trial bundle v.1/140.]

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95. Had this meant, she was asked, that she hoped that the grievance procedure might result in Mr Louca and Mr Priddy being stripped of their roles? Miss Kerslake said that she was '*…looking at a way forward which would be harmonious.*' Mr Sutton QC asked her whether she agreed that the effect of what she proposed in her letter was that Mr Louca and Mr Priddy would have a 'Sword of Damocles' above their heads by facing dismissal if their conduct towards her was repeated, she said,

> '*I found it intolerable coming into work in a climate of fear, in that I was worried about what criticism I would face next.*'

96. Asked whether she agreed that attitudes were entrenched on both sides, she said '*I believe I have co-operated.*' She said that unless Mr Louca could approach matters in a different way it would be difficult to work together, but added that a lot of water had gone under the bridge since they had last worked together.

97. She was asked to deal with the reservations NCAS had expressed about reintegration. *'Q Do you see the reference in the NCAS report -- trial bundle v.2/715 -- 'reintegration into her former unit would be difficult'? A Difficult but not impossible. Difficult emotionally because of my not being assured that the same views would not be held by colleagues. I think after the NCAS report and after working in the other Trust I felt stronger and able to continue to work.'*

98. *'Q The NCAS report had made it clear that there was no question of lack of capability or competence? A I agree. Q But there* <u>*was*</u> *a question over the feasibility of your return? A Yes. Q Professor Shaw had to make a decision about that? A Yes. I agree that the patients' interests are paramount. I agree that is Professor Shaw's main concern. Q Was it in your view appropriate for Professor Shaw to establish whether the breakdown was a reality or not? A In view of the number of other consultants who had left* [Miss Kerslake was referring to consultants who had left the department for reasons which had nothing to do with her] *it would have been useful for someone to enquire who was responsible for that. It was not my decision to make. Q Don't you think it would have been reasonable for him to make further enquiries into whether relationships had broken down? A That would have been enquiry no. 4 or 5. Q Would you agree your difficulties with Mr Louca, and his with you, were that he found you impossible to manage, it was not just clinical competence, there were relationship issues? A I was hoping that the NCAS report would have reassured my colleagues. I agree that there was evidence of a breakdown in working relationships between some of my colleagues and me,* <u>*on their side*</u>*.'*

99. I found the Claimant to be an entirely truthful witness. She gave her evidence, and conducted herself throughout the hearing, with restraint and

dignity, despite the obvious fact that the proceedings were a source of the most acute anxiety to her. In the circumstances her demeanour was admirable.

The statement of Mr Stephen Chadwick

100. The only other testimony introduced by the Claimant was the witness statement of Mr Stephen Chadwick, a consultant gastro-intestinal surgeon employed by the Defendant Trust, who has been a consultant at Northwick Park Hospital for about 22 years. He is critical of the system of clinical directorates as it has operated at Northwick Park Hospital because of the pressure which it puts upon the clinical directors themselves. He said that '*When major clinical issues arise, the Clinical Director comes under more pressure. Under these circumstances firm leadership can become construed as corporate bullying.*' He has known Miss Kerslake since 1996. He regards her as someone who is passive rather than aggressive. However, Mr Chadwick said that he was unable to give any real assistance as to the specific interrelationships between Miss Kerslake and her colleagues, or whether reintegration was likely to succeed.

Submissions of Mr Forde QC on the facts

101. After referring to a letter of 31st July 2009 (trial bundle v.1/149) in which Professor Shaw referred to competence concerns as requiring the NCAS investigation, Mr Forde QC said that, " … *the Trust was hopeful of a negative report from NCAS*…." Thus when the report was received, with the finding that she was capable and competent, "… *the reaction was consternation*." The reference in the report to the breakdown in relationships he described as "*the trigger*" for subsequent action. Thus, he submitted, the letter from Professor Shaw of 27 April 2011 (trial bundle v.1/171; see also paragraph 53 above) was the product of that consternation. "*The Trust was looking for a reason to continue the exclusion. It is at this point that we see the seeds being sown.*"

102. Referring to the letter of 19 May 2011 from Dr Fitzpatrick at NCAS to Professor Shaw following the meeting which had taken place on 17th May 2011 '*to explore the options for Miss Kerslake*' (at trial bundle v.1/179) Mr Forde drew particular attention to observations in the letter about a further meeting which had taken place on 19th May 2011:

> '*At today's meeting we were only able to discuss the recommendations relating to the feasibility of Miss Kerslake's reintegration into [the Trust]. You have explored the possibility of transferring Miss Kerslake to Ealing, but you told us that that this has not proved possible. Your Trust has now informed Miss Kerslake of a formal investigation to identify whether the relationship between Miss Kerslake and her colleagues has broken down beyond repair. This investigation has apparently commenced and I understand that it is scheduled to report in … one month's time.*

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> *Mr Nettel indicated that if the investigation does find the relationship has broken down beyond repair, the trust may consider this grounds for terminating Miss Kerslake's employment.*"

103. The construction which Mr Forde put on the observations by Mr Nettel referred to in that letter was that "*…this is the game plan: they are looking for grounds to dismiss her.*" He pointed out that the NCAS, in the form of Dr Fitzpatrick, had gone on to say,

> "*Mr Bell and I pointed out at the meeting that, it is our opinion that an action planning process focusing on reintegration, mentoring and team development is an alternative and more constructive way of addressing the assessment report's recommendations. The investigation … appears to sit uneasily with the plans for implementing the assessment report recommendations.*"

104. That letter had produced a response from Professor Shaw on 9th June 2011, Mr Forde said, which was a further indication of the course he had set. Professor Shaw began (trial bundle v.1/180a-180b) by saying that he was "*disappointed*" with some of Dr Fitzpatrick's observations. He went on to repeat the parts of the NCAS report which dealt with the breakdown in relationships. Later, referring to the sentence in Dr Fitzpatrick's report which included the reference to,

> "*… the investigation … appears to sit uneasily with the plans for implementing the … report….*"

Professor Shaw said,

> "*…[g]iven that the Trust and Miss Kerslake, not NCAS, remain responsible for considering the recommendations I am unclear how you feel able to outline an opinion, and impinge, on the Trust's responsibility to consider the recommendations and our decided way forward. Indeed it would seem inappropriate …for … NCAS to give subjective views on a carefully considered approach….Finally I would also like to clarify your record of the meeting. Mr Nettel … unequivocally stated that one possible outcome could be confirmation that that the relationship … had not broken down beyond repair. I am further disappointed that you chose not to record this in your letter.*"

105. The slightly sharp tone which Professor Shaw had introduced into this correspondence, Mr Forde seemed to be implying, was consistent with the "*game plan*" hypothesis. Mr Forde also criticised the Trust for not "*drilling down*" to see what substance there was in the consultants' capability concerns, and unfavourably compared Professor Shaw's approach with the approach of the previous Medical Director, Mr Burke. He also spoke of the Trust seeking

to "*sidestep*" the issue.

106. In the course of his opening, on the first day of the hearing, I asked Mr Forde whether it was his case that the investigation and hearing which are the subject of these proceedings were part of a deliberate attempt by Professor Shaw and the Trust to engineer Miss Kerslake's dismissal by devising a procedure which would produce the result they desired. No such case had been pleaded, and Mr Forde very frankly conceded that he could not put his case as high as that. He also expressly abandoned an assertion of bad faith on the part of the Trust in their selection of an employee of a firm associated with their solicitors as an investigator. In view of the points which he was making in closing, for example references to the Trust being "*hopeful*" that the NCAS report would be negative to Miss Kerslake; to their "*consternation*" on receiving a positive report; to "*the game plan*"; and to "*sidestepping*" I asked Mr Forde much the same question on the last day of the hearing. Again, he conceded that he could not put the case as high as to amount to bad faith on the part of the Trust, but he submitted that I could and should conclude that the Trust had acted capriciously, illogically, unreasonably, and in an arbitrary way.

Findings of fact

107. Although much of the factual material in the case is either agreed or neutral in its effect upon the issues, not all of it is. Moreover, there is active disagreement over the motives and priorities of the Defendant Trust, and of Prof Shaw as their agent, at various times. Mr Forde cautioned me to treat Prof Shaw's evidence with suspicion, upon the basis that it may have been the product of hindsight. I cannot avoid making some findings of fact on these points, and giving the reasons for making them.

108. First, I accept that the Trust was at all material times acting in good faith in its dealings with Miss Kerslake. Despite the tone and terms of some of the correspondence from the solicitors for the Claimant, that point is no longer really in issue, in view of the express concession made on behalf of Miss Kerslake. Leaving that concession aside, however, I accept that Professor Shaw was truthful in his evidence when he said that he, for his part and on behalf of the Trust, accepted the conclusions of the NCAS report and regarded them as definitively answering any conduct or capability concerns about Miss Kerslake. In my assessment of him as a witness Professor Shaw was straightforward, dispassionate and clear-minded. He answered questions directly. I regarded him as a reliable and truthful witness.

109. Secondly, I accept Professor Shaw's evidence that he was sincere in raising

the question of reintegration as and when he did, for the reason which he gave: *i.e.* because it was the single point upon which the NCAS raised an issue for the Trust to address. Mr Forde submitted that the Trust had seized upon this solitary negative point in an otherwise overwhelmingly positive report about Miss Kerslake from NCAS. He submitted that the Trust was "*looking for grounds to dismiss the Claimant*." It is, perhaps, understandable that Miss Kerslake and those who represent her regard the matter in that way: from their point of view it *is* the sole adverse finding. What that view overlooks, however, is the irrefutable fact that it was the only point which NCAS had in fact raised for the Trust to deal with. The Trust could not ignore it: something had to be done to address it. I respectfully disagree that the evidence shows that the Trust raised this issue because they were looking for grounds to dismiss Miss Kerslake. For the reasons I have given, I do not accept that it was a matter which the Trust raised cynically, or opportunistically, as a convenient way out.

110. Thirdly, Professor Shaw left me in no doubt that when he resolved to address the issue which the NCAS presented to him, he did not relish the prospect of tackling such problems as he could foresee were likely to be involved in dealing with reintegration. But that he was determined to do so in a professional and responsible manner he left me in no doubt. He repeatedly said that he had resolved to deal with matters one step at a time, in a logical and orderly fashion. I accept that evidence. I have no doubt that in his own mind, having appropriately taken legal advice, he was conscientiously following that approach as carefully as he could.

111. I therefore reject the suggestions that Professor Shaw (and thus the Trust) acted capriciously, arbitrarily, or whimsically in taking the steps that were taken after receipt of the NCAS report. Professor Shaw had to grapple with a management problem involving very senior personnel. Such problems obviously require the exercise of great care. He had responsibilities, as he explained in evidence, not merely in respect of these senior professional members of staff for whom he was effectively the employer, but also in respect of the junior staff who were required to work under their direction. Above all, as Miss Kerslake herself expressly agreed, Professor Shaw had a responsibility to the public to ensure that the clinical team worked harmoniously and safely in its care of them as patients.

112. The discharge of these responsibilities no doubt from time to time involves having to take hard decisions. It requires a dispassionate approach. Professor Shaw's predecessor, Mr Burke, had been criticised by Professor Walker for his inactivity in dealing with Mr Louca's concerns because in Professor Walker's view Mr Burke had been attempting "*to be nice*" to Miss Kerslake. Professor

Shaw gave me the impression that he was very clear-minded about such matters and that, having taken advice, he adopted his approach precisely and unflinchingly, with an exact regard to his responsibilities to all relevant parties.

113. I reject the suggestion that, *as a matter of fact*, Professor Shaw deliberately decided to proceed by instructing Capsticks' associates to investigate the extent of the breakdown in relationships as a means of sidestepping an investigation into Miss Kerslake's conduct and capability which he knew or believed would have entailed following strict MHPS procedures. I accept Professor Shaw's evidence that his view that MHPS was not engaged, because the matters under consideration were not conduct and capability concerns, was a view which he conscientiously held, whether correctly in law or otherwise.

114. There is then the suggestion that Professor Shaw acted capriciously, arbitrarily, and illogically in commissioning a 'non-MHPS compliant' investigation when it would inevitably involve references being made to the Claimant's capability. I understand this suggestion to be made upon the basis that Professor Shaw acted without the specific intent of circumventing procedures which he realised should have been adopted, but in a way which was based on mere personal preference or whim, without regard to the real nature of the situation he was dealing with, or in some other unaccountably bizarre way. I reject this suggestion too. My reasons follow.

115. I accept the evidence of Professor Shaw that when he received the final NCAS report, after making the observations and enquiries he had detailed on receipt of the draft, he regarded the issues of Miss Kerslake's conduct and capability as definitively settled. His evidence was not challenged on that point: it was not put to him in cross-examination that his concerns were in reality to do with capability. Professor Shaw said that the MHPS procedure had been followed, NCAS had made their assessment, and there was no case to answer on conduct and capability. His evidence was that he accepted that that was the position. I find no reason to disbelieve him, and there are reasons for positively finding that this was indeed the case. First, the contemporaneous documents reflect his acceptance of Miss Kerslake's competence. Secondly, his decisions to remove restrictions on both private and NHS practice also reflect it. Thirdly, the fact that he was acting not just in a management role as Medical Director for the Defendant Trust, but as the senior medical officer responsible to the GMC for the revalidation of Miss Kerslake's practice, is also consistent with his conscientiously accepting the issue of conduct and capability as finally settled. Fourthly, there was nothing more he could have

done to demonstrate that he regarded the question as having been finally answered.

116. The suggestion that Professor Shaw acted illogically is difficult to understand. The introduction to MHPS Part IV includes the following observations:

> "3.....*there will be occasions where an employer considers that there has been a clear failure by an individual to deliver an adequate standard of care, or standard of management, through lack of knowledge, ability or consistently poor performance. These are described as capability issues.* ....
>
> *4. Concerns about the capability of a doctor ... may arise from a single incident or a series of events, reports or poor clinical outcomes. Advice from [NCAS]... will help the Trust to come to a decision on whether the matter raises questions about the practitioner's capability as an individual (health problems, behavioural difficulties or lack of clinical competence) or whether there are other matters that need to be addressed. If the concerns about capability cannot be resolved routinely by management, the matter must be referred to the NCAS before the matter can be considered by a capability panel ....*"

Concerns *had* arisen in Miss Kerslake's case over capability issues. Those concerns could not be 'resolved routinely' by management. The Defendant Trust *had* referred the matter to the NCAS, and their report had been received. Such a reference to the NCAS was effectively a pre-condition to any hearing by a capability panel. If the NCAS *had* identified any lack of capability, the next step is set out at paragraph 14:

> *[NCAS] will assist the employer to draw up an action plan designed to enable the practitioner to remedy any lack of capability that has been identified during the assessment ....*"
>
> MHPS Part IV, Paragraph 14 ,trial bundle v.1 384-385]

There was no finding of 'lack of capability.' The finding was to the opposite effect. Thus the only suggestion as to an 'action plan' was over the issue of reintegration. Had the NCAS identified during the assessment any lack of capability which could not be remedied by means of an action plan, the next step, of proceeding to a capability hearing, would have been justified. The inescapable fact is that because no such lack of capability was identified, there was nothing which could properly be put before a capability panel. (If one considers, entirely hypothetically, what the consequences would have been *had* concerns over Miss Kerslake's capability been placed before a capability panel, it is likely -- at least -- that the panel would have accepted the inevitable

submission on her behalf that, on the basis of the NCAS report, there was no case to answer.)

117. The role of NCAS is, of course, purely advisory. However, NCAS having done all its work on the case, and, as an independent national body, having come to its conclusion on conduct and capability, it is difficult to see how Professor Shaw, even if he had disagreed with it, could properly have commissioned a new investigation into matters of conduct and capability, without any new allegations or fresh evidence. The differences between consultants such as (on the one hand) Mr Louca and Mr Priddy, and (on the other hand) Miss Kerslake, were long-standing matters which plainly pre-dated the NCAS report. The fact that the former maintained their view, despite the conclusions of that report, was a matter of concern. Professor Shaw gave evidence, which I accept, that the conclusions of the report were communicated to Messrs Louca and Priddy, but the whole report was not disclosed as it contained material in respect of Miss Kerslake which was personal, private, and confidential. It became clear to him that the NCAS report's conclusions had made little difference to the views of Messrs Louca and Priddy, and it seemed that other consultants might also share that opinion.

118. Even if Professor Shaw had conscientiously disagreed with the conclusion NCAS had reached, how was it illogical for him to act as he did? If he had commissioned a further investigation into conduct and capability, objection could then have been made upon the basis that Professor Shaw was acting *mala fide* at worst, or unreasonably at least, in attempting to re-run an investigation which had already been completed and had resulted in an outcome favourable to the Claimant.

119. Professor Shaw said that he decided to move on by taking steps to enquire into the *extent* of the breakdown in relationships. He wished to have evidence from which the extent of the problem, and whether it was remediable or (if it were truly the case) irremediable, might be judged objectively. That was not an enquiry into the conduct and capability of the Claimant. It was an enquiry into the extent and strength of the views of those who were opposed to her return, and whether such differences were retrievable or irretrievable. The Trust had made it clear by its correspondence and by its actions that it accepted the NCAS result. They were not contractually bound to do so, but in practical terms they would have had to have had a good reason not to accept it. The disaffected consultant colleagues of the Claimant were not in the same position at all. The Trust might conceivably be faced with a significant number of consultants refusing to work with the Claimant if she were permitted to return, or even resigning (as some of them had indicated they would.) Such

disruption within the clinical team would be obviously detrimental to the interests of patients, and it would certainly be detrimental to the proper running of the department and the work of all the other staff there.

120. In dealing with his thoughts as to the appropriate way to proceed, Professor Shaw at one stage began to refer to legal advice which he had received, but he stopped before revealing matters which might be the subject of legal professional privilege. However, the fact that he had accepted that the NCAS report had cleared Miss Kerslake on conduct and capability grounds (as I have found as a fact he did, on behalf of the Trust) seems to me to be a complete answer to the suggestion that a further investigation into her conduct and capability should have been begun without any new allegations or evidence to be considered.

121. In my judgment Professor Shaw was correct to take the view which I find he did take. However, even if he were arguably wrong to have done so, for the reasons I have already given I reject any suggestion that his decision in this respect was *Wednesbury* unreasonable in the sense referred to in *Hussain v. Surrey & Sussex Healthcare NHS Trust* [2011] EWHC 1670 (QB) below. For the same reasons I reject, as a matter of fact, the suggestion that Professor Shaw acted capriciously, arbitrarily or illogically. I find that insofar as his decision was a discretionary one, the exercise of his discretion was entirely genuine and rational.

The Claimant's contract of employment and incorporation of (1) MHPS; and (2) The Trust's Investigation Policy

122. The contractual starting point is to look at the Defendant's predecessors' letter to the Claimant offering the post on terms which she accepted. The letter is at trial bundle v.1/96, 18th August 1995. In part it reads as follows:

> *"This appointment is subject to the provisions of the Trust's terms and conditions. … including any locally agreed terms and conditions which are relevant to your post."*

The terms and conditions are at p. 98 - they are the standard '*Terms & Conditions of Service for Hospital Medical and Dental Staff in the NHS in England and Wales*' issued in July 1994. At p. 99 the reference to 'locally agreed terms and conditions' is repeated. Specific terms and conditions relating to Disciplinary and Appeals Procedures may be seen at trial bundle v. 1/103-104. These

include the separate disciplinary procedures for personal conduct and professional conduct, and the HC 90 (9) regime, which in due time was wholly replaced by MHPS.

123. Counsel for the Claimant submitted that the reference to locally agreed terms and conditions "inevitably incorporates the Investigation Policy." Counsel for the Defendant submitted that it was not pleaded as part of the Claimant's case that this provided a mechanism for incorporation of the investigation policy into the Claimant's contract of employment. The submission presupposed, without having established that this is the case, that the policy is a "term" or "condition". By contrast, the Claimant's contract of employment expressly incorporates the then prevailing disciplinary procedure, HC(90)9, which was replaced by MHPS, as a means of dealing with conduct and capability concerns. This point therefore requires an examination of some of the detail involved.

124. HC (90) 9 was a circular issued in March 1990 and consolidated previous guidance. It provided that the procedure to be followed depended on the nature of the allegation of misconduct and gave definitions of *"Personal Conduct"* as *'… performance or behaviour of practitioners due to factors other than those associated with the exercise of medical or dental skills.' "Professional Conduct" '… performance or behaviour of practitioners arising from the exercise of medical or dental skills…;'* and *"Professional Competence"* as *"… adequacy of performance of practitioners related to the exercise of their medical or dental skills and professional judgment.* 'Annex B' provided for the "*Disciplinary Proceedings in cases relating to the Hospital … Staff …*". It gave guidance on the procedure to be followed "*in serious disciplinary cases involving hospital … doctors*" where "*the outcome of disciplinary action could be the dismissal of the medical or dental practitioner concerned*". The first step in cases involving professional conduct or professional competence was to consider whether there was a *prima facie* case, which, if well founded, could result in serious disciplinary action such as dismissal. If so, an inquiry by an investigating panel should be held. Annex E provided for an "*intermediate procedure*" which involved the use of independent professional assessors to investigate and advise on less serious matters involving professional conduct or competence.

125. MHPS replaced the disciplinary procedures contained in Health Circular HC (90) 9, and also abolished the right of appeal to the Secretary of State held by certain practitioners. The Defendant Trust was required, under the Department of Health's Directions on Disciplinary Procedures 2005, to implement the framework within their local procedures by 1 June 2005. The background and history of these matters is helpfully set out in the opinion of

Lord Steyn in *Skidmore v Dartford & Gravesham NHS Trust* [2003] ICR at 723-728 and in the judgment of Smith LJ in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust* [2009] IRLR 829; [2010] ICR 101, CA, at paragraphs 25 – 44.

126. In summary, MHPS abolished the distinction previously drawn between personal and professional misconduct, and created a single process for handling conduct and capability issues in association with the NCAS. The introduction, produced by the Department of Health, includes the statement that *"… the same disciplinary procedures will apply to all doctors … employed in the NHS"*.

127. Part I of MHPS describes the "*Action when a concern arises*." All NHS bodies must have procedures for handling serious concerns about an individual's conduct and capability. A serious concern about capability will arise where the practitioner's actions have or may adversely affect patient care. The duty to protect patients is paramount and

> "*at any point in the process where the case manager has reached the clear judgment that a practitioner is considered to be a serious potential danger to patients or staff, that practitioner must be referred to the regulatory body whether or not the case has been referred to the [NCAS]*."

[A summary of the key actions is given:]

- *clarify what has happened and the nature of the problem or concern;*
- *discuss with the [NCAS] what the way forward should be;*
- *consider whether restriction of practice or exclusion is required;*
- *if a formal approach under the conduct or capability procedures is required, appoint an investigator;*
- *if the case can be progressed by mutual agreement consider whether an [NCAS] assessment would help clarify the underlying factors that led to the concerns and assist with identifying the solution.*

"The report of the investigation should give the case manager sufficient information to make a decision whether, among other things:

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- *there are concerns about the practitioner's performance that should be further explored by the [NCAS];*

…

- *there are serious concerns that should be referred to the GMC …*

- *there are intractable problems and the matter should be put before a capability panel*

- *no further action is needed."*

128. The focus of the work of NCAS is likely to involve performance difficulties which are serious or repetitive, in other words "…*performance falling well short of what could be expected of doctors and which, if repeated, would put patients seriously at risk*."

129. So far as investigation and hearing procedures are concerned, the relevant part of MHPS part IV provides as follows:

"*Procedure to be followed prior to capability hearings*

The case manager must notify the practitioner in writing of the decision to arrange a capability hearing. This notification should be made at least 20 working days before the hearing and include details of the allegations and the arrangements for proceeding including the practitioner's rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel. This period will give the practitioner sufficient notice to allow them to arrange for a companion to accompany them to the hearing if they so choose.

All parties must exchange any documentation, including witness statements, on which they wish to rely in the proceedings no later than 10 working days before the hearing. In the event of late evidence being presented, the employer should consider whether a new date should be set for the hearing.

Should either party request a postponement to the hearing the case manager is responsible for ensuring that a reasonable response is made and that time extensions to the process are kept to a minimum. ….

Witnesses who have made written statements at the inquiry stage may, but will not necessarily, be required to attend the capability hearing. Following representations

from either side contesting a witness statement which is to be relied upon in the hearing, the Chairman should invite the witness to attend. The Chairman cannot require anyone other than an employee to attend. However, if evidence is contested and the witness is unable or unwilling to attend, the panel should reduce the weight given to the evidence as there will not be the opportunity to challenge it properly. A final list of witnesses to be called must be given to both parties not less than two working days in advance of the hearing.

If witnesses required to attend the hearing choose to be accompanied, the person accompanying them will not be able to participate in the hearing.

In respect of the hearing itself there are the following provisions:

18. The capability hearing will normally be chaired by an Executive Director of the Trust. The panel should comprise a total of 3 people, normally 2 members of the Trust Board, or senior staff appointed by the Board for the purpose of the hearing. At least one member of the panel must be a medical … practitioner who is not employed by the Trust. As far as is reasonably possible or practical, no member of the panel or advisers to the panel should have been previously involved in the investigation. ……

19. Arrangements must be made for the panel to be advised by:

- *A senior member of staff from Human Resources, an*
- *A senior clinician from the same or similar clinical specialty as the practitioner concerned, but from another NHS employer.*

….

It is important that the panel is aware of the typical standard of competence required of the grade of doctor in question. If for any reason the senior clinician is unable to advise on the appropriate level of competence, a doctor from another NHS employer in the same grade as the practitioner in question should be asked to provide advice.

20. It is for the employer to decide on the membership of the panel. A practitioner may raise an objection to the choice of any panel member within 5 working days of notification. The employer should review the situation and take reasonable measures to ensure that the membership of the panel is acceptable to the practitioner. It may be necessary to postpone the hearing while this matter is resolved. The employer must provide the practitioner with the reasons for reaching its decision in writing before the hearing can take place.

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> *21. The hearing is not a court of law. Whilst the practitioner should be given every reasonable opportunity to present his or her case, the hearing should not be conducted in a legalistic or excessively formal manner.*
>
> *22. The practitioner may be represented … by a friend, spouse or colleague, or a representative … from a trade union or defence organisation. Such a representative may be legally qualified but they* [sic] *will not … be representing the practitioner in a formal legal capacity…. "*

130. In *Mezey v South West London & St George's Mental Health NHS Trust* [2008] EWHC 3340 (QB) Underhill J granted an injunction restraining disciplinary proceedings against a consultant on the grounds that such proceedings were not in accordance with Part IV of MHPS and so not in accordance with the employment contract between the consultant and the employer trust. The Court of Appeal [2010] EWCA Civ 293 upheld that decision. In that case, it was common ground between the parties that the relevant provisions of MHPS were contractual. The Court of Appeal expressed some uncertainly about how that came about, but proceeded on that basis: see paragraph 62, *per* Toulson LJ.

131. In the case of *Kulkarni v Milton Keynes Hospital NHS Foundation Trust and another* [2009] EWCA Civ 789 [2010] I.C.R. 101, the Court of Appeal also held that Part IV of MHPS had contractual effect. The Defendant Trust in that case had refused to allow a trainee doctor, a man who was facing disciplinary proceedings for an allegedly improper examination of a female patient, to be represented at the hearing by a lawyer instructed by his defence organisation. The issue whether this was lawful turned upon the proper construction of a particular paragraph of MHPS, part IV paragraph 22, above. It was not in dispute that this paragraph was contractual as between the doctor and the employer trust. The Department of Health was an interested party. The NHS Trust in that case conceded that their disciplinary policy must be consistent with MHPS and the latter must hold sway if there were any differences between the two. In the instant case the Defendant Trust makes a similar concession.

132. It seems to me to be quite clear that MHPS is intended to be a binding supervening scheme for dealing with all conduct, capability and ill-health concerns in respect of practitioners such as the Claimant. It replaces all that went before in terms of contractual arrangements, in particular the HC (90) (9) framework.

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The Investigation Policy

133. As already mentioned, in July 2005, the Defendant's Board ratified an Investigation Policy that had previously been negotiated and approved by the Human Resources, Training and Education Committee, the Executive Team and the Joint Staff Committee. The provisions of the Policy were notified to employees of the Defendant including the Claimant. It is not expressed to be contractual.

134. The introduction to the policy begins: "*1.0 .... This policy is designed to ensure when investigation into employment related issues is required, that a clear, fair and robust process is used by [the Trust.]*"

135. Next there is set out the 'Policy Statement': "*2.1 The purpose of investigation under this policy is to determine the facts about a concern or allegation. This will enable the Trust to take action to address the specific matters investigated, improve its capacity to deliver its objectives and identify areas for improvement (either individual, team or systems.) 2.2 The Trust believes that it is important that concerns are investigated professionally to ensure that the facts about concerns or allegations against individuals are established, and appropriate action taken. 2.3 The Trust is committed to ensuring all members of staff are treated fairly and equitably. This policy is designed to ensure that all investigations into employment related issues are investigated objectively, consistently and fairly. 2.4 The Trust is committed to ensuring good working relationships across the organisation and has adopted this approach to investigating concerns about the conduct and capability of employees, and concerns raised by employees, to ensure that investigations are seen to be objective, fair, and non-adversarial. 2.5 .... In cases of a single incident or non-complex conduct or capability issues ... [reports within 15 days.] ....*"

136. There is then a section entitled "*3.0 SCOPE.*" This reads as follows: "*3.1 This policy focuses on the investigation of employment related issues (e.g. incidences of misconduct, poor performance, grievances, harassment and bullying). 3.1 It may not always be possible to investigate employment-related issues separately under this policy as these may form part of a wider investigation. In these circumstances, the approach outlined in this policy should be followed as closely as possible."*

137. The investigation process is dealt with at paragraph 5. At 5.1 there is the following statement:

> *"Issues that may require investigation may be identified in a number of*

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ways:

- *incidents of misconduct;*
- *continued poor performance*
- *complaint, concern or grievance raised with management.*"

Under the heading at 5.2 "*Decide whether an investigation is appropriate*" it is provided that the manager requesting an investigation should discuss the matter with a senior manager. Whilst the senior manager should take advice from human resources staff, or health and safety staff or other appropriate members of staff, the policy provides a wide range of decisions will then be open to him or her. A broad discretion is given under 5.5 to the investigating officer as to what should be included in the conduct of the investigation.

138. There is a section at paragraph 7 dealing with 'outcomes.' *"7.0 … The conclusion will normally be one of the following outcomes: a) that there appears to be no sufficient evidence that there is a case of misconduct or capability to answer (this may be supplemented by a recommendation for training and development, or other measures); b) that there is sufficient evidence of a case of misconduct and capability for the employee to answer, which needs to be considered in a formal hearing; c) that there is no evidence of misconduct and capability, but that there are procedural, policy, or other issues that the Trust should address to reduce the risk of future occurrences."*

139. Appendix A, which is entitled "*Guidelines for conducting investigatory interviews*" contain references to:-- " … *the employee whose behaviour/performance is being investigated* …" in paragraph 1, and to "…*the allegations/incident being investigated* …" in paragraph 2. There is also reference in paragraph 7 to "*[t]he employee whose conduct/capability is being investigated*…." In paragraph 9 the document has a reference to "… *the allegation/complaint/issue being investigated* …."

140. The Claimant submits that the Policy is explicitly concerned with *all* employment-related issues and is no way restricted to particular types or categories of issues. The Defendant Trust contends that the Investigation Policy is concerned with establishing whether an employee's conduct or capability has fallen below the required standards. The Claimant concedes that it does concern these matters "*but it is not restricted to them.*"

141. Close examination of the wording of the policy reveals repeated references to its being concerned with conduct or capability issues, and the only other examples given of conduct to which it relates are to grievances,

harassment and bullying. References are made throughout to "*concerns*" about and "*allegations*" against individuals. Taking X as an individual employee, the twin areas of focus of the policy are the conduct and capability of X on the one hand, and grievances raised by X (*e.g.* bullying of X by other employees) on the other.

142. The Claimant submits that the Investigation Policy was incorporated into the Claimant's contract of employment. It is accepted that '*it does not clearly say so*' but, submits Mr Forde, this may be inferred from the fact that it covers a very important area. Such a policy is effectively mandated by the Employment Rights Act 1996 section 3 (1) (aa). It came about as a result of a collective agreement arrived at by management and employee representatives. It is a detailed document which is prescriptive in character. As a policy, it is coherent and workable. It is accepted, Mr Forde said, that not every clause within it will have contractual effect: '*Some matters are doubtless guidance.*'

143. The Defendant's case is that the Investigation Policy is not incorporated into the Claimant's contract of employment at all, and, even if it were, it is not applicable because it is confined to misconduct and capability. Mr Sutton's first point was on the pleadings. The Claimant, in a statement of case which consists of 244 paragraphs set out over the space of 50 pages, had pleaded no case as to how or why the investigation policy should be regarded as having contractual effect. Secondly, he submitted that no case was put to Professor Shaw in cross-examination as to how the Trust was bound by the terms of the policy, or as to any alleged breach of its terms. Thirdly, he contended that the specific provisions relied upon (at paragraphs 208-210 of the Particulars of Claim) are plainly discretionary and advisory in character: *e.g.* the gathering of copies of relevant documentation such as "… *incident forms, floorplans and 'role profile'…*" and references to the investigator providing supporting information in the form of "… *appendices including the typed signed version of interview notes* …."

144. In particular, Mr Sutton submitted, it is expressly stated in the policy that it is a matter for the investigator to determine which documents and witnesses are relevant and to write up his report based on that material. Beyond giving guidance on format and outline methodology, there is no guidance on how the task of interviewing should be approached, still less as to whether witnesses' opinions should be interrogated or challenged. Finally he submitted that it is clear from the history of the development of these nationally-agreed arrangements that in terms of conduct and capability concerns MHPS '*trumps*' any locally agreed policy.

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Guidance to be found in the authorities on contractual incorporation of policies

145. The problem of the extent to which a policy or procedure such as the Investigation Policy is incorporated into a contract of employment has been considered in a number of cases, and some of them are very recent. However, a helpful point at which to begin looking for guidance as to the proper approach is to be found in the judgment of Hobhouse J (as he then was) in *Alexander v Standard Telephones & Cables Ltd (No 2),* [1991] IRLR 286 at 292–3 as follows:

> "The relevant contract is that between the individual employee and his employer; it is the contractual intention of those two parties which must be ascertained. In so far as that intention is to be found in a written document, that document must be construed on ordinary contractual principles. In so far as there is no such document or that document is not complete or conclusive, their contractual intention has to be ascertained by inference from the other available material including collective agreements. The fact that another document is not itself contractual does not prevent it from being incorporated into the contract if that intention is shown as between the employer and the individual employee. Where a document is expressly incorporated by general words it is still necessary to consider, in conjunction with the words of incorporation, whether any particular part of that document is apt to be a term of the contract; if it is inapt, the correct construction of the contract may be that it is not a term of the contract. Where it is not a case of express incorporation, but a matter of inferring the contractual intent, the character of the document and the relevant part of it and whether it is apt to form part of the individual contract is central to the decision whether or not the inference should be drawn."

146. In *Hameed v Central Manchester Universities Hospitals NHS Foundation Trust* [2010] EWHC 2009 (QB) the claimant contended that disciplinary proceedings against her had been conducted unfairly and in breach of her contract of employment. In that case Dr Hameed had no written contract of employment at the relevant time, but it was common ground that her employment was contractually governed by the standard Terms and Conditions of Service for doctors employed in the NHS published in September 2002, including paragraph 189a:

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

capability procedures (which will be consistent with the [MHPS] framework) …".

The court had to decide whether the contract included provisions of the employer's document produced to implement MHPS either expressly through paragraph 189a or through an implied term of trust and confidence. Applying the principles stated by Hobhouse J in *Alexander*, Swift J concluded that, not "… each and every provision of the Trust Procedure is apt to be treated as an express contractual requirement. There are a small minority of provisions which are too vague and/or discursive to fulfil such a function …"

147. In *Lakshmi v Mid Cheshire Hospitals NHS Trust* [2008] IRLR 956 a consultant physician employed by the Defendant Trust claimed that the Trust was in breach of contract in its conduct of disciplinary proceedings against her. Mr Simeon Maskrey QC, sitting as a deputy judge of the High Court, considered it improbable that only some provisions of the procedure had been incorporated into the contract of employment because then "the parties [would] have left it wholly unclear as to which parts should be incorporated and which should not." He was also concerned that, if parts of the procedure were incorporated into the contract of employment, then "they have to be construed strictly and in accordance with contractual law", and that this might, in some circumstances, lead to absurd results. He concluded that, if the employment contract was to be given a sensible and workable meaning intended by the parties, it should not be taken to include the terms of the trust's disciplinary procedure, but to include a term that the employer would comply with the procedure unless there was good reason to do otherwise. If the employer departed from the procedure without good reason, it would be in breach of its obligation to act in good faith.

148. Andrew Smith J in *Hussain* [2011] EWHC 1670 (QB) considered the respective approaches of both Swift J and Mr Maskrey QC, and said that the difference between them was in his view less marked than might at first appear.

> "The most obvious difference is that Mr Maskrey would allow the employer (and presumably the practitioner) to depart from the provisions of the procedure "for good reason". If he intended by this to afford the employer a general discretion to depart from the procedure if it considered departure justified, I respectfully disagree. If he meant that the parties are not to be taken to have intended precisely and literally to comply with the detailed provisions of the procedure if that would have absurd and impractical consequences, then this purpose can be achieved through the principles explained in the *Alexander* case to determine which parts of the procedure are incorporated through the (objectively evinced) intention of

the parties and by a properly robust application of the conventional principle of contractual construction that parties are not taken to have intended to make an agreement that produces absurd results or is inconsistent with them having a workable contractual relationship. The principles summarised in *Alexander* and applied in many subsequent cases recognise that some provisions of procedures of this kind have contractual effect and others not, and often it is a matter of fine judgment to decide whether individual provisions are or are not contractual." (see para 159.)

149. Later, Andrew Smith J said at [168],

> "There is no single test as to whether an employer and employee intended to agree that provisions of an agreement such as the Practitioners Disciplinary Procedure should be contractual between them (rather than advisory or hortatory or an expression of aspiration), and if so which provisions."

He then referred to the "indicia that a provision is to be taken to have contractual status" of which he set out five examples of relevance to that case: see §168 (i) to (v):

(i) The importance of the provision to the contractual working relationship between the employer and the employee and its relationship to the contractual arrangements between them. In that case it was common ground that parts of the Practitioners Disciplinary Procedure were contractual, and that as a result in some circumstances the Trust might exclude or bring disciplinary proceedings for misconduct against a practitioner. The implication of that was that provisions important to implementing the agreement about exclusion and about conduct hearings were also apt to be contractual: the more important the provision to the structure of the procedures, the more likely it was that the parties intended it to be contractual.

(ii) The level of detail prescribed by the provision: as Penry-Davey J said in *Kulkarni v Milton Keynes Hospital NHS Trust*, [*supra*] at para 25, the courts should not "become involved in the micro-management of conduct hearings", and the parties to the contract of employment are not to be taken to have intended that they should be. (In the Court of Appeal in *Kulkarni*, at para 22, Smith LJ endorsed this

observation of Penry-Davey J.)

(iii) The certainty of what the provision requires: as Swift J observed (in *Hameed* at para 68), if a provision is vague or discursive, it is the less apt to have contractual status.

(iv) The context of the provision: a provision included amongst other provisions that are contractual is itself more likely to have been intended to have contractual status than one included among other provisions which provide guidance or are otherwise not apt to be contractual.

(v) Whether the provision is workable, or would be if it were taken to have contractual status; the parties are not to be taken to have intended to introduce into their contract of employment terms which, if enforced, not be workable or make business sense.

Andrew Smith J concluded his judgment by saying,

> "174. I have rejected Dr Hussain's various other complaints that the procedures adopted for investigating and otherwise dealing with her case, were not in accordance with the Practitioners Disciplinary Procedure and so those aspects of her claim of breach of contract fail. I add that, in any event, I do not consider that parts of the Practitioners Disciplinary Procedure upon which these complaints are based are contractual. I cannot accept that the parties to individual contracts of employment intended that the detailed provisions about investigations … and about other matters should be enforced through the legal process as breaches of contract, with the court "micro-managing" these arrangements. I consider that these paragraphs are to be understood to be by way of advice or guidance to investigators and others."

Application to this case

150. In the instant case, (1) MHPS is self-evidently of major importance to both parties in dealing with conduct and capability concerns. It is of similar importance to all NHS doctors and employers. Matters of conduct and capability are of very serious import to a medical practitioner's reputation and employability within the NHS, and thus MHPS is of crucial significance to the contractual arrangements between the Claimant and the Defendant. It is a nationally agreed framework which specifically and expressly replaced all previous disciplinary procedures in the Claimant's contract of employment. (2) The Trust's Investigation Policy is not stated expressly to be of contractual

force. The full provisions of the Investigation Policy in respect of the way investigations should be managed are more detailed than the MHPS provisions and leave many matters to the discretion of the investigator. It is clear from its wording that it is a policy which is not intended to be applied rigidly but to be adapted to the particular circumstances of any given case to which it may apply. (3) MHPS is clear, concise, and certain in its requirements. By contrast, the Investigation Policy appears essentially to be concerned with the provision of guidance in a variety of different potential situations, including dealing with employees' grievances. In terms of strict application in a capability case, the provisions of MHPS are readily workable and reliable.

151. Applying the principles explained in the authorities which are mentioned above to the circumstances of this case I have reached the following conclusions on the question of incorporation.

(1) MHPS Parts I - IV are incorporated into the contract of employment insofar as they deal with concerns over conduct and capability.

(2) The detailed terms of the Investigation Policy are essentially matters of guidance which require adaptation to the circumstances of any individual case. In that respect they are not apt for incorporation into the contract. (Were they to be regarded as contractual, the court might have to become involved in micro-management by an examination of their potential application line by line in the individual case.)

(3) If that is not a correct conclusion, I would hold that, in any event, on its proper construction the Investigation Policy applies only to work-related issues involving (a) the conduct or capability of individual employees and (b) complaints by such employees raised as grievances.

(4) Further, it is inappropriate for the policy to be applied to the investigation of a possible breakdown in relationships between employees where (a) the suggested basis breakdown is a perception of lack of capability; and (b) assertions of such lack of capability have already been formally and properly investigated and found to have no substance.

(5) Whilst the involvement of NCAS is a necessary contractual step in a conduct and capability case before referral may be made to a capability panel, there is no other contractual requirement to follow any particular advice which NCAS gives.

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Categorisation or classification: the jurisdiction of the court to review the decision of the Trust

152. In *Skidmore* [*supra*] a charge of personal misconduct had been brought against a consultant by the NHS Trust which employed him, alleging that he had deliberately sought to mislead a patient and her family by stating, untruthfully, that internal damage suffered by the patient in an operation performed by him had been caused by defective equipment. The contract of employment incorporated Circular HC 90 (9) in respect of the disciplinary procedures to be followed in respect of allegations of professional misconduct. At a hearing before the Chief Executive of the Trust, the question of whether the proceedings were properly constituted or whether the case should have been dealt with under the Circular HC (90)9 procedure governing professional conduct was argued as a preliminary point. The Chief Executive decided that the allegations were of personal and not professional misconduct and that as a result she had jurisdiction to deal with the complaint. It was found that the applicant had lied to the patient and her family, and that he should be summarily dismissed. The applicant's appeal to a panel of the Trust board was dismissed and his complaint of unfair dismissal was rejected by an employment tribunal, which found, inter alia, that the allegations in respect of which the applicant had been dismissed were matters of personal misconduct and therefore susceptible to the disciplinary procedure which the Trust had invoked. The applicant's appeal to the Employment Appeal Tribunal was dismissed. Allowing his appeal, the Court of Appeal concluded that the behaviour alleged was properly categorised as professional, not personal, conduct which should have been investigated by an external panel as required by the Circular, and that the Trust had used the wrong procedure.

153. On appeal by the Trust to the House of Lords, it was held, dismissing the appeal, that it was for the Trust, who would initiate the commencement of disciplinary proceedings, to decide on the appropriate disciplinary route to be followed, so long as its decision complied with the terms of its contract with the applicant; that where its decision did not so comply, and was acted upon, the usual remedies for breach of contract would arise; and that, accordingly, use of the wrong procedure would entitle the applicant to appropriate relief. The House of Lords also held that the surgical operation formed the subject matter of the applicant's lies. The conduct in question would not have occurred but for the exercise of his medical skills (or the lack of them) in the course of the operation. Since certain allegations raised issues requiring medical experience for their determination which might not be available under the internal procedure, the applicant's behaviour fell within the category of professional conduct as defined by the Circular. Accordingly, the disciplinary procedures appropriate to that classification should have been used, and not

the procedure adopted by the Trust.

154. Andrew Smith J in *Hussain* had considered the leading speech of Lord Steyn in *Skidmore* and said that the position referred to by him was only a starting point. Where a contract confers upon one party a power of this kind, he said, the party is subject to some constraints as to the decision he can properly take. He made reference to dicta of Leggatt LJ in *Abu Dhabi National Tanker Company v Produce Star Shipping Company Limited*, [1993] 1 Lloyd's Reports 397 at p.404, to the effect that not only must a discretion be exercised honestly and in good faith but, having regard to the provision of the contract by which it is conferred, it must not be exercised arbitrarily, capriciously or unreasonably. In this context, Andrew Smith J said, "unreasonably" was used in a sense analogous to *Wednesbury* unreasonableness. In such circumstances, the court could review the decision, but he held that the court should not interfere simply because it considered the decision under challenge to be wrong.

155. Counsel have, since the hearing, helpfully supplied me with an agreed note of the recent decision of the Court of Appeal in *Mattu v. The University Hospitals of Coventry and Warwickshire NHS Trust* [2012] EWCA Civ 7641, in which the cases of *Skidmore* and *Hussain* were considered. In his judgment in *Mattu* Elias LJ said,

> "81. … I do not accept the submission of [counsel for the Trust] that a term in the contract which provides that 'it is for the Trust to decide upon the most appropriate way forward' makes the Trust the final arbiter of which procedure should be adopted, subject at least to bad faith or the absence of reasonable grounds for the decision. A similar argument was unsuccessfully advanced before the House of Lords in *Skidmore v Dartford and Gravesham NHS Trust* when the relevant clause in earlier disciplinary provisions stated that 'it is for the authority to decide under which category a case falls.' Lord Steyn, with whose judgment Lords Bingham, Clyde, Hutton and Scott agreed, held that this language was insufficient to confer the final decision on classification to the authority, thereby excluding the role of the court. In my judgment that principle applies equally here, and I respectfully disagree on this point with the analysis of Andrew Smith J in *Hussain v Surrey and Sussex Healthcare NHS Trust* [2011] EWHC 1670 (QB)."

156. On this point, Stanley Burnton LJ and Sir Stephen Sedley were essentially in agreement with Elias LJ: see paragraphs 24-34 and 134-155 respectively. Accordingly, it is clear that the test is one of objective correctness. In other

words, the question is whether the decision by the Defendant Trust that (a) the matter was not a conduct and capability concern, and therefore (b) that it should be dealt with other than by use of the strict MHPS procedure, was objectively correct. If it was not, it amounted to a breach of contract.

157. Whether or not he had in mind on this particular point the analysis of Andrew Smith J in *Hussain* or otherwise, Mr Forde QC repeatedly used the terms '*capricious,*' '*irrational*' and '*unreasonable*' in describing the decision of Professor Shaw. As already indicated above, I have rejected the criticisms of the decision expressed in the use of those terms as a matter of fact. In the end, however, the question requires an objective answer, which is not a matter of subjective fairness or reasonableness.

Categorisation or classification: was the Trust's decision correct, or is the issue under investigation, and which it is proposed to consider at the hearing, one of 'conduct and capability' or a hybrid of both so as to engage MHPS?

158. This is really the central issue in the case. It is, as just noted, essentially a matter for objective judgment. It is convenient to deal with a simple and straightforward point first of all. No serious suggestion has ever been made that any conduct of the Claimant had ever been a cause for concern, in the sense of professional or personal *misconduct*. Mr Forde did submit at one stage that there might be a subtle distinction to be made between misconduct and conduct which, though unimpeachable in itself, might be the cause of disaffection in others. I shall deal with that presently as a discrete matter. As the narrative of events given in the first part of this judgment shows, however, no complaint has ever been made against Miss Kerslake on the basis that she had misbehaved personally or professionally. By contrast, as can be seen in that narrative, for some years before the NCAS report there had been direct assertions of lack of *capability* made against Miss Kerslake on a number of occasions. Every such allegation was investigated as and when it was made. Each time the matters were investigated, whether (for example) by Mr Burke as Medical Director, or by the Healthcare Commission, or by the expert appointed by the Coroner, there was no case to answer.

159. Miss Kerslake had then herself brought the formal grievance proceedings on the basis of allegations of misconduct against Mr Louca and Mr Priddy. The Trust had dealt with that by inviting Prof Walker as an independent expert to investigate and report. He had done so. The outcome was a rejection of the complaint which had been made by Miss Kerslake, accompanied by the raising of real concerns by Prof Walker on her capability.

What was the Trust's duty in such circumstances? It was obviously to begin yet another investigation into capability. They did so. NCAS were involved and reported, again, not merely that there was no case to answer, but that the Claimant was positively assessed as competent to practise as an independent consultant surgeon.

160. From the first suggestion of lack of capability to the stage of the final NCAS report the various processes had taken years. Miss Kerslake had been under restriction for what would normally have been thought of as an unreasonably long period. This was partly because the AMD inquest had been delayed, but also partly because she had begun her own grievance procedure. That had had the unexpected result of criticism of her capability in the Walker Report. Thus the whole process had had to be repeated.

161. The NCAS report was not merely accepted at face value. Professor Shaw raised a number of issues on capability by probing into nuanced areas of the report and seeking further particular assurances, by his letter dated 3rd February 2011, as to the question of whether Miss Kerslake's capability was assessed at associate specialist level or as a fully independent consultant, so that it was safe for her to return to the role of consultant at the Trust. The reply from NCAS to those enquiries was unambiguous. Dr Fitzpatrick said in his letter of 7th March 2011 that the Claimant had been assessed as a consultant gynaecologist undertaking the full range of gynaecological duties. Thus each of those further issues was resolved positively in Miss Kerslake's favour, and Professor Shaw received assurances which were sufficient to make it impossible for him seriously to consider that any criticisms of Miss Kerslake's capability had been established. The final outcome of the process was the positive finding that Miss Kerslake was capable and competent to practise as a Consultant Surgeon in Obstetrics and Gynaecology. The result of that, in turn, was that all restrictions were lifted.

162. I have found that Professor Shaw took the decision to accept the final NCAS report, and to remove all restrictions in good faith. There is no basis for a suspicion that he simply did so to allow himself to embark on a route to dismissal which did not involve capability. Indeed, it is difficult to contemplate what other course was open to him. The questions which he had raised had been answered comprehensively. To reject the report in the face of those answers would require good reason, and he had none. Had he, without such good reason, commissioned yet a further investigation into capability he might well have been criticised for irrationality and bias. From the tone and content of the correspondence from the solicitors for the Claimant (see, *e.g.* the passage quoted from their letter of 27th May 2011 at paragraph 60 above) it

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would not have been unreasonable for Professor Shaw to have expected any such commission to have been characterised as one designed simply to tell him what he wanted to hear.

163. One way in which I understand the Claimant's case to be put, however, is that Professor Shaw should have regarded the matter as a complex case in which capability concerns arose in an unusual way. The disaffected consultant colleagues of the Claimant had indicated to NCAS and to the Trust that there were 'communication' and 'team-working' problems associated with working with the Claimant. Counsel for the Claimant has referred to paragraph 4 of Part IV of MHPS, and to concerns potentially arising thereunder from (*inter alia*) '*reports.*' Paragraph 5 gives examples such as

> '…*inability to communicate effectively* …'
>
> and
>
> '… *ineffective clinical working team skills.*'

Thus, it is submitted, the complaints of colleagues (*e.g.*) that they could not work with her, raised issues of capability.

164. In my view the submission ignores both the purpose and the substance of the NCAS report. In this context NCAS had made an objective assessment that the Claimant was perfectly able to communicate effectively and to work in teams in the circumstances in which it assessed her (at Ealing Hospital.) NCAS was well aware of the issues which existed between Miss Kerslake and her colleagues at Northwick Park Hospital, her grievance procedure, the Walker report, and the reasons for the request for NCAS to become involved. The whole purpose of the assessment was to observe Miss Kerslake on neutral ground.

165. Secondly, every conceivable aspect of Miss Kerslake's capability in terms of '*effective communication*' and '*working in teams*' was systematically examined and dealt with at paragraphs 1.6; 2.1.1; 2.2.1; 2.2.2; 2.3 (*seriatim*); and 3.1 – 3.9 (*seriatim*) of the NCAS report, with satisfactory results. The fact that it had been reported that some of her colleagues at Northwick Park Hospital did not wish to work with the Claimant because of capability concerns is not a matter, in the circumstances, which could reasonably be regarded as raising an issue of her capability, in the face of the substance of the findings of NCAS in these respects.

166. I have found that Professor Shaw decided that the NCAS assessment was for all present purposes the final word on capability. The report, however, left a single issue for the Defendant Trust to address: reintegration. As soon as he raised this orally with the General Manager and with the Clinical Director, Mr Louca, he became aware that their concerns were unabated. Shortly afterwards he received a visit from them, with other consultants, to protest. To a greater or lesser degree the indication was that working relationships between them and the Claimant had broken down.

167. This placed Professor Shaw in a difficult position. Doing nothing was not an option which was open to him. The Claimant was determined to return to work at Northwick Park Hospital and a significant number of other members of the clinical team were apparently strongly opposed to that. Professor Shaw took advice. In doing that he was acting entirely responsibly. Whether acting on that advice or otherwise, he decided to investigate the strength of the opposition to Miss Kerslake's return, in order to have evidence from which, as he put it, he could '*measure*' that opposition. He said he had,

> '*to consider the question of feasibility of reintegration at Northwick Park Hospital….*' He needed '*…some information on the breadth, depth, and magnitude of the other consultants' views to assess that feasibility … to get a measure of whether reintegration will not be feasible, which could result in a dysfunctional team, and that in turn endangering patient safety. So for that reason we decided to embark on an investigation, not to measure <u>why</u> people held that view but to assess the extent of that view and to try to get a sense of whether that view was reversible.*'

I accept that this was his reason for commissioning the Capsticks report.

168. When that report was received, it provided, on any view, some evidence of the strength of the opposition and of the degree to which working relationships had broken down. It is obvious that one of the main reasons for opposition by those who expressed themselves most strongly were concerns over the Claimant's capability. Investigation of capability, however, was not the purpose of the report: as just noted, it was

> '*… not to measure <u>why</u> people held that view but to assess the extent of that view and to try to get a sense of whether that view was reversible.*'

169. For Professor Shaw, capability was a matter which was cut and dried. He had no choice but to accept the NCAS report. As I have said, I accept that he did so in good faith, so that that, as Medical Director, represented his subjective view. It was also the only view which could be taken objectively.

There has to be a point of finality in any process for it to be workable. Endless re-investigations of matters already properly enquired into would result in chaos. That would be unacceptable in any sensible business, but it would be quite impermissible in a situation in which the considerations include (as they do here) a professional reputation on the one hand and the safety of the public on the other. Whether a breakdown in working relationships was remediable, however, was a quite separate and distinct matter. Thus the issue under investigation was not one of capability.

170. In no meaningful sense of the word was the issue under investigation one which involved the 'conduct' of the Claimant. She was willing to reintegrate. She imposed no pre-conditions. There is not a scintilla of evidence that her conduct at Northwick Park Hospital was improper or unbecoming a consultant surgeon. The Walker report had not upheld her grievance, but nor had it suggested that she had abused her position by making it. Prof Walker had made criticisms of the way she had dealt with various matters, but none of those criticisms could be stigmatised as allegations of misconduct. It is more realistic to say that the 'conduct' of those who oppose her return is possibly involved: but there is no suggestion that any of them is motivated by malice, as distinct from their genuinely-held beliefs, however mistaken such beliefs may be. Miss Kerslake has not antagonised her colleagues by her behaviour. She accepted the result of the Walker report, and I accept her evidence that however much she disagreed with it, she decided to move on, and regard it as one of the matters which she referred to as '*water under the bridge.*'

171. It is necessary now to deal with the point to which I made reference earlier as involving a subtle distinction made by Mr Forde in respect of the notion of 'conduct.' He submits that insofar as the Defendant Trust in the instant case argues that a breakdown in professional relationships is outwith MHPS, they have to deal with its express terms. In particular he points to Part III, Paragraph 4:

> "*Misconduct can cover a very wide range of behaviour and can be classified in a number of ways, but it will generally fall into one of four distinct categories: (1) A refusal to comply with reasonable requirements of the employer. (2) An infringement of the employer's disciplinary rules including conduct that contravenes the standard of professional behaviour required by doctors … by their regulatory body. (3) The commission of criminal offences outside the place of work which may, in particular circumstances, amount to misconduct. (4) Wilful, careless, inappropriate or unethical behaviour likely to compromise standards of care or patient safety, or create serious dysfunction to the effective running of a service*."

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Plainly the instant case does not involve categories (1) to (3). As I understand the argument for the Claimant, however, it is submitted that the Defendant Trust should have considered her case as a hybrid of conduct and capability under the fourth category, since the suggestion was being made that her reintegration would lead to dysfunction in the effective running of the service the Trust provides.

172. If that is the point which the Claimant is making, it seems to me, with respect, to be a strained construction of the words which define the fourth category. Without attempting to construe the words as though they were part of a statute, in my view it is clear that they are concerned with blameworthy conduct on the part of a doctor: "*wilful, careless, inappropriate or unethical behaviour*" which *either* may affect standards of care, *or* may create dysfunction. Here the doctor's conduct is entirely blameless. The perception of dysfunction is not one which will be "created" by her behaviour at all. The perception is that her mere presence within the department will result in a reaction *by colleagues* which will result in dysfunction. I do not accept that those responsible for drawing up MHPS, and those who negotiated on behalf of doctors in agreeing to its implementation, could possibly have had such matters in mind when considering these provisions. Nevertheless it is important to consider the way in which this aspect of the case is put in detail.

173. Counsel for the Claimant in his skeleton argument pointed to Part III of MHPS at paragraph 5:

> "*Examples of misconduct will vary greatly. The employer's Code of Conduct should set out details of some of the acts that will result in a serious breach of contractual terms and will constitute gross misconduct, and could lead to summary dismissal. The code cannot cover every eventuality. ..... Acts of misconduct may be simple and readily recognised or more complex and involved. Examples may include unreasonable or inappropriate behaviour such as verbal or physical bullying, harassment and/or discrimination in the exercise of their duties towards patients, the public or other employees. It could also include actions such as deliberate falsification or fraud.*"

174. The *Shorter Oxford English Dictionary* defines the noun 'misconduct' as '*improper or wrong behaviour*.' Any mention of 'misconduct' in ordinary speech, too, necessarily implies misbehaviour in terms of moral or professional obloquy, however venial it may be. To describe as an act of 'misconduct' a situation in which a doctor is simply rejected as a working colleague by others

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on the grounds of their perception (or misperception) of her professional standards, does not seem to me to accord with normal use of English. Where the doctor has been passed as entirely competent by the national clinical assessment service, use of the term 'misconduct' in such circumstances is wholly inappropriate.

175. Part IV of MHPS is concerned with capability. Mr Forde drew attention, however, to paragraph 8:

> "*It is inevitable that some cases will cover conduct and capability issues. It is recognised that these cases can be complex and difficult to manage. If a case covers more than one category of problem, they should usually be combined under a capability hearing although there may be occasions where it is necessary to pursue a conduct issue separately. It is for the employer to decide on the most appropriate way forward having consulted with an [NCAS] adviser and their own employment law specialist.*"

Thus, Mr Forde submitted, here there was a hybrid case arising from the communication and team-working problems reported by the colleagues of the Claimant.

176. The problem which Mr Forde faces, it seems to me, is that if the notions of conduct and capability are each taken separately, and objectively, there is simply no case against the Claimant. It does not seem logical to me to consider that, on the same evidence, some sort of case which is a hybrid of the two may exist. It is insufficient for the case to be one which is "*complex and involved*" for it to be considered as misconduct, unless there is also a concern about the conduct of the Claimant, as distinct from the conduct of her colleagues. If the behaviour characterised as misconduct *i.e.* "*unreasonable or inappropriate behaviour … towards … other employees*" is *their* behaviour rather than hers, it is surely clear that it is wrong to regard that as a case against her which involves conduct or capability issues.

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'Feasibility' and the task of the panel

177. "Feasibility" it is submitted on behalf of the Claimant is part and parcel of capability. In the course of his closing submissions Mr Forde said,

> "*The feasibility of return inevitably involves questions of capability. The panel are likely to investigate competence matters, raised as they are by the reports of the consultants who have mentioned competence concerns. Professor Shaw may accept NCAS report but the panel may not. The panel simply cannot look into breakdown without looking at the causes of that breakdown – thus it is bound to involve capability. The problem is that the Capsticks report did not address the question of whether or not views were reasonable. If the Trust acts on views which are reasonably held it is a competence issue. If the Trust acts on views which are unreasonably held that would be a breach of the implied term of trust and confidence*."

178. Mr Sutton made the fair point that these contentions did not form part of the Claimant's pleaded case. The question was whether the Trust was entitled to hold a hearing at all, not how the hearing should be conducted. He submitted that the panel should be left unfettered to decide what was and was not relevant. It is no part of the function of the court to dictate such matters.

179. The solution to such problems as these submissions raise must be that there is a reasonable expectation that the panel will conduct itself in an appropriately responsible way in approaching its quasi-judicial task. They may be expected to take a logical, step-by-step approach in accordance with their terms of reference. The following matters are, I think, uncontroversial propositions which were raised at various points in the course of the case.

180. How the panel should proceed at the hearing is a matter for their own good judgment. They will no doubt realise that the starting point from the point of view of the Trust, to whom they report, is that the conclusion reached by NCAS is that there is no question over the Claimant's capability. They will appreciate that it was the NCAS which raised the issue of a breakdown of relationships. The terms of reference required this issue to be enquired into and evidence obtained, to be presented in due time to them. Like any other responsible tribunal, they will arrive at a decision according to all the evidence placed before them by the parties which is relevant to the issue. In arriving at that decision they will be asked to consider, as a matter of objective fact, whether such a breakdown has occurred.

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181. Much may depend upon the way in which the case for the Claimant is conducted at the hearing, and (in particular) upon the way the consultants are cross-examined. It seems to me that it is entirely a matter for the panel whether it chooses to make any examination itself of the grounds for the other consultants' views in reaching a judgment upon the issues of (a) the existence of a relationship breakdown; and, if that is found to have occurred, (b) whether such breakdown is irretrievable. I am conscious of the undesirability of giving even an impression of micro-management in making these observations, and I make it clear that it is not my intention to do so. It is an objective fact that by its terms of reference the task of the panel is limited to making findings on those issues and not to making findings on any wider question of capability, which have already been settled by the NCAS report.

Dismissal for 'some other substantial reason' where the real ground is conduct or capability

182. The Trust is not permitted to dismiss under the guise of 'some other substantial reason' if the real reason for dismissal is capability or conduct. This has been referred to as "sidestepping" by Mr Forde QC in this case. It would be an impermissible circumvention of the procedures contained in MHPS. In *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust* [2009] EWHC 2360 (QB); [2010] Med. L.R. 68, a consultant general surgeon applied for an interim injunction against the respondent NHS Trust who were seeking to dismiss him. Following a number of serious untoward incidents he had been suspended from practice. The respondent Trust's disciplinary policy provided a detailed procedure for dealing with capability issues which stated that the aim was to resolve such issues through ongoing assessment and support. Another contractual provision provided that the Trust could dismiss the applicant for 'some other substantial reason.' They decided to proceed to a hearing on conduct grounds. That was postponed when the applicant contended that the capability procedure should have been followed. He was later invited to a meeting at which he was given a letter dismissing him on the basis of a loss of trust and confidence. It stated that a payment would be given in lieu of notice and that the dismissal was not by reason of misconduct or capability. The applicant submitted that most of the matters alleged by the Trust to have given rise to concern about him fell within the ambit of concerns about capability and that, as provided for in the disciplinary policy, attempts should have been made to resolve capability issues through local action before holding a hearing. The respondent Trust contended that the applicant had been dismissed for 'some other substantial reason,' and in those circumstances, the disciplinary procedure was not engaged.

183. Holroyde J. granted the application. Although the contract provided for

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termination on three months' notice, it could not have been intended that the Trust could simply ignore the express provisions concerning the disciplinary process. A loss of trust could be a sufficient 'other substantial reason' to justify the termination of a contract of employment: *Turner v Vestric Ltd* [1980] I.C.R. 528. However, the judge said that a common theme which emerged from some of the witness statements was that it was the applicant's lack of judgment and insight which gave rise to the concern about him. It was strongly arguable that a lack of judgment and insight went to his capability to perform his role as a surgeon and what was relied upon as the intelligible and proper cause for the loss of trust and confidence was actually an adverse view of the applicant's capability.

184. The judge said that the contractual provision relating to 'some other substantial reason' was a residual category for cases where there was no misconduct or capability issue. The fact that the Trust regarded the disciplinary route as applicable initially was important, and they had been unable to provide a satisfactory explanation as to why what began as a matter of capability suddenly ceased to be viewed as such. By missing out on the disciplinary procedure to which he claimed to be entitled, the applicant was entitled to submit that he had lost the opportunity to clear his name and to avoid dismissal. That was not something that could be compensated for adequately by way of damages. What the injunction would achieve was a restoration of the position where the prehearing process to consider his capability would be available to him. There was a serious issue to be tried, damages would not be an adequate remedy if an injunction were refused.

185. The contrast between that case and the instant case may be of significance. In that case the Trust had witness statements, upon which it had placed reliance, in which reference was made to the applicant's lack of insight and lack of judgment. That went to his 'capability' to perform his role as a surgeon. The GMC had temporarily restricted his practice on the ground that his fitness to practise might have been impaired which, the GMC Panel had said, "… poses a real risk to members of the public and which may adversely affect the public interest." There had been no NCAS assessment.

186. In the present case the Trust has accepted the conclusion of the NCAS report that there is no question over the Claimant's capability. It does not rely upon the statements of the witnesses who make adverse comments about capability as evidence of the truth or accuracy of those comments, but as evidence that there are potentially irreconcilable differences between the witnesses and the Claimant. Whether or not other consultants have lost confidence in the Claimant's capability is an issue which has to be approached

as a matter of fact: do the witnesses hold that belief and is it an unshakeable belief? Is there any way of persuading them to modify it? It is difficult to see how the Trust, having accepted the NCAS report, could proceed on any basis other than that it is a *mistaken* belief. Many mistaken beliefs are nevertheless genuinely held. Someone may be an entirely competent surgeon, as a matter of fact. But it may equally be a matter of fact that a number of colleagues think that he or she is incompetent. As was once observed in a very different context, the propositions 'A has a broken ankle,' and 'A thinks that he has a broken ankle,' are quite different things. Whether or not any change of mind is possible is another question.

The unfair dismissal cases

187. A dismissal by reason of an irretrievable breakdown in working relationships is capable of providing 'some other substantial reason' for terminating an employment contract fairly for the purposes of s.98 Employment Rights Act 1996 provided that the employer has taken all reasonable steps to resolve matters before resorting to dismissal: *Turner v Vestric Ltd*. [*supra*]

188. In *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 the issue was whether a doctor could, in accordance with the terms of his contract, be dismissed by reason of the existence of a breakdown in working relationships, as distinct from who might be said to be responsible for that state of affairs. The EAT (Keith J presiding) held (at paragraph 58):- "…the fact is that the Whitley Council terms only apply when it is the employee's conduct or competence which is the real reason for why the action was taken against him. Although as a matter of history Mr Ezsias' conduct was blamed for the breakdown, the tribunal's finding in the present case was that his contribution to that breakdown was not the reason for his dismissal. We do not suppose that those who were responsible for negotiating the Whitley Council terms had this in mind, but the fact is that the Whitley Council terms do not apply to cases where, even though the employee's conduct caused the breakdown of their relationship, the employee's role in the events which led up to that breakdown was not the reason why action was taken against him. We have no reason to think that employment tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of 'some other substantial reason' as a pretext to conceal the real reason for the employee's dismissal."

189. On a renewed application in open court by counsel for permission to appeal in that case: [2011] EWCA Civ 1440, Mummery LJ said, at paragraph

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> "The main point which [counsel] has made is that there was an error in the employment tribunal's analysis and categorisation of the case in a way which, he submitted, would enable employers unlawfully to avoid putting in train applicable contractual disciplinary procedures to which a person in the position of the applicant would be entitled. ....
>
> "8. .... [Counsel] has focused on the word 'behaviour', and what he says occurred here was that the applicant's 'behaviour' was singled out as a cause of the breakdown in relationships of the department between the various colleagues of the applicant and that that was behaviour which triggered the disciplinary procedure, which the applicant was entitled to have applied to him in relation to criticisms of his behaviour."

190. Mummery LJ said that it had been submitted that the legal error was the acceptance that 'some other substantial reason' was a correct or proper categorisation of the case, when what was being criticised was the applicant's behaviour. Once his behaviour has been criticised, it was submitted, that engaged the disciplinary procedure, which had not been used, and therefore there was an error of law by the tribunal: they should have found that some other substantial reason was *not* a proper categorisation because the proper contractual steps had not been followed in the way that was provided for in the disciplinary procedure. Counsel's main point in that case was that this reason should not extend to a dismissal in circumstances,

> " 21 ... where there is a clear contractual route for the parties to follow or in a way that becomes a convenient device for employers to undermine contractual rights -- what I have called 'sidestepping'. It would obviously be wrong, and I agree with [counsel] on this, for an employer in a case to which the contractual disciplinary procedure applied to seek to sidestep it by categorising allegations of personal professional misconduct as some other substantial reason ....,

191. The tribunal had found as a fact that the reason for dismissal was not a conduct reason. The 'other substantial reason' was the *objective fact* of the breakdown of relationships in the department. That is all the tribunal were obliged to look at: was that a potentially fair reason?

> "26. .... In my view what [counsel]'s submission seeks to do is to go behind that reason to what I have mentioned to him as the reasons for the reason, saying '*ah, it was not so much the breakdown, it is the fact that they were criticising the conduct of Mr Ezias as the reason for the breakdown, he was the cause of the breakdown,*' but, in my view, that is not a correct analysis of the way in which the law of unfair dismissal works. For a

dismissal to be fair an employer must have a potentially fair reason. A potentially fair reason may be a conduct reason. That has not been relied on in this case. A potentially fair reason is the residual category of 'some other substantial reason'."

192. This case is not an unfair dismissal case. Whether a prospective reason for dismissal is potentially fair or otherwise is irrelevant. Considerations of fairness and reasonableness are not the appropriate tests, absent bad faith. I have made my findings of fact as to those matters. The anticipated 'other substantial reason' in the Claimant's case is the *objective fact* of the breakdown of relationships in the department.

193. At times it did appear to me that Mr Forde seemed to be seeking to go behind that reason to what Mummery LJ in *Ezsias* called 'the reasons for the reason.' If that was what Mr Forde was seeking to do, such a reasoning process may have its own internal logic, but, from the point of view of the Trust, in considering the exercise of its contractual rights and obligations, it does not cast doubt upon the objective fact that there is evidence of an *apparent* breakdown of relationships in the department. In view of the history of the matter, the Trust's proper concern is to enquire into that, to deal with the extent of the breakdown, to see if it is remediable, and to ensure that the department is not adversely affected by it in providing its service to the public. Attribution of the cause of the problem to a competence concern involving Miss Kerslake would only restart a circular argument which could never be settled. The obligation of the Trust as employers must be to examine the extent to which it may be possible to resolve the differences which have led to the breakdown, and, if that is not possible, to make a decision as to how to bring the matter to a conclusion in the best possible way.

The implied term of trust and confidence generally

194. The following propositions of law were agreed between the parties:

(1) It is an implied term of every contract of employment that the employer will not without reasonable or proper cause conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence: *Malik v B.C.C.I.* [1998] AC 20.

(2) Where a contract of employment provides an employer with a *prima facie* unlimited discretion, it will be regarded as subject to an implied term that it will be exercised genuinely and rationally: *Horkulak v Cantor Fitzgerald*

International [2005] ICR 402.Thus, it is common ground that, to the extent that any of the procedural steps in MHPS or the Trust's Investigation Policy confer discretion on the Defendant, any such discretion is to be exercised in accordance with the term of trust and confidence implied into every contract of employment, and in a manner that is rational and is not capricious.

(3) It is an implied term in the contract of employment that MHPS is to be followed in respect of any matter of capability or conduct unless the Trust can show a good reason not to: *Lakshmi v Mid Cheshire Hospitals NHS Trust* [2008] IRLR 956.

195. In the light of the observations on classification above, and in particular the fact that NCAS had raised the question as a matter to be addressed by the Trust, it follows that in my view the decision to undertake an investigation into relationship breakdown did not breach the implied term of trust and confidence.Nor did the decision breach the implied term to follow MHPS. It was not a matter of conduct, capability or ill health. The Trust had positively concluded on the basis of the evidence that it had no concerns as to any of these matters.

196. The manner in which the investigation was undertaken was not such as to amount to a breach of the implied duty of mutual trust and confidence. I am satisfied that the investigator acted in good faith. The omission of in-depth enquiries as to the reasons for adverse views on capability (the lack of 'drilling-down' as it was described in argument) was entirely understandable given (a) the terms of reference (to find out whether such adverse views were held in fact, and if so, how extensively) and (b) the fact that the investigator was a layman. (The proposed panel will include an external medical practitioner.)

197. Nor, in my view, did the decision to convene the meeting of a panel to consider the possibility of whether the Claimant's employment should be terminated breach the implied term of trust and confidence: as Professor Shaw had expressly pointed out in correspondence, one possible outcome of the hearing following the investigation which was expressly contemplated by the Trust was a positive one in favour of the Claimant. It is to be noted that the views reported by Capsticks' investigator were by no means all adverse. Some significant individuals spoke very well of relationships with the Claimant. Moreover the Trust has agreed to adequate procedural safeguards, including appropriate representation. Everything will be done in the open, and reasons will have to be given for any decision. Thus it could not possibly be said that the decision to convene the meeting struck at the root of the contract.

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The Claimant's alternative case.

198. The Claimant submits that her contract was also subject to two further implied terms:

(1) That the Defendant would afford her substantive rights and protections equivalent to those provided for in the NHS Directions and Guidance to NHS Trusts and employers, so that, if the matters alleged against her are outwith the definitions of conduct or capability (or a hybrid of the two) any investigation and hearing should be equivalent to those provided for in the National Health Service's own Directions and Guidance to NHS Trusts and employers. (I shall call this for brevity the "equivalent level of protection" point.)

(2) That disciplinary processes be conducted fairly and without undue delay.

199. The second of these further propositions is not controversial. The Claimant attributes it to, and it undoubtedly derives in part at least, from the judgment of Slade J in *Lim v Royal Wolverhampton Hospitals NHS Trust* [2011] EWHC 2178.

200. Further proposition (1) is less clearly rooted in authority. Mr Sutton submitted that there is no actual authority for it at all. Mr Forde developed the point by asking how would it be logical for a practitioner facing proceedings resulting from an alleged breakdown in professional relationships, which may culminate in dismissal, to be provided with a lower level of procedural safeguards than if the allegation were incompetence or misconduct? It is illogical, he submits, that the Claimant may be entitled to extensive procedural safeguards if a problem is defined by an employer as concerning conduct or capability but may not have the same procedural safeguards, if the problem is said by the employer to be a breakdown of trust and confidence.

201. The phraseology used in both the pleading and in argument may have some significance. In the pleading it is put as follows:

> "*… it is a breach of the implied term of trust and confidence to fail to afford the Claimant substantive rights and protections equivalent to those provided for in the NHS Directions and Guidance …*"

[Particulars of Claim para. 120: identical terms used at para.123]

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In argument, some of the phrases used by counsel for the Claimant included the following:

> *"The Claimant's secondary position is the use of the implied term of trust and confidence which should afford her exactly the same protection to that afforded in MHPS."*
>
> *"… in circumstances where the employer seeks to commence proceedings relying on the implied breach of trust and confidence the employee must be afforded by dint of the same implied term the same degree of protection as MHPS…."*
>
> *"In circumstances in which the Defendant was seeking to operate the implied term the Claimant was entitled to parallel protection by means of the implied term of trust and confidence. "*

202. In the case of *Kulkarni* (*supra*) the claimant, had brought proceedings seeking a declaration that the Trust was acting unlawfully and in breach of contract. Dismissing the claim, the judge concluded that, in the light of the express term in the defendant's disciplinary policy which prevented legal representation and which was part of the claimant's contract of employment, there was no room for an implied term providing a discretionary right to be so represented, and that the refusal to allow legal representation did not amount to a denial of natural justice. On appeal, it was held, allowing the appeal, that in construing a contractual term, the court had to decide objectively what it meant, and that was what a reasonably informed neutral onlooker would have thought it meant. If the practitioner happened to have a spouse, partner, colleague or friend who was legally qualified and who was prepared to represent him or her, that was permitted. Such a representative would be entitled to do all the things that lawyers did when representing clients, so that the expression in the policy relied on by the Trust 'not representing the practitioner formally in a legal capacity' was devoid of meaning. Accordingly, the claimant was contractually entitled to be represented at his disciplinary hearing by a lawyer instructed by his defence organisation.

203. An examination of the judgment of Smith LJ in *Kulkarni*, with which Sir Mark Potter P, and Wilson LJ, agreed, might lead one to the view that the "equivalent level of protection" point raised on behalf of the Claimant has its roots in a concession made by counsel for the Secretary of State for Health in argument before the Court of Appeal when counsel was asked about the distinction between procedural provisions in Part III of MHPS (misconduct) and those in Part IV dealing with capability. Part III made no reference to the

rights of a doctor to be accompanied or to be represented at a disciplinary hearing concerning conduct. Part IV provided that a practitioner at a disciplinary hearing concerning capability might be represented by someone who was legally qualified, but it stated that such a representative would not 'be representing the practitioner formally in a legal capacity.' Smith LJ said:

> "48. … we sought Miss Lee's submissions [*Miss Lee was counsel for the Secretary of State*] on the absence of any express provision as to representation in Part III of MHPS which dealt with misconduct hearings and the presence of quite detailed express provisions in Part IV in respect of a capability hearing. Miss Lee accepted that it would be illogical to provide the practitioner facing misconduct proceedings <u>with a lower level of protective representation</u> than one facing capability or health proceedings. [*Counsel for the Trust*] also accepted that and I agree that that must be correct. It follows that para. 22 of Part IV [*allowing* representation] must be taken to apply to all types of proceedings." [*Underlined emphasis added.*]

204. In that case, therefore the concession was made, and approved by the Court of Appeal as correctly made, that equivalent procedural safeguards must be provided in both conduct hearings on the one hand and capability hearings on the other. That was matter of construction of an express term of the contract, as Smith LJ made clear at paragraphs 57-61:

> "57. The task of the court when construing a contractual term is to decide objectively what it means. Here, the contractual term is that set out in the Trust's own disciplinary policy. However, where the employed person is a doctor …, the provisions of that policy must be consistent with MHPS…..
>
> "58. What it means is what the parties must, objectively considered, be taken to have agreed. The subjective wishes and intentions of the parties are not relevant but the court can taken into account all the surrounding facts and circumstances."

205. Smith LJ went on to consider (in observations which she expressly stated at paragraph 63 were *obiter*) whether it might be lawful for an employer to restrict an employee's procedural rights (in that case of legal representation) as a matter of natural justice in purely domestic law or under Article 6 of the ECHR.

206. In dealing with this she said:

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"64. In *Le Compte v Belgium* [1981] 4 EHRR the appellants, who were medical practitioners had faced disciplinary proceedings before the Belgian *Ordre des médecins,* as a result of which they were suspended from practice. Dr Le Compte had defied the suspension; criminal proceedings followed and he was imprisoned and fined. The applicants appealed to the ECHR alleging *inter alia* that the disciplinary proceedings had not been Article 6 compliant. The Court said that Article 6 rights were not usually engaged in disciplinary proceedings but that they could be in some circumstances. What those circumstances might be was not explained. In the present case, the right to practise medicine was a civil right and article 6 was engaged.

"65. It appears to me that the distinction which the court was drawing was that, in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, article 6 would not be engaged. However, where the effect of the proceedings could be far more serious and could, as in that case, deprive the employee of the right to practise his or her profession, the article would be engaged.

"66. The difficulty is to know where to draw the line. [Counsel for the Trust and for the Secretary of State] both submitted that Dr Kulkarni was facing ordinary disciplinary proceedings brought by his employer and the only effect, if the charge were found proved, would be that he would lose his job. Only proceedings before the General Medical Council can deprive a doctor of the right to practise. But, as [counsel for Dr Kulkarni] pointed out, the National Health Service is, to all intents and purposes, a single employer for the whole country. .... If Dr Kulkarni is found guilty on this charge he will be unemployable as a doctor and will never complete his training. If he applies for any other position he will be obliged to declare the finding against him and the fact of his dismissal. Moreover, submitted [counsel for Dr Kulkarni], it is highly likely that the system of 'alert letters' would be operated in this case if Dr Kulkarni were found guilty. An alert letter is a letter warning other NHS employers not to employ the doctor named, who is regarded as presenting an unacceptable risk to patients. The alert letter procedure is currently governed by the Healthcare Professionals Alert Notice Directions 2006.

"67. It seems to me that there is force in [counsel for Dr Kulkarni]'s submission and, had it been necessary for me to make a decision on this

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issue, I would have held that Article 6 is engaged where an NHS doctor faces charges which are of such gravity that, in the event they are found proved, he will be effectively barred from employment in the NHS."

207. Although no issue arose in the instant case over whether a disciplinary or dismissal process engaged the Claimant's civil rights under Article 6 of the ECHR, a point was made that,

> "… *she had a legitimate expectation that she could be afforded the procedural safeguards provided by MHPS and the Trust's own policies. The Claimant draws attention to the fact that MHPS was specifically drafted and agreed with employees' Article 6 Convention rights in mind. Indeed such rights are specifically referred to in MHPS Part II, Paragraph 13*."

(Claimant's Skeleton Argument for opening at paragraph 87.)

208. The observations of Smith LJ in *Kulkarni* were relied upon in the case of *Mattu,* in which a point was expressly raised that a dismissal process engaged Dr Mattu's civil rights under Article 6. So far as it is relevant in the instant case, Dr Mattu's argument on the point was as follows. In practice the effect of the decision to dismiss him meant that he would be unable to obtain any other job whether in the public or private sector. This amounted to a determination of his right to work in his chosen profession. That right was engaged where the decision of the employer in practice had the effect of depriving the employee of that right, even though the decision to dismiss only directly affects employment in a particular post: see the observations of Smith LJ in *Kulkarni* at paragraph 66 of the judgment. Article 6 applies where there is a determination whether a person can lawfully be deprived of the right to practise in his chosen profession.

209. In his judgment in *Mattu,* Elias LJ said that, as a matter of fact, he did not accept that dismissal rendered Dr Mattu unemployable, and thus he did not accept the fundamental premise on which the Article 6 argument depended. However, he went further, and explained why in his view the whole Article 6 point in such circumstances was unsound. Essentially he held that employers, be they public authorities or private concerns, in disciplinary or dismissal procedures were simply not 'determining' any 'civil right': and thus Article 6 (the essential premise of which was "[i]n the determination of his civil rights ….") could not be engaged. *Contractual rights* were in issue, and such rights could be civil rights, but the employer was not 'determining' the employee's rights in the judicial sense at which Article 6 was aimed. The employer was not purporting to act as a judge: he was "… asserting a right rather than

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determining it." Moreover, the ECHR cases which established that Article 6 applied to the right to exercise a profession were concerned with decisions by bodies which directly regulated such rights (such as the GMC.)

210. The observations in the case of *Kulkarni,* which Elias LJ described as the 'lynch-pin' of Dr Mattu's argument, and those in a subsequent decision of the Supreme Court (*R (G) v Governors of X School* [2011] ICR 1033) which did not disapprove *Kulkarni,* appeared to have "simply assumed without argument that rights were being determined by the employer." For these reasons, amongst others, Elias LJ and Stanley Burnton LJ considered the observations in *Kulkarni* unsound.

211. Sir Stephen Sedley, in his judgment dissenting in the result, did not agree with all the reasons given by the other members of the court for holding that Article 6 was not engaged, but he said at paragraph 131: "The reason why article 6 has no present application is uncomplicated. An employer which dismisses an employee, without or with the benefit of a formal hearing, is not determining the employee's civil rights. It is exercising a contractual power. Depending upon the process adopted and its outcome, two civil rights may then come into play: the common law right not to be unlawfully dismissed and the statutory right not to be unfairly dismissed. For the determination of each of these the state provides an independent and impartial tribunal. It is required to do the same in respect of bodies empowered to truncate the practice of an individual's profession; but the present respondent is not such a body."

212. In the instant case, if it is found that the professional relationship between the Claimant and a significant proportion of her consultant colleagues in the Obstetrics and Gynaecology department has irretrievably broken down, the Claimant may face dismissal from her post with the Trust for that reason. She faces, in those circumstances, the unwelcome prospect of loss of what Smith LJ had called in the passage cited above from her judgment in *Kulkarni* 'a specific job'. That is not the same as a case in which the effect of the proceedings is to '*deprive the employee of her right to practise … her profession….*'

213. Smith LJ went on to consider circumstances in which a doctor facing what counsel in that case called 'ordinary disciplinary proceedings' might be effectively deprived of the right to practise his or her profession. Counsel for Dr Kulkarni pointed out that, whether or not the matter came before the GMC, which is the ultimate authority on fitness to practise, if his client was found guilty of the charge before the Trust's disciplinary committee, the NHS is to all intents and purposes a single employer for the whole country, and so Dr Kulkarni would be unemployable as a doctor and could never complete his training. Smith LJ accepted the force of those submissions.

214. Whatever may be said about the impact of a decision to dismiss the Claimant (and I must make it clear that I realise that despite the undoubted fact that she has been found to be blameless in terms of professional competence by NCAS, dismissal on the ground of a breakdown of relationships would be a very heavy blow for her personally and professionally) she would not, as a result, be barred from other employment in the NHS. NCAS having assessed her as entirely competent, and her own present employers accepting that, she is in no sense in the position of a doctor who has been found to be guilty of serious misconduct or of incompetence. Moreover, she has demonstrated to the satisfaction of NCAS that she is entirely capable of sustaining good working relationships with other professional colleagues. Thus any decision based upon a breakdown of relationships at Northwick Park is one which can only be seen in that strictly limited context.

215. The equivalent level of protection point seems to derive, in terms of logic, from the perception of a need for equal procedural treatment in dealing with concerns over conduct on the one hand and of capability on the other. In MHPS each of those is of equal importance. The consequences for an NHS practitioner, in particular, of an adverse finding of either of the two against him or her are equally grave. It may render the practitioner permanently unemployable. Mr Forde asked rhetorically why it would be logical for a practitioner facing proceedings which may culminate in dismissal for a breakdown in relationships to be provided with a lower level of procedural safeguards. One answer might be that such a dismissal (were it to occur) would be no reflection on the practitioner's conduct or capability, and no bar whatsoever to re-employment within the NHS.

216. Whether such a point is correct or not, I do not accept that the implied term of trust and confidence in the circumstances in this case can be relied upon by the Claimant to create an equivalent set of procedural safeguards to those in MHPS Part IV in respect of matters which are not matters of conduct and capability. The contractual duty which the implied term of trust and confidence places upon the Trust is not to act in any way which is calculated to destroy or seriously damage the employment relationship without reasonable or proper cause: see the cases of *Malik & Mahmud* [1998] AC 20 and *Bournemouth University Higher Education Corpn v Buckland* [2011] QB 323. In my view it is a distortion of reality for it to be suggested that the investigation and proposed hearing in the circumstances of this case strike at the root of the contract of employment in such a way.

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Conclusions on the alternative case for the Claimant

217. My conclusions upon the alternative case based on the implied term of trust and confidence, and the equivalent level of protection point, are as follows.

(1) The implied term of trust and confidence requires that the Defendant Trust in its dealings with the Claimant in investigating the suggested breakdown in relationships act in good faith, with reasonable promptitude, and not capriciously or whimsically, or unreasonably in a *Wednesbury* sense. A deliberate attempt to avoid MHPS-compliant procedures, if the Trust truly believed they applied, would have amounted to a breach of the implied term. Such conduct would strike at the root of the contract of employment. No such breach has been shown on the evidence in this case.

(2) Any discretion given to the Defendant Trust is to be exercised in accordance with the implied term of trust and confidence, in a manner that is rational and is not capricious. It has done so.

(3) It is an implied term in the contract of employment that MHPS is to be followed in respect of any matter of capability or conduct unless the Trust can show a good reason not to do so.

(4) The implied term of trust and confidence does not require any particular form of investigation into an issue between the Claimant and the Defendant if it is not one of conduct and capability, and the implied term cannot be relied upon to require the same form of procedure to be employed by the Defendant as if it were a conduct and capability matter.

(5) As a matter of reality, the adverse resolution either of a conduct investigation, or of a capability investigation, frequently if not invariably has effects which go far beyond the loss of the specific post in question. Any purported distinction between conduct hearings and capability hearings is thus a distinction without any difference in substance, and accordingly there should be no significant procedural difference.

(6) The 'equivalent level of protection' point and the 'reading over' of procedural safeguards between Parts III and IV of MHPS in *Kulkarni* should not be further extended to concerns which an employer has to investigate which are *not* matters of conduct and capability, and which

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cannot result in a formal finding of misconduct or incompetence: there are obvious differences which are of substance.

(7) I have already found that the Trust acted in good faith, and that the Trust has not acted capriciously, whimsically or unreasonably in a W*ednesbury* sense.

Exclusion

218. On 23rd December 2011 [trial bundle v.1/260] Mr Nettel wrote to the solicitors acting for Miss Kerslake stating that,

> *"I understand that the investigation is now complete."*

He referred to Professor Shaw's absence on leave and to Miss Kerslake's 'placement' at Ealing ending on 31st December 2011. He went on to say,

> *"However, in light of the on-going investigation* [sic] *she will not be required to attend work pending Professor Shaw's decision on the next steps. She will of course be entitled to full pay .... This is an interim measure and does not constitute a formal sanction. If Miss Kerslake wishes to attend at the Trust please can she ensure that she contacts Professor Shaw for his permission to do so."*

A further letter from Mr Nettel to the solicitors dated 11th January 2012 referred to the "*on-going process*" but repeated the statement that Miss Kerslake "*will not be required to attend wor*k" and that this was "*an interim measure*".

219. In view of the large measure of agreement as to the facts of the case, I asked more than once at the hearing that the parties should identify any issue which might require a finding of fact. It appears that an oversight occurred over one point, and I gave directions that a further hearing should be convened to deal with it if it were not capable of agreement. However, in a note of agreed facts submitted by counsel for both parties to the Court (following confidential disclosure to the parties on 8th June 2012 of the unapproved judgment in draft form,) it is stated that, on 7th March 2012, Professor Shaw wrote to the Claimant to inform her that the Trust would be investigating the separate matter of the Ealing SUI to determine whether there were any concerns about the Claimant's conduct or capability arising from that incident. The Claimant was informed that the Trust would consider whether to exclude her for the purposes of that investigation if the need to exclude her in respect of the breakdown in working relationships were to fall away.

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220. It is further agreed that a Board Member has been appointed since 7th March 2012 to oversee the process of the Ealing SUI investigation. The Claimant would be entitled to make representations about any formal exclusion to that designated Board Member. In compliance with the procedural regime in MHPS Part II the Trust Board has continued to be regularly informed of the Claimant's exclusion from work.

221. The Claimant submits that the exclusion resulting from Mr Nettel's letters was plainly an informal exclusion from work. It is in clear breach of MHPS Part II, which deals with exclusion. In paragraph 1 the provisions of Part II are expressed to be mandatory. Paragraph 29, as already mentioned, specifically prohibits informal exclusion:

> "*29. No practitioner should be excluded from work other than through this new procedure. Informal exclusions, so-called 'gardening leave' have been commonly used in the recent past. No NHS body may use 'gardening leave' as a means of resolving a problem covered by this framework.*"

222. Other relevant provisions of Part II of MHPS are as follows:

> "*4. When serious concerns are raised about a practitioner, the employer must urgently consider whether it is necessary to place temporary restrictions on their practice. This might be to amend or restrict their clinical duties, obtain undertakings or provide for the exclusion of the practitioner from the workplace.*
>
> *5. Exclusion of clinical staff from the workplace is a temporary expedient. Under this framework, exclusion is a precautionary measure and not a disciplinary sanction. Exclusion from work ("suspension") should be reserved for only the most exceptional circumstances.*
>
> *6. The purpose of exclusion is: …to protect the interests of patients or other staff; and/or to assist the investigative process when there is a clear risk that the practitioner's presence would impede the gathering of evidence.*
>
> …
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> *14. An immediate time limited exclusion may be necessary for the purposes identified in paragraph 6 above following: a critical incident when serious allegations have been made; or there has been a breakdown in relationships between a colleague and the rest of the team; or the presence of the practitioner*

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is likely to hinder the investigation. Such an exclusion will allow a more measured consideration to be undertaken. This period should be used to carry out a preliminary situation analysis, to contact the [NCAS] for advice and to convene a case conference. The manager making the exclusion must explain why the exclusion is being made in broad terms (there may be no formal allegation at this stage) and agree a date up to a maximum of two weeks away at which the practitioner should return to the workplace for a further meeting. The case manager must advise the practitioner of their rights, including rights of representation.

15. A formal exclusion may only take place after the case manager has first considered whether there is a case to answer and then considered, at a case conference, whether there is reasonable and proper cause to exclude. The [NCAS] must be consulted where formal exclusion is being considered. If a case investigator has been appointed he or she must produce a preliminary report as soon as is possible to be available for the case conference. This preliminary report is advisory to enable the case manager to decide on the next steps as appropriate.

16. The report should provide sufficient information for a decision to be made as to whether: … the complexity of the case warrants further detailed investigation before advice can be given on the way forward and what needs to be inquired into.

17. Formal exclusion … must only be used where …. there is a need to protect the interests of patients or other staff pending the outcome of a full investigation of … concerns about serious dysfunctions in the operation of a clinical service -… or … the presence of the practitioner in the workplace is likely to hinder the investigation.

18. Full consideration should be given to whether the practitioner could continue in or (in cases of an immediate exclusion) return to work in a limited capacity or in an alternative, possibly non-clinical role, pending the resolution of the case.

….

24. Practitioners should not be automatically barred from the premises upon exclusion from work. Case managers must always consider whether a bar from the premises is absolutely necessary. There are certain circumstances, however, where the practitioner should be excluded from the premises. This could be, for example, where there may be a danger of tampering with evidence, or where the practitioner may be a serious potential danger to patients or other staff. In other circumstances, however, there may be no reason to exclude the

practitioner from the premises. The practitioner may want to retain contact with colleagues, take part in clinical audit and to remain up to date with developments in their field of practice or to undertake research or training."

223. As I understand the position of the parties on this point, it is accepted that Part II of MHPS is incorporated into the contract of employment. In my view it is clearly contractual. It is also accepted that there has been no formal exclusion in accordance with the provisions set out above. Part II is not solely concerned with conduct and capability: the wording of paragraphs 14 and 17, for example, makes it clear that it is applicable in cases of relationship breakdown or where there is a need to protect the interests of patients or other staff pending the outcome of an investigation into concerns about serious dysfunctions in the operation of a clinical service. Concern about the investigation being hindered did not arise, as the investigation had been concluded.

224. The Defendant accepts that any formal exclusion of the Claimant would have to be dealt with in accordance with the provisions of Part II MHPS, which encompasses an exclusion to protect the interests of patients or staff in the event of concerns about serious dysfunction of a clinical service.

225. It is accepted that Mr Nettel on behalf of the Trust "… asked the Claimant to stay away from work …" from 11 January 2012, but it is not accepted that that amounts to informal exclusion. The basis for that stance is not clear. Any employer '*asking an employee to stay away from work*' on a temporary basis, on full pay, is obviously asking him or her to take what is commonly called 'gardening leave.' That is what MHPS, which applied to the situation, expressly prohibited.

226. Various proposals were made in correspondence inviting the Claimant to discuss alternatives for a return to work away from the department. When I asked during the hearing about the level of the duties which were involved it became clear that they were not at the level of a Consultant Surgeon. The reality disclosed at trial was that what was proposed as alternative work lacked any real substance. The suggestion that the informal exclusion was not an exclusion at all as the Claimant could have returned to work at any time with the Trust (albeit not in her former department) but did not take up the offers of work is therefore one which also lacks substance.

227. The Trust's alternative defence is that if, which they deny, the Claimant

was excluded, her exclusion was clearly justified given the serious concerns about dysfunction within the clinical team and the implications for patient safety. The Claimant herself in evidence accepted that she could not have returned to the same department under the same clinical management until the "breakdown" issue was resolved, and she had made that clear. In those circumstances, if, which I doubt, there was any need for her to be excluded on the ground of patient safety arising from concern over dysfunctional problems which might result from her attempting to rejoin the clinical team before the panel hearing, then the Trust should have taken steps formally to exclude her, which would have involved making further contact with NCAS, as provided by paragraph 15.

228. It follows, in my judgment, that the Claimant has been informally excluded from work from 11th January 2012 to date, in breach of her contract of employment, by reason of the Trust's failure to observe certain of the stipulated procedural requirements for formal exclusion set out under Part II MHPS. Any award of damages would be necessarily modest, but there is no clear guidance to be found as to the measure of such damages. The Claimant remains in receipt of full pay. Damages are in my view not an adequate remedy for the breach of contract, and I see no reason for refusing her the declaration she seeks in this respect, although, for the reasons I have given the remainder of her claim fails.