Neutral Citation Number: [2021] EWCA Civ 1791

Case No: A2/2021/1211

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION

Mrs Justice Thornton

[2021] EWHC 1474 (QB)
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/11/2021

Before :

LORD JUSTICE UNDERHILL

(Vice-President of the Court of Appeal (Civil Division))

LORD JUSTICE SINGH

and

LADY JUSTICE ELISABETH LAING

- -

Between :

SASHA BURN — **Claiman** / **Appella**

- and -

ALDER HEY CHILDREN'S NHS FOUNDATION TRUST — **Respond**

- -

- -

Betsan Criddle and Benjamin Jones (instructed by the **Medical Protection Society**) for the **Claimant**

Simon Gorton QC (instructed by **Weightmans LLP**) for the **Respondent**

Hearing date: 21 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be

Tuesday 30 November 2021 at 10:30am

Lord Justice Underhill :

INTRODUCTION

1.
The Claimant in these proceedings, who is the Appellant before us, is a consultant paediatric neurosurgeon employed by the Respondent, the Alder Hey Children's NHS Foundation Trust ("the Trust"). She was the consultant with responsibility for the care of a child to whom I will refer as A between 1 and 4 December 2017. On the evening of Sunday 3 December a surgical fellow, Dr Marnet, performed an operation to drain fluid from A's brain. Unfortunately A's condition deteriorated and a further operation had to be performed in the small hours of the following morning. The Claimant, as the consultant on call, was in communication with the surgeon by text and phone but did not come in to the hospital. A few days later A died.

2.
In early 2020 the Trust commenced a formal investigation into, among other things, the Claimant's clinical decision-making in relation to A's care. The investigation was conducted in accordance with its policy Handling Concerns about Conduct, Performance & Health of Medical & Dental Staff ("the Policy"). The Claimant was restricted from all clinical duties pending its outcome.

3.
A dispute has arisen about whether for the purpose of her participation in that investigation the Claimant should be supplied with copies of certain documents in the possession of the Trust. Most regrettably, the parties have been unable to resolve that dispute, and in December last year the Claimant commenced proceedings in the High Court seeking an injunction restraining the Trust from concluding the investigation until she had been given "the opportunity to be interviewed having had sight of all documents related to the investigation", together with an injunction requiring the disclosure of all such documents and a declaration as to her contractual rights.

4.
The investigation remains on hold, and the Claimant remains restricted from clinical duties, pending the outcome of these proceedings.

5.
A speedy trial was directed and took place before Thornton J over three days at the end of April this year. By a clear and thorough judgment handed down on 18 June she dismissed the claim. This is an appeal against her decision, with permission granted by Bean LJ.

6.
The Claimant has been represented before us by Ms Betsan Criddle, leading Mr Benjamin Jones, and the Trust by Mr Simon Gorton QC. Both Ms Criddle and Mr Gorton appeared below.

THE CONTRACT AND THE POLICY

7.
Clause 17 of the Claimant's contract of employment states that if issues relating to conduct, competence and behaviour cannot be dealt with informally they will be resolved "through our disciplinary or capability procedures".

8.

It is common ground that the “procedures” referred to in clause 17 include the Policy. As its title makes clear, the Policy covers the whole range of potential concerns about a practitioner’s conduct or performance. Section 1 – “Action when a Concern Arises” – provides for an initial investigation of concerns raised. That investigation may lead to the restriction of the practitioner’s practice or their exclusion from work pending a final decision (section 2) and to one of three types of formal procedure which may lead to consequences for their employment: which procedure will be followed depends on whether the concerns arise from “conduct and disciplinary matters” (section 3), “issues of capability” (section 4) or ill-health (section 5). The procedures under sections 3 and 4 involve a full hearing before a panel at which a practitioner will typically give evidence and have the opportunity to cross-examine the Trust’s witnesses on any disputed issues of fact.

9.
The present case concerns the initial investigation stage. I can summarise the relevant provisions of section 1 as follows. Para. 1.6 provides that wherever the investigation relates to a “potentially serious concern”, including one where there has been an adverse effect on patient care, the Trust must appoint a “Case Manager”, who in the case of a consultant will be its Medical Director. The Case Manager will assess the nature of the concern and its seriousness, on the basis of the existing information, and decide “whether an informal approach can be taken to address the problem, or whether a formal investigation will be needed” (para. 1.12).

10.
The provisions governing the formal investigation, if that is the route decided on, are at paras. 1.13-1.20, which are headed “The Investigation”. Para. 1.13 requires the Case Manager to appoint a “Case Investigator”. The duties of the Case Investigator are set out under a number of bullets in para. 1.14, but the only one to which I need refer is the fourth, which requires them to “avoid breaches of confidentiality so far as possible” and to “approach the practitioner concerned to seek views on information that should be collected”. Para. 1.15 makes it clear that the Case Investigator does not make any decision as to what action should be taken at the conclusion of the investigation: that is a matter for the Case Manager (see para. 1.20, which I set out below).

11.
The provision which is central to this appeal is para. 1.16. It reads:

“The practitioner concerned must be informed in writing by the Case Manager, as soon as it has been decided, that an investigation is to be undertaken, the name of the Case Investigator and made aware of the specific allegations or concerns that have been raised. The practitioner must be given the opportunity to see any correspondence relating to the case together with a list of the people that the Case Investigator will interview [my emphasis]. The practitioner must also be afforded the opportunity to put their view of events to the Case Investigator and given the opportunity to be accompanied.”

12.
The remaining paragraphs of section 1 read, so far as material:

“1.17. At any stage of this process – or subsequent disciplinary action – the practitioner may be accompanied in any interview or hearing by a companion. In addition to statutory rights under the Employment Act 1999, the companion may be another employee of the NHS body; an official or lay representative of the British Medical Association, British Dental Association or defence organisation; or a friend, partner or spouse. The companion may be legally qualified but he or she will not be acting in a legal capacity.

1.18. The Case Investigator has discretion on how the investigation is carried out but in all cases the purpose of the investigation is to ascertain the facts in an unbiased manner. Investigations are not intended simply to secure evidence against the practitioner as information gathered in the course of an investigation may clearly exonerate the practitioner or provide a sound basis for effective resolution of the matter.

1.19. If during the course of the investigation it transpires that the case involves more complex clinical issues than first anticipated, the case manager should consider whether an independent practitioner from another NHS body should be invited to assist.

1.20. Wherever possible, the Case Investigator should complete the investigation within 4 weeks of appointment and submit their report to the Case Manager within a further 5 days. The report of the investigation should give the Case Manager sufficient information to make a decision whether:

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

•
Restrictions on practice or exclusion from work should be considered

•
There is a case of misconduct that should be put to a conduct panel; (see Section 3)

•
There are intractable problems and the matter should be put before a capability panel; (see Section 4)

•
There serious concerns about the practitioner's health that should be considered by the Trust's occupational health service; (see Section 5)

•
There are serious concerns that should be referred to the GMC or GDC;

•
No further action is needed."

(The NCAS is the "National Clinical Assessment Service", which is the arm of the NHS which assists Trusts with issues about professional competence. The GMC and GDC are the General Medical Council and the General Dental Council.)

13.
The Procedure is adopted verbatim (at least so far as concerns the provisions with which we are concerned) from the Department of Health's document Maintaining High Professional Standards in the Modern NHS ("the MHPS"). The background to the introduction of the MHPS is explained in the judgment of Lord Hodge in Chhabra v West London Mental Health NHS Trust[2013] UKSC 80, [2014] ICR 194, at paras. 3-8 (pp. 196-198), and I need not give details here.

THE DOCUMENTS IN ISSUE

14.
As appears from the terms of the relief sought, it is the Claimant's case that she is entitled to see "all documents related to the investigation". Although that is indeed her position as a matter of principle, the particular context for the dispute is more specific. I can sufficiently summarise it as follows.

15.
Following A's death there were a number of investigations and reviews of the circumstances. I need not give the details, but I should note that they included a "Root Cause Analysis" ("the RCA") and a report by an independent doctor, Dr Robert Campbell, dated 15 November 2019. Following the receipt of Dr Campbell's report, the Trust decided to initiate a formal investigation, in accordance with the Policy, into various issues concerning the Claimant's clinical decision-making. This was communicated to her at a meeting with the Medical Director on 24 January 2020, which was attended also by a representative from her defence society, the Medical Protection Society ("the MPS"), Lisa Jones; and it was confirmed by a letter dated 30 January.

16.
The terms of reference for the investigation were communicated to the Claimant and her representative by a letter dated 4 March 2020. The first item was "whether the decisions taken by [the Claimant] in relation to [A] on 3rd and 4th December 2017 were appropriate and reasonable". That is the only aspect of the investigation which is relevant for our purposes: it is referred to in the contemporary documents as "ToR 1". The Claimant was told that the Case Investigator would be Sarah Wood, a consultant surgeon.

17.
On 21 July 2020, in preparation for an interview with the Claimant, Ms Wood sent the Claimant and Ms Jones a document part of which was headed "ToR 1: Preliminary questions and documents". There followed a list of 22 documents (or categories of document) and then a list of questions that she was intending to ask about the events of 3 and 4 December 2017. The purpose of including the list of documents was not stated: there was no explicit offer to supply copies if requested. Ms Wood's evidence at the trial, as the Judge summarised it at para. 67 of her judgment, was that she had provided the list, which was of the documents that she had seen, "in the spirit of being transparent, but it was not her intention that the Claimant be provided with the documents contained in [it]".

18.
There followed an exchange of e-mails of which I need only give a summary. Ms Jones asked for copies of thirteen items on Ms Wood's list of which the Claimant did not already have copies: one of the items consisted of fourteen statements given by Trust staff in connection with the RCA exercise ("the RCA statements"). She made it clear that she believed that she was entitled to see the documents requested under para. 1.16 of the Policy and that the Claimant would not attend the interview until they had been supplied. Ms Wood's eventual position, after taking advice, was that para. 1.16 did not give the Claimant any right to see the documents but that the Trust was nevertheless happy to supply copies, subject only to any consents that might be needed from third parties for reasons of confidentiality or data protection.

19.
In accordance with that approach the Trust sought to obtain the consents which it believed were necessary. It was mostly able to do so, and most of the documents asked for by Ms Jones were supplied prior to the issue of proceedings. But A's parents have not consented to the release of two letters to them from, respectively, the Clinical Director of the Trust (dated 6 March 2019) and its Medical Director (dated 8 March 2019); nor had it by the date of the issue of proceedings been possible to obtain consent from three of the staff who provided RCA statements, including Ms Marnet. I will refer to those as "the withheld documents". (Subsequent to the issue of proceedings Ms Marnet did give her consent, and her statement has now been provided to the Claimant, though this did not occur until after Thornton J's judgment.)

20.
In a broad sense the withheld RCA statements are likely to be relevant to the investigation because they are likely to cover the events which are its subject-matter: indeed the Judge found, on the basis of Ms Wood's evidence, that that was the case as regards at least two of them. (It does not of course automatically follow that the Trust is obliged, as a matter of fairness or otherwise, to disclose them before interviewing the Claimant: that is what this case is about.) It is less clear that the withheld correspondence with A's parents is relevant to the investigation. It appears from Ms Criddle's submissions that the Claimant and her advisers believe that it was only because of that correspondence that Dr Campbell's report was commissioned and thus also that the decision was made to commence the investigation; but even if that were so it is hard to see how the origins of the investigation have a bearing on its conduct once commenced. Ultimately, however, that is not a question that we need to resolve.

THE JUDGE'S DECISION AND THE APPEAL

21.
Before the Judge Ms Criddle put her case three ways. In short:

(1) She contended that, as Ms Jones had asserted throughout, the right conferred by the second sentence of para. 1.16 of the Policy was very wide in its scope and extended to all documents seen by the Case Investigator in connection with the investigation (which would appear to include both documents assembled for the purpose of the investigation and documents generated in the course of it). It was not limited to correspondence in the ordinary sense of the word, nor was it subject to any criterion of "relevance". (The latter submission may seem surprisingly ambitious, but it was forensically necessary since if the Trust was obliged only to supply "relevant" documents it could, and did, argue that the assessment of relevance was a matter for its judgment.) On that basis she was entitled to see all the withheld documents, though there might also be many others whose existence had not yet been disclosed. I will refer to the obligation asserted by the Claimant as a "general disclosure obligation".

(2) She claimed that the Trust was in breach of the obligation in the fourth bullet of para. 1.14 (see para. 10 above).

(3) She contended that the effect of the so-called "implied term of trust and confidence" was that the Claimant should be able to see (at least) the withheld documents in order to respond properly to the investigation.

22.
The Judge rejected the claim in its entirety. Although in her grounds of appeal the Claimant sought to rely on all three bases, Bean LJ only permitted the appeal to proceed as regards the claim on basis (1) – i.e. based on para. 1.16 – and I need accordingly say nothing more about the other two.

23.
As to the claim based on para. 1.16, the Judge's reasoning can be sufficiently summarised at this stage as follows:

(1) The provision only gave the practitioner the right to see "correspondence". At paras. 97-98 of her judgment she rejected the Claimant's contention that that term must in the context of this provision be given a construction wider than its natural meaning so as to refer to any document. The RCA

statements were not correspondence within the natural meaning of the word, and the claim in relation to them failed on that basis: see para. 104.

(2) The two letters to A's parents were unquestionably correspondence. At para. 98 the Judge rejected a submission from the Trust that the reference in para. 1.16 was only to correspondence with "those professional organisations which tend to be involved in an investigation". But:

(3) She held that the phrase "relating to the investigation" required a judgment whether the letters were relevant to the investigation, in the sense of there being "a nexus and causative connection" (para. 99); and that that judgment fell to be made by the Case Investigator, subject to review by the Court only on rationality grounds and where the Investigator's judgment appeared "questionable" (para. 100). She relied on Braganza v BP Shipping Ltd[2015] UKSC 17, [2015] ICR 449, and IBM United Kingdom Holdings Ltd v Dalgleish[2017] EWCA Civ 1212, [2018] ICR 1681. And:

(4) Ms Wood had given evidence that in her opinion, the honesty of which was not impugned, the letters were not relevant to the investigation (para. 105). The Judge did not accept that that opinion was questionable (para. 106).

Accordingly there had been no breach of the obligation in para. 1.16.

24.
The Claimant's challenge to the Judge's reasoning as regards the claim based on para. 1.16 is carefully pleaded under four grounds, but I need not set those out at this stage because, as will appear, I believe that the answer to the claim is rather more straightforward than appears from her analysis.

25.
The Trust has filed a Respondent's Notice challenging the Judge's rejection of its argument noted at para. 23 (2) above. It contends that the phrase "correspondence relating to the case" refers only to "communications relating 'to the case', i.e. the MHPS case" – elsewhere described as "only those communications that are sent or exchanged pursuant to the MHPS process and relating thereto". That may not be exactly how the point was put before the Judge, but it is in essence a generalisation of the rather more specific submission made to her, in as much as correspondence with professional bodies is an obvious instance of communications "pursuant to the MHPS process": I return to this below.

CONCLUSION AND REASONS

26.
It will be more convenient if I state my conclusion and reasons at the outset and address the contrary arguments in that context. In my view the case advanced in the Respondent's Notice is well-founded. I do not read the words relied on in para. 1.16 as imposing a general disclosure obligation (whether or not limited to "relevant" documents). I believe that they are concerned only with correspondence generated by the investigatory process, and they create no obligation to disclose correspondence (let alone other documents) on the basis only that it relates to the matters which are the subject-matter of the investigation. My reasons are as follows.

27.
I start with the actual language of the phrase relied on. I take separately the words "correspondence" and "relating to the case".

28.

As for “correspondence”, it is inescapable that in its natural meaning this refers only to communications sent by one person to another. Ms Criddle urged on us the need to construe para. 1.16 “purposively”. I consider below what the purpose of the right conferred by this particular provision is; but to construe it as referring to all documents of any character would strain even the most purposive construction. This is a problem for the Claimant not only as regards the withheld RCA statements. It also casts doubt on the wide meaning that Ms Criddle has to give to the phrase “relating to the case” in order to catch the correspondence with A’s parents: if, as she contends, that phrase refers to anything connected with the subject-matter of the investigation it is hard to see why the disclosure obligation would be limited to correspondence.

29.
As for “relating to the case”, this is a very general phrase which is not susceptible to nice verbal analysis. It needs to be construed in the context of para. 1.16 as a whole and of the wider purpose of this group of paragraphs.

30.
As to that, I consider first the character of para. 1.16 as a whole. It consists of three sentences, as follows:

(1) The first imposes the basic obligation to inform the practitioner that an investigation is to be undertaken and of the basics of the process – the nature of the allegations and the identity of the Case Investigator.

(2) The second sentence starts with the particular obligation with which we are concerned, but it is important to note that that is closely paired – the phrase is “together with” – with an obligation to supply “a list of the people that the Case Investigator will interview [my emphasis]”. That is a limited and high-level process obligation: its purpose is, evidently, to enable the practitioner to suggest other persons who may have relevant information and who he or she believes should be interviewed. It suggests that the first part of the sentence is likewise of a limited and high-level character. It is also important to note that it does not impose any obligation on the Case Investigator to communicate after the interview what the interviewees have said – still less, to provide copies of the Investigator’s notes of the interview or any statement that may be produced: that casts light on the nature of the obligation in the first part of the sentence because it makes it unlikely that it was intended to create any general disclosure obligation (whether of correspondence or of documents generally) of the kind alleged.

(3) The third sentence requires the Case Investigator to give the practitioner the opportunity “to put their view of the events” (and to be accompanied). Again, this is an obligation of a general character, expressed in broad terms. It is not easy to reconcile with a specific obligation of (ongoing) full documentary disclosure of the kind contended for by the Claimant.

Viewed overall, the character of para. 1.16 is to ensure that the Claimant is afforded certain specific and high-level rights in connection with the investigation. It is not where one would expect to find a general disclosure obligation of the kind contended for; and the way that the other rights are framed (in particular the second part of the second sentence) does not sit well with such an obligation.

31.
As for what the MHPS (and thus the Policy which adopts it) is likely to have intended as regards documentary disclosure, it is necessary to bear in mind that the investigation with which we are concerned is preliminary in nature. It is carried out in order to enable a decision to be taken as to

whether the case should proceed to a full hearing, at which stage any facts that may be contentious will be revisited in the context of a formal and fully open process. Of course the investigation must be conducted fairly, because even a decision that there is a case to answer will have serious consequences for a practitioner: I return to this at paras. 33-35 below. But I regard it as highly unlikely that it was the intention of the MHPS that the Case Investigator should be under any obligation to provide the practitioner at this stage of the process with copies of all documents which they have assembled for the purpose of the investigation or generated in the course of it. That would have the potential seriously to encumber and formalise what is otherwise a process whose conduct is explicitly left to the discretion of the investigator (see the opening words of para. 1.18) and which is intended to be relatively speedy (see para. 1.20).

32.
In the light of those considerations, I do not think that the requirement in para. 1.16 to allow the practitioner "to see any correspondence relating to the case" can be intended to impose a general disclosure obligation as regards documents relating to the investigation or its subject-matter. In my view, in the context in which it appears the phrase "relating to the case" is intended to ensure simply that the practitioner sees correspondence between the Case Investigator and others of a kind which they have a legitimate interest in seeing as part of the formal process. One example would be an invitation to an independent practitioner to "assist" in accordance with para. 1.19; there might also, as the Trust argued below, be circumstances in which the Case Investigator might wish as part of the process to approach the relevant professional bodies or other outside organisations. In both cases the practitioner clearly has a legitimate interest in knowing what is happening. The loose way that the MHPS is drafted makes it difficult to draw the line with precision, and there may be particular instances where it is debatable whether a particular piece of correspondence is covered: in such cases no doubt it will be prudent for an Investigator to err on the side of transparency. But on no view does the obligation extend to the Trust's letters to A's parents. They were not generated as part of the formal process of the investigation nor indeed as part of the investigation at all, which they pre-date by almost a year.

33.
Ms Criddle's core submission was that it would be impossible for a Case Investigator to perform their obligation to afford the practitioner "the opportunity to put their view of events" – which must of course be a fair opportunity – unless he or she was given access to the documents which will enable them to do so. She reminded us that the process is intended to look for exculpatory as much as inculpatory evidence: see the second sentence of para. 1.18. That being so, para. 1.16 must be given the purposive construction for which the Claimant contended.

34.
I entirely accept that a Case Investigator will often be obliged, for the purpose of an investigatory interview, to show the practitioner relevant documents to which he or she has access (though <u>not</u> all documents relating to the case in the sense identified at para. 21 (1) above). To take an obvious example, a practitioner will not normally have a fair opportunity to give their version of events relating to their treatment of a patient without sight of the clinical notes; but there will be many other examples.

35.
I do not, however, accept that that requirement can only be given effect by construing a general disclosure obligation out of the inapt language of the second sentence of para. 1.16. On the contrary, it is much more straightforwardly based on ordinary fairness. There may not on the orthodox view be

a general implied duty on an employer to act fairly in all contexts; but such a term is very readily implied in the context of disciplinary processes – see para. 114 of the judgment of Simler J in Chakrabarty v Ipswich Hospital NHS Trust[2014] EWHC 2735 (QB), [2014] Med LR 379. In the present case the requirement in the third sentence of para. 1.16, i.e. that the practitioner must be given the opportunity to put their version of events, necessarily implies that they must be shown any documents that they fairly need in order to be able to do so; what those documents are will obviously depend on the particular circumstances of the case. (The same obligation can also probably be derived from the phrase "in an unbiased manner" in para. 1.18.) A fairness-based obligation of this kind is important, but it is very different from the general disclosure obligation for which the Claimant contends.

36.
Ms Criddle referred us to the judgment of Andrew Smith J in Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB), [2012] Med LR 163, in which he described the equivalent obligation in the (MHPS-derived) disciplinary policy of the defendant Trust as being "directed to correspondence about and evidencing the matters that are the subject of an investigation" (see para. 136). But he was there addressing a different submission, and his choice of language is not directed to the present issue: the decision is of course in any event not binding on us.

37.
The Claimant's alternative "trust and confidence" case advanced before the Judge was essentially of the character described in para. 35 above: that is, it was based on a general obligation on the Trust, through the Case Investigator, to conduct the investigation fairly. Since permission to appeal as regards this part of her case was refused, it is not open to her to argue that it is necessary as a matter of fairness for her to be given copies of the withheld documents before she is interviewed. I should say, however, that I agree that this way of putting her case could not have succeeded. The Claimant can be given a fair opportunity to put her version of events at this stage without seeing either the withheld RCA statements or the correspondence with A's parents. Even if, which we are not in a position to judge, there are things in the RCA statements (and which do not appear elsewhere [1]) on which she needs to be given the opportunity to comment, that can be done by giving her the substance of the point in question without sight of the document itself.

38.
Since I would decide the case on the foregoing basis it is unnecessary to consider the issue decided by the Judge about the extent of the discretion on the part of the Case Investigator to consider what documents were "relevant".

DISPOSAL AND CLOSING OBSERVATIONS

39.
I would dismiss the appeal.

40.
It is extremely regrettable that this dispute has delayed the progress of the investigation by almost a year. Even if there were more merit in the Claimant's argument about the construction of para. 1.16 than I believe there is, I very much doubt if this was a battle worth fighting. The Trust did not seek to withhold documents simply on the basis that there was no legal obligation to disclose them: its attitude – which was, if I may say so, sensible and commendable – was that it would give the Claimant everything on the list unless there were objections on the grounds of confidentiality. As I have already observed, the few documents that it had to withhold on that basis were not of such a character that it

was impossible for the interview to proceed without sight of them. If the Claimant had taken a less absolute approach, a decision would almost certainly have been taken long ago whether any further steps were needed: indeed, if a decision had been made that a conduct hearing was required that too would probably now have been concluded.

41.
In this appeal we are concerned only with the first stage of the MHPS disciplinary process. It is not appropriate for us to consider what disclosure obligations may arise if the case proceeds to a hearing. I would only say that I hope that the parties will try to resolve any difficulties that may arise by reference to the touchstone of straightforward fairness.

42.
I wish to add that I agree with Singh LJ's observations about the conceptual basis of the duty of procedural fairness to which I refer at para. 35 above. My strong provisional view is that it is preferable to treat that duty as arising from the nature of the disciplinary process rather than as an aspect of the trust and confidence duty.

Singh LJ:

43.
I agree that this appeal should be dismissed, essentially for the reasons given by Underhill LJ. I would like to add a few words of my own on the issue of procedural fairness.

44.
In North West Anglia NHS Foundation Trust v Gregg[2019] EWCA Civ 387; [2019] ICR 1279, at para. 97, Coulson LJ said:

"There has been a certain amount of debate in the cases as to whether there is a separate obligation on the part of an employer to act fairly. The authorities suggest that there is no freestanding obligation to act fairly which is separate from the term of trust and confidence …"

45.
The authority cited by Coulson LJ for that proposition was the decision of Simler J in Chakrabarty v Ipswich Hospital NHS Trust[2014] EWHC 2735 (QB); [2014] Med LR 379. In that case Simler J said, at para. 114:

"Whilst Mr Edis also contends for a freestanding, discrete implied term of fairness, I am not persuaded that a general obligation to act fairly is properly to be implied into a contract of employment. Rather where the authorities contemplate questions of fairness, they do so in the context of the implied term of trust and confidence, or on a narrower basis by reference to an implied term that disciplinary processes will be conducted fairly, without unjustified delay."

46.
For my part, I can well understand why the law does not imply a general obligation to act fairly into a contract of employment. If it did, it might be thought that there would have been no need for Parliament to create the law of unfair dismissal, something which it first did in the Industrial Relations Act 1971. But it must be recalled that fairness can have either a substantive aspect or a procedural aspect. I can well see that the common law will not imply a requirement that there should be substantive fairness in the employment context, otherwise this would cut across the fundamental principle that an employer has the power to dismiss at common law provided it acts in accordance with its contractual obligations, for example by giving the appropriate period of notice to terminate

the contract. Substantive fairness, and not only procedural fairness, is required by the law of unfair dismissal.

47.
However, when it comes to procedural fairness, I am not presently persuaded that the only way in which this can be implied into the employment relationship is through the implied term of mutual trust and confidence. As Simler J suggested in Chakrabarty, there may be a narrower basis for an implied term that disciplinary processes will be conducted fairly, which is not conceptually linked to the implied term of trust and confidence.

48.
I would prefer to leave this important issue of principle open for a future case, in which it may be necessary to decide the point, but it does not appear to me that there would be a legal impediment to such an implied term. As Coulson LJ noted in Gregg, at para. 97, the law has already taken the step of introducing some concepts of public law into the employment contract, so that the employer's decision-making process in a case such as Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] ICR 449 had to be reasonable in the Wednesbury sense: Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223. In my view, if the law were to imply a term into the contract of employment that disciplinary processes must be conducted fairly, that would be a short step which builds on Braganza.

Elisabeth Laing LJ:

49.
I agree with both judgments.

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[1] In this connection, I should mention that we were told by Mr Gorton that Ms Wood's evidence before the Judge was that the statements that she had obtained from the authors of the three RCA statements were in fact far more detailed thanthosestatements.

Case No. A2/2021/1211

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

(QUEEN'S BENCH DIVISION)

BETWEEN: –

SASHA BURN

Appellant

- and -

ALDER HEY CHILDREN'S NHS FOUNDATION TRUST

Respondent

AGREED ORDER

UPON hearing Counsel for the Appellant and Leading Counsel for the Respondent at a hearing of the appeal on 21 October 2021

IT IS ORDERED that:

1. The appeal is dismissed.

2. The stay imposed on Thornton J's Order of 2 July 2021 by the Order of Bean LJ dated 23 July 2021 is lifted.

3. The Appellant do pay the Respondent's costs of the appeal on the standard basis, to be the subject of detailed assessment if not agreed.

4. The Appellant do make an interim payment to the Respondent on account of the costs of the appeal in the sum of £25,000.

DATED this 26th day of November 2021