



Neutral Citation Number: [2018] EWHC 2278 (QB)

Case No: HQ18X02966

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 28 August 2018

**Before :**

**THE HONOURABLE MR JUSTICE NICKLIN**

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**Between :**

**Marjan Jahangiri**

**Claimant**

**- and -**

**St. George's University Hospitals  
NHS Foundation Trust**

**Defendant**

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**Iain Quirk** (instructed by **Mishcon de Reya LLP**) for the **Claimant**  
**Simon Cheetham QC** (instructed by **Capsticks Solicitors LLP**) for the **Defendant**

Hearing date: 24 August 2018  
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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.

.....  
THE HONOURABLE MR JUSTICE NICKLIN

### **The Honourable Mr Justice Nicklin :**

1. On Friday, 24 August 2018, I heard an application for an injunction brought by the Claimant against her employers, the Defendant. The Application had been issued on 17 August 2018. The matter was clearly urgent, but was able to be dealt with on the basis of proper notice having been given to the Defendant so that it had a proper opportunity to put before the Court the evidence upon which it wanted to rely together with its submissions. At the end of the hearing on Friday, I indicated that I would reserve judgment over the bank holiday weekend and give judgment at 2pm today.

### **The Parties**

2. The Defendant is the NHS trust responsible for operating St George's Hospital in Tooting, London ("the hospital"). St. George's is one of the country's principal teaching hospitals and is shared with St George's, University of London, which trains medical students and carries out advanced medical research. The hospital also plays a role in training a wide range of healthcare professionals from across its region.
3. The Claimant is a doctor. She is a leading heart surgeon and a pioneer of minimally invasive aortic valve surgery. She became a Professor of Cardiac Surgery in July 2007. In 2018, the Claimant was awarded the *British Medical Journal* Clinical Leadership Award and was one of three finalists for the Silver Scalpel Award for training excellence at The Royal College of Surgeons of England. The Claimant has a mortality rate of 1.2% compared to a UK average of 7-15%.
4. The Claimant is one of 6 surgeons employed in the Cardiac Surgery Unit of the Defendant ("the Unit"), where she is the aortic lead. She operates on a very high number of complex patients and, for the last five years, has had one of the largest clinical practices in the UK. In addition to her clinical work, the Claimant has an important role in cardiothoracic training. She is the Chairman of the London Training Board/Speciality Training Committee for Cardiothoracic Surgery and, as Training Programme Director, she is responsible for some 35% of all UK trainee heart surgeons. In her witness statement, the Claimant states that she has been instrumental in the hospital becoming the lead provider of training in London from 2013. She is the lead training supervisor in Unit.
5. In her academic role, the Claimant supports up to 7 research fellows at any one time, supervising higher degrees undertaken by junior doctors. In her evidence, the Claimant states that the training and progress of these research fellows is dependent upon her supervision and that she is the only cardiac surgeon at the hospital who undertakes research, attracting over £1m in grant funding. In the last four years, the Claimant has published some 57 articles in academic journals and trained five PhD students and four Doctor of Medicine (Research) fellows.

### **Background**

6. The immediate issue – and the cause of this application – is the decision taken by the Defendant on 9 August 2018 to exclude the Claimant from working at the hospital pending a disciplinary investigation into an allegation made against her. It is necessary for me to set out a little of the history to contextualise the present dispute.

7. In 2017, the Defendant received an alert from the National Institute for Cardiovascular Outcomes Research (“NICOR”) indicating an increase in the mortality rate amongst patients receiving cardiac surgery at the Unit. In a witness statement for these proceedings, Professor Andrew Rhodes, Acting Medical Director of the Defendant, states that the Defendant was also concerned about the working relationship between cardiac surgeons and an allegedly dysfunctional environment in the Unit. As a result, the Defendant commissioned a Cardiac Task Group, an “*internal task force*”, to review the situation. As part of this review, a two-day mediation event took place in December 2017. In her witness statement, the Claimant states that, prior to this mediation, she was required to attend two one-to-one interviews with the mediator. She complains that the mediator required her to include in her mediation statement an apology to colleagues and that she found the mediation humiliating and stressful. The mediation apparently produced a 21-page ‘settlement agreement’ dated 12 December 2017 between the 14 ‘parties’ (the Defendant was not a party). The extent to which this emerged as a product of consensus is unclear, but each party signed the agreement and (for good measure) initialled each page. The agreement was stated to be “*in binding settlement of all existing disputes, concerns and issues between the parties that have been the subject of this mediation*”. Professor Rhodes says that the agreement provided that “*the parties would draw a line under any existing disputes*”.

#### *The March Investigation*

8. On 14 March 2018, Harbhajan Brar, Director of Human Resources and Organisational Development at the Defendant, was forwarded an email from an employee (who I will refer to as “XK”) about an alleged incident involving the Claimant. In the email (dated 11 March 2018), XK alleged that the Claimant had shouted at a nurse and had prioritised a private patient over an NHS patient.
9. Professor Rhodes says that, after discussions with Mr Brar, he decided that XK’s allegation should be investigated. Stephen Jones, Director of Corporate Affairs, was appointed to do so. The investigation began on 23 March 2018. An investigation into an allegation of misconduct was required to be conducted in accordance with the Defendant’s Medical and Dental Staff Conduct and Capability Policy and Procedure (Maintaining High Professional Standards) (“MHPS Policy”).
10. There is an issue on the evidence as to an alleged failure by the Defendant to disclose XK’s email of 11 March 2018 to the Claimant until 4 May 2018. Mr Quirk complains that the Claimant had been told by Professor Rhodes and Mr Brar that there was no written complaint, that no record had been taken of an oral complaint and that complaints could be made anonymously. The statement that there was no written complaint was reiterated to the Claimant in an email from one of the investigators on 12 April 2018. The MHPS Policy requires that the subject of an investigation “*must be given the opportunity to see any correspondence relating to the case*” (§6.2). It might be thought that XK’s email of 11 March 2018, as a reasonably contemporaneous (and apparently only) written account of the events the subject of the complaint/investigation, comfortably fell within that obligation.
11. The investigation took some time. The MHPS Policy expects that investigations should be completed within 4 weeks, but it was not until 31 May 2018 that the Claimant was advised by letter from Professor Rhodes that the Defendant had decided

that the complaint should be treated as an allegation of misconduct and proceed to a disciplinary hearing. The Claimant was told that she would be notified of the arrangements for the hearing “shortly”. In fact, it was not until a letter of 27 July 2018 (received by the Claimant on 2 August 2018) that she was advised that the disciplinary hearing would take place on 18 September 2018.

#### *The Bewick Review*

12. Separately, in April 2018, the Defendant received a further NICOR alert regarding mortality statistics for the Unit. The Defendant commissioned Professor Mike Bewick, an independent health consultant, to provide a written report making recommendations for addressing the elevated mortality rates after cardiac surgery at the hospital (“the Bewick Review”).
13. Professor Bewick produced his report on 9 July 2018. He had interviewed a large number of the staff in the Unit. One of the focuses of the review was to investigate whether there had been any improvement in the working relationships since the ‘mediation’ in December 2017. The report included summaries of comments from some of those interviewed. One paragraph noted: “*Some [of the interviewees] felt that there was a persistent toxic atmosphere and stated that there was a ‘dark force’ in the unit*”. Professor Bewick made recommendations in relation to several surgeons in the Unit, but no recommendations were made concerning the Claimant.
14. In his evidence, Professor Rhodes stated that “*when read properly and in context, it is clear that the reference to a ‘dark force’ relates to the surgical team*”. He rejected any suggestion that it was a reference to him or to the management of the Defendant. Mr Quirk has referred me to an unsigned witness statement from an unidentified nurse that worked in the Unit. The nurse was interviewed for the Bewick Review. This statement had been prepared for the March Investigation, but the nurse states that s/he had made the remark about “*dark forces*” in his/her interview and that s/he had told Professor Bewick that “*the dark forces were not in the Unit, but is in the Trust*”.
15. A copy of the Bewick Report was apparently leaked to the media and an article appeared in the *Health Service Journal* on or around 30 July 2018. Mainstream media reports of the Bewick Report started to appear from 3 August 2018. Many quoted the ‘dark force’ reference.

#### *The Hollywood Review*

16. Professor Rhodes states in his evidence that, following the Bewick Review, the Defendant decided to commission a human resources consultant, Julia Hollywood, to produce a report addressing whether: “*it is possible to have trust and confidence in the cardiac surgical consultant team, both collectively and individually, to deliver a safe and sustainable service going forward in light of the concerns raised about an apparent breakdown in working relationships*” (“the Hollywood Review”). I was told at the hearing that Ms Hollywood has experience in the health sector. Professor Rhodes states that the Hollywood Review is intended to address the issues identified in the Bewick Review “*as quickly and thoroughly as possible*” and that he regarded the need to avoid undue influence of any of the potential witnesses as being of “*the utmost importance*”.

17. Professor Rhodes met with 5 of the 6 surgeons in the Unit at around 8am on 2 August 2018. That was followed by a meeting of the whole Unit at lunchtime that day. Professor Rhodes states in his witness statement:

“Given the nature of the review, which related to the breakdown in relationships identified by the Bewick report, I ... explained that anyone that acted or instructed someone to act on their behalf to impede, hinder or influence the review would be investigated and such matters, if proved, would be deemed to be acts of gross misconduct...”

18. He followed up that warning by sending a letter to each of the 6 surgeons in the Unit, dated 2 August 2018, which also included the following, under the heading ‘*Consequences of undermining the review process*’:

“Given the serious nature of the issues raised in Professor Bewick’s report and the implications for the unit and the Trust as a whole, any attempt by any employee of the Trust, or anyone acting on their behalf, to impede, hinder or influence in any way, whether directly or indirectly, the conduct of this review or the evidence which is provided to it, will be treated as a matter of potential gross misconduct and addressed as such under the Trust’s procedures accordingly. Employees are instructed to report any such attempt to Ms Hollywood or ... Mr Brar at the earliest opportunity.”

19. Also, on 2 August 2018, the Claimant received the letter of 27 July 2018 regarding the disciplinary hearing (see [11] above). As well as notifying the Claimant of the arrangements for the disciplinary hearing to be held on 18 September 2018, the letter also informed the Claimant that XK was not going to be called as a witness at hearing. The Claimant states in her witness statement that she regarded that as a matter of surprise as XK was the complainant. Ordinarily, she might have expected to have the opportunity to ask the complainant questions about the events that were the subject of the allegations, in particular her perception of what had taken place and what she had known about the circumstances of the treatment of the two patients.

20. For the purposes of the disciplinary hearing, the Claimant had instructed Hempsons solicitors to represent her. The solicitor with conduct of that matter is Bertie Leigh. He has provided a witness statement for the purposes of the Claimant’s application dated 17 August 2018. It was served on the Defendant’s solicitors the same day. In the material parts of the statement, Mr Leigh states:

“... [A] vital piece of evidence in the [disciplinary] proceedings concern an email sent by [XK] at the request of the Acting Medical Director... [XK] to this day has never been asked to explain her concern and how far it was based on her misunderstanding about a broken piece of equipment that made an operation impossible...”

On 27th July 2018 the Chairman of the Panel sent out a notice saying that the Trust was not going to call [XK] or any other witnesses except the investigator. That meant that at the hearing no one would have understood whether [XK]’s complaint was really based on a misunderstanding or not...

On [Thursday] 2nd August at 18.00 [the Claimant] came to see me with the bundle prepared for the hearing. I pointed out to her that it raised a serious

problem for me because management were going to call no witnesses except the investigator... We discussed the problem this created and I advised her that I needed to interview [XK]. I have previously interviewed a number of other witnesses and the arrangements have been made for me by [the Claimant] or her secretary. I asked her to organise the approach [to XK]...

It never occurred to me that the ... Hollywood Inquiry would be investigating what [XK] had to say about the events of 6 March 2017 (sic) [sc. 2018]. The latter have been exhaustively investigated by the Trust...

Accordingly, I advised [the Claimant] that it would be helpful if I could interview [XK] and asked if she would arrange for me to speak to her."

21. Mr Leigh's evidence appears to be accepted by the Defendant on this application; it certainly has not been challenged or disputed. Indeed, Professor Rhodes has confirmed in his witness statement that the Hollywood Review would not re-investigate the complaint by XK.
22. In her witness statement, the Claimant explains that, acting upon Mr Leigh's request, on Monday 6 August 2018, she asked her secretary to contact XK to ask her to come to the Claimant's office. XK, she says, responded to this request and arrived at the secretary's office at around 2pm. The Claimant states that she called out "hello" to XK from her own office. XK and the Claimant's secretary spoke to each other, but the Claimant does not know about what. By the time the Claimant had completed what she was doing and was ready to speak to XK (at around 2.10pm) XK had left.
23. XK's account of that meeting is set out in an email sent on 9 Aug 2018 at 15.27. She stated that, at about 2.30pm on 6 August 2018, she had responded to a call to go the Claimant's office. She assumed that it was a patient-related matter. She said she was surprised when the secretary told her that the Claimant wanted to speak to her. XK states that the secretary appeared to know about allegations in the disciplinary process and stated that she thought it was "unfair". The secretary, she said, reiterated that the Claimant was really keen to speak to XK and that the secretary would be present as a witness. XK stated that she did not think that that was a good idea. She states:

"... [the Claimant] came out of her office and said, '[X] can we talk'. I said that is [a] bad idea and walked away. I called [another employee] and told her I am very uncomfortable and I need representation."

She expresses her concern arising from the incident as follows:

"In summary I am extremely concerned and shaken by the way in which this [sc. the disciplinary process] is being handled. I believe confidentiality has not been adhered to as a number of people have approached me or made comments about this issue. I am also aware that the investigation on [the Claimant] has been put back to Sept which does instil me with any faith as I believe it will leave me open and vulnerable to further intimidation."

It is important, in light of the reference to "*intimidation*" to note that, in the email, XK had also raised concerns about having been spoken to by another surgeon earlier that day about the disciplinary process involving the Claimant. It is not clear from the

email whether XK felt that she had felt intimidated by the actions of the Claimant, the other surgeon or both.

24. Professor Rhodes states in his witness statement that he first learned of the incidents involving XK on 6 August 2018 when Peter Holt, a consultant vascular surgeon and Clinical Director, telephoned him. He learned initially only of the approach made by the other surgeon. He spoke to XK and asked her to document what had happened. Professor Rhodes states that he was informed (he does not identify by whom) later in the day that the Claimant had also sought to speak to XK.
25. Professor Rhodes explains that, although he accepts that the Hollywood Review would not be reinvestigating the XK allegations (which were still pending determination in the disciplinary process):

“Given that [XK] had given evidence in relation to alleged buying (sic) [sc. bullying] by the Claimant it is clear that any evidence she could give, in relation to that incident or any other incidents she witnessed, would be of interest to Ms Hollywood. Therefore I was concerned that the Claimant was... approaching someone who would be giving evidence to the Hollywood Review and was doing almost immediately having been told not to do so, potentially in a way which could hinder the review.”

*The MHPS Policy on Exclusion*

26. In relation to exclusions pending investigation into alleged misconduct, the MHPS Policy provides:

**7 Restriction on Practice/Exclusion from Work**

**Purpose of Exclusion:**

In certain circumstances it may be necessary to exclude a practitioner from work at the Trust for a specific period or place restrictions on their practice. The purpose of exclusion is intended as an interim measure whilst action is taken to resolve the problem is being considered:

- 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.

The degree of action must depend on the nature and seriousness on the concerns and on the need to protect patients, the practitioner concerned and/or their colleagues. Alternative ways to manage risks, avoiding exclusion must be considered. These include:

- Medical or clinical director supervision of normal contractual clinical duties;
- Restricting the practitioner to certain forms of clinical duties;

- Restricting activities to administrative, research/audit, teaching and other educational duties. By mutual agreement the latter might include some formal retraining or re-skilling.
- Sick leave for the investigation of specific health problems...

## **8 The Exclusion Process**

The Chief Executive has overall responsibility for overseeing exclusion procedures and for ensuring that cases are properly managed. The case should be discussed fully with the Chief Executive, the appropriate Medical Director, the Director of Human Resources, the [PPAS] and other interested parties (such as the police where there are serious criminal allegations...) prior to the decision to exclude a practitioner.

If any of the above parties are not available exclusion can be made if the concern is deemed serious enough. The members of staff in the Trust with the authority to exclude:

- Chief Executive
- Medical Director
- Associate Medical Directors
- Clinical Directors – for staff below consultant level

## **9 Immediate Exclusions**

An immediate time limited exclusion which should not normally be of more than two weeks) (sic) may be necessary for the purposes:

- a critical incident when serious allegations have been made; or
- there has been a break down in relationships between a colleague and the rest of the team; or
- the presence of the practitioner is likely to hinder the investigation...

## **10 Formal Exclusion**

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 a reasonable and proper cause to exclude. The case conference will normally include the Chief Executive, Medical Director (or nominated deputy) and Case Manager. Where possible the Director of HR or a nominated deputy will be present.

- The [PPAS] 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. The report should provide sufficient information for a decision to be made as to whether
  - The allegation appears unfounded; or
  - There is a misconduct issue; or
  - There is concern about the practitioner's capability; or
  - 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.

Formal exclusion of one or more clinicians 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:

- allegations of misconduct,
  - concerns about serious dysfunctions in the operation of a clinical service,
  - concerns about lack of capability or poor performance;
- or
- the presence of the practitioner in the workplace is likely to hinder the investigation.

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.

When the practitioner is informed of the exclusion, there should, where practical, be a witness present and the nature of the allegations or areas of concern should be conveyed to the practitioner. The practitioner should be told of the reason(s) why formal exclusion is regarded as the only way to deal with the case. At this stage, the practitioner should be given the opportunity to state their case and propose alternatives to exclusion (e.g. further training, referral to occupational health, referral to the [PPAS] with voluntary restriction). The formal exclusion will be confirmed in writing as soon as is reasonably practicable. The letter should state the effective date and time, duration (up to 4 weeks), the content of the allegations, the terms of the exclusion and that a full investigation or what other action will follow. The practitioner and their companion should be advised that they may make representations about the exclusion to the designated board member at any time after receipt of the letter confirming the exclusion. In cases when disciplinary procedures are being followed, exclusion may be extended for four-week renewable periods until the completion of disciplinary procedures if a return to work is considered inappropriate. The exclusion should still only last for four weeks at a time and be subject to review. The exclusion should usually be

lifted and the practitioner allowed back to work, with or without conditions placed upon the employment, as soon as the original reasons for exclusion no longer apply. If the case manager considers that the exclusion will need to be extended over a prolonged period outside of his or her control (for example because of a police investigation), the case must be referred to the [PPAS] for advice as to whether the case is being handled in the most effective way and suggestions as to possible ways forward. However, even during this prolonged period the principle of four-week "renewability" must be adhered to.

If at any time after the practitioner has been excluded from work, investigation reveals that either the allegations are without foundation or that further investigation can continue with the practitioner working normally or with restrictions, the case manager must lift the exclusion, and make arrangements for the practitioner to return to work with any appropriate support as soon as practicable.

### **10.1 Exclusion from premises**

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 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. This must be agreed with the case manager at the time of exclusion.

### **10.2 Keeping in contact and availability for work:**

As exclusion under this framework should usually be on full pay, the practitioner must remain available for work with their employer during their normal contracted hours. The practitioner must inform the case manager of any other organisation(s) with whom they undertake either voluntary or paid work and seek their case manager's consent to continuing to undertake such work or to take annual leave or study leave. The practitioner should be reminded of these contractual obligations but would be given 24 hours' notice to return to work. In exceptional circumstances the case manager may decide that payment is not justified because the practitioner is no longer available for work (e.g. abroad without agreement).

The case manager should make arrangements to ensure that the practitioner can keep in contact with colleagues on professional developments, and take part in Continuing Professional development (CPD) and clinical audit activities with the same level of support as other doctors or dentists in their employment. A mentor could be appointed for this purpose if a colleague is willing to undertake this role...

## 11 Keeping Exclusions under Review

The case manager must review the exclusion before the end of the four week period and a report of the progress of a case must be provided to the Chief Executive and the Board. The Board members may be required to sit on an appeal panel and therefore the information presented to the Board should only be sufficient so as they can satisfy themselves that procedure is being followed, and that all reasonable efforts are being made to bring the situation to an end as quickly as possible. Only the designated Board member should be involved to any significant degree in each review.

The Board will also receive a summary showing all exclusions monthly from the Human Resources Department.

An exclusion will lapse and the practitioner will be entitled to come back to work if the exclusion is not actively monitored.

27. It is common ground between the parties that, where Paragraphs 9 and 10 of the MHPS Policy refer to exclusion on the grounds that the continued presence of the person would be likely to “*hinder the investigation*”, the investigation being referred to is the investigation into the allegation(s) of misconduct.

### *The 9 August 2018 Meeting and Exclusion*

28. On 9 August 2018, according to her witness statement, the Claimant arrived at the hospital shortly after 7am to prepare for a major complex operation that she was due to perform that morning. Shortly after arriving, she was summoned to a meeting with Professor Rhodes, Mr Holt and Claire Low, the Senior HR Manager. Although she was given little more than an hour's notice, she was able to arrange to be accompanied by her husband and by Mr Leigh. The Claimant was not told in advance the purpose of the meeting.
29. At the meeting, the Claimant says that she was told that she was to be excluded from the hospital with immediate effect, would have to leave the premises after the meeting and would be the subject of a formal investigation. The basis for this was an allegation that she had indirectly approached XK, a witness in the Hollywood Review, and that by doing so she had directly contravened Professor Rhodes' instruction not to obstruct the Review, given on 2 August 2018 (see [17]-[18] above).
30. In both their witness statements, the Claimant and Mr Leigh state that they explained to Professor Rhodes, and the other attendees of the meeting, that the Claimant's attempt to approach XK was nothing to do with the Hollywood Review but was in connection with the disciplinary proceedings. Both also state that they made representations as to the impact on patients that an immediate exclusion would have. Mr Leigh states that these points were ignored by Professor Rhodes.
31. Professor Rhodes' evidence is as follows:

“This evidence gave me clear concern that there was an attempt to influence a potential witness to the Hollywood Review. As a consequence of the statement made, the Trust excluded the Claimant on 9 August 2018. We went through the events described with the Claimant. The meeting lasted approximately

45 minutes as there were lots of questions and challenges ... The decision was taken in line with MHPS [Policy] and discussions took place before the decision to exclude was taken... The decision was taken with the CEO, Deputy Director of HR, Stephen Jones and myself... It was evident that the Claimant was meant to be operating and there would be an impact on the patient, whatever course we took in terms of timing of the exclusion.

The reasons for that decision were that there had been a meeting on 2 August 2018 in which the Claimant was clearly and unequivocally told not to impede the investigation that was being conducted by Ms Hollywood. Subsequently, the Trust received a statement that the Claimant had approached [XK], a potential witness to the Hollywood review. This was based on initial evidence that had been presented by Ms Davies, Mr Holt and [XK].”

32. Mr Quirk points out that, at the time of the meeting with the Claimant in the morning of 9 August 2018, “*the statement*” from XK that is referred to by Professor Rhodes could not have been the email of that date because it arrived after the Claimant had been excluded.
33. The evidence of Professor Rhodes as to (a) the decision-making process leading up to the decision to exclude; and (b) what took place at the meeting with the Claimant is most unsatisfactory. The Claimant and Mr Leigh’s witness statements were served on 17 August 2018. Professor Rhodes’ statement is dated 22 August 2018. Although Professor Rhodes may not be familiar with the Court’s expectations about witness statements and evidence, the Defendant’s solicitors certainly are. The Court is best assisted when the evidence of someone who is responding to the account of an event given by another witness indicates clearly what is accepted or disputed and provides any other relevant facts. Further, where a centrally important issue is the making of a particular decision, the Court can reasonably expect to be given a clear explanation as to (a) who made the decision; (b) on what material; and (c) why. Professor Rhodes’ evidence fails to do this. Indeed, given that XK’s email was not available until **after** the decision to exclude, and so the references in the quotation above to “this evidence” and “a statement” cannot include or be a reference to the email, it is impossible to ascertain *what* information or evidence was available to the unidentified decision-maker(s) upon which he/she/they made the decision.
34. The only other statement provided by the Defendant is from Jacqueline Totterdell, the Chief Executive of the Defendant. She was on annual leave when the material events concerning the Claimant’s exclusion took place, although she states that she was in contact with the hospital during her absence and was “*briefed about any developments on this matter*”. Ms Totterdell does not explain her role in the decision to exclude the Claimant or what she had been told. That is so despite (a) being identified as one of the people who was involved in the decision-making; and (b) that she bore “*overall responsibility for overseeing exclusion procedures and for ensuring that cases are properly managed*” (§8 MHPS Policy – see [26] above). As to her involvement, Ms Totterdell simply says in her witness statement:

“I do not intend to repeat the allegation about the events on 6 August 2018 which led to the Claimant’s exclusion... as these are clearly described in Andrew Rhodes’ witness statement. I do wish to state that I wholeheartedly supported the

decision that was made to exclude [the Claimant] on 9 August 2018 which was made after discussion with me.”

35. Put bluntly, that evidence is wholly inadequate. It does not explain:
- i) In what discussions did Ms Totterdell participate?
  - ii) With whom?
  - iii) When?
  - iv) What was she told about what XK had said and what did she understand the Claimant had done?
  - v) Was she aware of the explanation that had been given by the Claimant and Mr Leigh as to why the Claimant had tried to contact XK?
  - vi) Did she ask whether XK had been told the Claimant's explanation for trying to contact her and what XK's response was?
  - vii) Did she conclude that the Claimant's exclusion was necessary? If so, on what basis?
  - viii) Did she consider alternatives to exclusion?
  - ix) Why did she conclude that alternatives to exclusion had to be rejected?
  - x) Did she inquire, or was she told, of the consequences for the hospital (and patients) of an immediate exclusion of the Claimant?
  - xi) Did she consider these consequences when deciding whether it was necessary immediately to exclude the Claimant?
36. Criticism can also be made about the lack of similar information, evidence and explanation in Professor Rhodes' witness statement, but at least he has addressed some of the issues. The Defendant has not provided witness statements from Mr Holt or Ms Low (who attended the meeting at which the Claimant was excluded) or from the Deputy Director of HR, Stephen Jones, who was one of those identified by Professor Rhodes as having been involved in the decision to exclude. Even allowing for the (relatively) limited time before the hearing, these omissions are surprising. No application was made by the Defendant that it be granted further time to put in further evidence.

*9 August 2018 Letter*

37. The letter dated 9 August 2018 sent by Professor Rhodes to the Claimant confirming her suspension stated the allegations made against her in the following terms:
- “1. That you instructed your PA... to contact [XK]... on 6 August and asked to meet with her. Your PA stated to [XK]: ‘Marjan doesn't blame you she just needs to talk to you and wants to see you’. You were waiting for [XK] in your office and called [X's] name out to call her into your office. [XK]

is a potential witness to the review into the cardiac surgical consultant team currently being undertaken by Julia Hollywood.

2. That, as a result of instructing your PA to contact [XK] on your behalf, you have directly contravened the express instruction from the Trust that was made to you in writing on 2 August 2018 when you were informed not to impede, hinder or influence in any way directly or indirectly the Hollywood review, and also warned explicitly that any such actions would be treated as potential gross misconduct and investigated under the Trust's procedures.
  3. That, as a result of contacting [XK], you have acted in a manner inconsistent with both the Trust's policy on Raising Concerns at Work (Whistleblowing), which makes clear that the Trust will not tolerate the harassment or victimisation of anyone raising a concern or any attempt to bully anyone into not raising a concern, and with the values of the Trust."
38. There is no reference in the letter to the Claimant's explanation given at the meeting earlier that day, and corroborated by her solicitor, that she had been asked by Mr Leigh to contact XK in relation to taking a statement from her for the disciplinary process. Further, it is completely unclear from where the quotation attributed to the Claimant's secretary has come. It is not in the email of 9 August 2018 from XK. Also, the details given in the letter in paragraph 1 of what was alleged to have taken place on 6 August 2018 are different from the account given in XK's email. On the evidence provided by the Defendant it is impossible to see from where this account has come.
39. As to the justification for the immediate exclusion of the Claimant, Professor Rhodes stated in the letter:
- "... I have considered whether or not it would be appropriate to exclude you from work pending the outcome of the investigation. After careful consideration I have decided that it is appropriate to exclude you immediately from work for an initial period of two weeks. I considered other options, including restricting your clinical duties however, I did not consider this was appropriate because:
- The allegation is very serious because (if proven) it relates to an attempt to influence a colleague and/or challenge a colleague for having raised concerns;
  - The allegation is very serious because (if proven) it directly contravenes a strict instruction not to interfere with the investigation that the Trust has commissioned."
40. In her witness statement, Ms Totterdell says of the decision to exclude the Claimant:
- "I am extremely concerned about the impact of the Claimant returning to the unit and the impact that this could have on the Hollywood Review."

That, of course, is not a basis on which the exclusion could be justified under the MHPS Policy. Exclusion could only be used where a conclusion had been reached that the continued presence of the Claimant in the workplace was "*likely to hinder the*

*investigation*” into the complaint made by XK about the Claimant’s alleged approach to her on 6 August 2018.

41. The 9 August 2018 letter imposing the exclusion on the Claimant also contained the following instruction:

“The circumstances giving rise to your exclusion and all matters addressed in this letter must be treated in the **strictest confidence** by you as they will be by the Trust. You are of course free to discuss the matter with your professional adviser/defence organisation or representative on condition that any such adviser or representative strictly observes the confidentiality of this process. Otherwise you should not discuss such matters further, except when you are providing information in the context of the Trust’s pending investigations. This includes any interactions you may have with colleagues from St. George’s or other clinical colleagues when carrying out private practice. Additionally, you must not discuss these matters with the media, breach of which, whether by yourself or anyone acting on your behalf, will be treated as potential gross misconduct.”

42. I asked Mr Cheetham QC what was the source of this purported duty of confidence. He told me that it was the general obligation of confidentiality that arose in the course of the Claimant’s employment rather than any express term in her employment contract.

*Advice from Practitioner Performance Advice Service (formerly NCAS) (“PPAS”)*

43. On 10 August 2018, an adviser at PPAS sent a letter to Karen Daly, Associate Medical Director of the Defendant. It is clear that there had been a discussion on the telephone between the adviser and Ms Daly on 8 August 2018 concerning the complaint made by XK of the attempt by the Claimant to speak to her. The adviser made clear that her advice “*is based upon the information that you have shared with [PPAS]*”. She asked to be advised if she had misunderstood any of the information she had been given “*as this may affect my advice*”. The adviser set out what she understood from what she had been told by Ms Daly:

“On Monday 6 August 2017... [the Claimant’s] secretary... asked to speak to [XK – a witness who is involved in the MHPS investigation] and is ... alleged to have ‘told her off’. [XK] is reported to have been very upset about what was said to her and has gone off work with stress. The Trust is concerned that, whilst [the Claimant] did not speak to the witness herself, the circumstances suggest that she shared the Case Manager’s decision [to refer the matter for a disciplinary hearing] with her colleagues which led to them approaching the witness. The external investigator appointed to carry out the team investigation has indicated that she cannot carry on with the investigation if witnesses are being intimidated.

You explained that, having considered the situation and taken legal advice, you have decided to exclude [the Claimant] on the basis that her presence may interfere with the investigation. The Trust has also decided to pause the disciplinary hearing whilst an MHPS investigation takes place regarding the alleged witness intimidation.

Dealing firstly with the issue of exclusion, we discussed that in accordance with [the MHPS Policy], exclusion may be appropriate to assist the investigative process where there is a clear risk that the practitioner's presence would impede the gathering of evidence. Exclusion is a measure of last resort reserved for the most exceptional circumstances and consideration should be given as to whether there are alternative ways to manage the risk. This will depend upon the nature of the concerns and the nature of the practitioner's role. The rationale for the decision should be clearly documented and explained to the practitioner, who should be given the opportunity to propose their own alternatives to exclusion.

[The MHPS Policy] provides for a two week period of immediate exclusion which allows for a preliminary situation to be carried out and to allow a more measured consideration to be undertaken. At the end of this two week period a decision will need to be made regarding whether the practitioner can return to work or whether to move to a four week period of formal exclusion.

I would advise [that] this two week period is used to undertake a preliminary investigation into the alleged incident with [XK]. In particular, you will need to consider whether there is evidence to suggest that [the Claimant] was involved in any way in the discussions which allegedly took place between her colleague, her secretary and [XK]..."

44. This letter raises a number of questions about what PPAS had been told by Ms Daly and, in particular, from where she had got the information that the Claimant's secretary had 'told off' XK. That allegation features nowhere in the documentation before the Court. Professor Rhodes, in his witness statement, confirms that the advice of PPAS was sought in advance of the exclusion of the Claimant, but he does not state what PPAS were told or what of PPAS' advice was relayed to him. There is no witness statement from Ms Daly. It is not clear whether the advice that "*the decision should be clearly documented*" was conveyed (a) during the call on 8 August 2018; and (b) to Professor Rhodes (or anyone else in the Defendant involved in the decision to exclude the Claimant). But it is clear that, beyond the letter of 9 August 2018 itself, no other document recording the decision-making process has been provided to the Court by the Defendant.
45. There is also no evidence to suggest that Ms Daly (or anyone else) sent PPAS any further information that might have a bearing on the advice given, for example that the Claimant had maintained that the reason she had sought to contact XK was with a view to obtaining a statement from her for the disciplinary process.

#### *Media coverage of the exclusions*

46. Another surgeon was excluded from the Unit by the Defendant at the same time as the Claimant on the grounds that he had also spoken to XK. I do not need to deal with the circumstances of that exclusion, but the fact that two surgeons had been excluded became the subject of media attention. For example, on 11 August 2018, an article appeared in *The Times* newspaper (and probably also online) headlined: "*Hospital suspends cardiac surgeons*". Of particular note in the article are the following paragraphs:

"Two leading surgeons at a scandal-hit cardiac unit have been suspended from their posts, The Times has learnt.

Sources allege that the pair are seen as troublemakers by managers at St George's Hospital in south London, after they attempted to blow the whistle on problems at the unit, although this was firmly denied by the trust.

The Times can also reveal today the death of a man who died after waiting months for treatment at the 'dysfunctional' unit. The death of Michael Patrick Lydon, 66, in 2015, prompted a serious incident investigation, its final report criticised a lack of management oversight and said patients referred for cardiac surgery should be seen and treated within 18 weeks.

The trust has failed to report waiting times for treatments including heart surgery for more than two years, and admits that ten patients suffered 'severe harm' because of waiting time problems between May 2015 and February 2017.

Staff are said to be shocked by the suspensions. It is understood that the consultants were told the suspensions, made as an HR consultant is being brought in to review the unit, were because of their behaviour.

Asked whether the suspensions were due to the surgeons' attempts to become whistleblowers, a spokesman for St George's said: 'We completely and absolutely refute this suggestion, which is untrue.'

47. The article was dominated by a 'case study' of the death of Mr Lydon with an image of the headline from an earlier article in *The Times* - "*Bickering surgeons blamed for NHS deaths*" - which appears to have been published as part of the media reports of the Bewick Review from 3 August 2018 (see [13] above). Although the Claimant was not named in the article, she would have been readily identifiable to those who worked at or were familiar with the hospital. Readers with that information could well have gained the impression from the article that the Claimant had been excluded on grounds of patient safety. Such an impression would have been wholly false. I suspect that most readers – recognising the severity of the step of excluding a doctor from work – might have been surprised to discover that it was as a result of the Claimant having asked to speak to another employee.
48. I was told at the hearing that the Claimant was not asked for a comment prior to publication of the article by the newspaper, but that she has felt inhibited by what she could say by the ban on discussing matters with the media imposed by the 9 August 2018 letter.
49. I asked Mr Cheetham QC why the fact that the Claimant had been excluded from the hospital and the reasons for her exclusion were matters over which the Defendant could impose or exercise a duty of confidentiality preventing disclosure by the Claimant. Whilst many in the position of the Claimant would not wish, themselves, to broadcast details of their exclusion, it was for them to choose. The potential unfairness to someone in the Claimant's position is clearly demonstrated in this case. Mr Cheetham QC confirmed that the Defendant would not seek to prevent the Claimant from responding to media reports concerning her exclusion, or the disciplinary proceedings, in order to correct any misapprehension as to the basis on which she had been excluded.

*The impact of the exclusion of the Claimant*

50. In her witness statement, the Claimant sets out what happened after being told of her exclusion at the meeting with Professor Rhodes:

*“(i) Impact of exclusion on my patients*

The decision to exclude me from my work has major implications for my patients.

...[in] the morning of 9 August 2018, when I was pulled into the meeting with Professor Rhodes and excluded, I was due to operate on a patient, Mrs X. Mrs X was to undergo valve sparing aortic root replacement surgery to treat advanced disease of the aorta. This is highly complicated surgery that is only undertaken by a handful of surgeons in the UK. I am the only surgeon at the Defendant who is capable of performing this surgery. At the time I attended the exclusion meeting, preparations for the operation had been made; the team was fully assembled and the theatre was ready. There was a bed booked for Mrs X in the CTICU. There was no reason for the surgery not to go ahead as planned.

The operation was cancelled because the Defendant chose to exclude me from work. No risk assessment had been undertaken as to the implications of this for Mrs X and her family, indeed Professor Rhodes even informed me that he knew nothing of Mrs X's case. The cancellation of the surgery would inevitably extend Mrs X's stay in hospital and thus cause her moderate harm, which would be sufficient to trigger the Defendant's statutory duty of candour in addition to causing Mrs X and her family significant and avoidable distress. The financial impact of cancellation will be considerable since such procedures carry a tariff of over £15,000 which will now be added to the Defendant's deficit.

I was not permitted to personally apologise to Mrs X. I do not know what reason was given to the patient for the cancellation of her procedure but I suspect that the Defendant did not discharge its duty of candour towards her because Professor Rhodes informed me that no one would be told of my suspension. I do not know what has happened to Mrs X and I am extremely upset about the impact of this event on my patient and her family. My secretary has informed me that Mrs X has attempted to contact me, but I am prohibited from having any communication with her. This is conduct that I regard as discourteous and unprofessional on my own part and only wish I could apologise to her. I cannot remember any occasion in my career when I have cancelled a patient without meeting them myself, explaining the precise reasons and agreeing a plan with her going forward. I do not understand why the Defendant wishes me to behave in this way.

Mrs X is not the only patient who will be affected by my exclusion:

- (1) In the week commencing 20 August 2018, I had six operations scheduled. Three of those patients I had reviewed urgently on 8 August 2018 as they require surgery soon due to clinical and social reasons. I do not know what will happen to these patients, but I fear that their operations may have to be cancelled.

- (2) In the week commencing 27 August 2018, I had nine patients awaiting surgery who I would have expected to be operated on during the course of the next two weeks. These patients have medium range and complex operations and they may need to be cancelled.
- (3) I have one out-patient clinic in the next fortnight where I would expect to see up to 25 new and follow-up patients, some of whom are about to have invasive and complex surgery...

*(ii) Impact of exclusion on training*

... I am instrumental within the Defendant's training programme. Amongst other things, I am one of three supervisors of the trainees in the Unit. The other consultant that has been suspended... is one of the other supervisors. The trainees that we supervise (registrars and senior registrars) are vital to the day-to-day running of the Unit. This, and their training, has now been interrupted. I have learnt that the trainees met with [the] regulatory body of London Deanery and Health Education on 16 August. The trainees have expressed their significant dissatisfaction and their desire to leave the Unit if I do not return to work. Their departure would affect the delivery of service and patient safety matters.

*(iii) Impact of exclusion on research*

The five full-time research fellows who I supervise are all involved in clinical and basic science research which involves patient participation and assessing patients for treatment and enhancing their quality of life. All of this has come to a halt. Many of these patients are scheduled for these research investigations and treatment, and without my supervision and input it is simply not possible to carry out this work. Whilst the exclusion letter provides that I can undertake research at home, this clearly is not sufficient to allow me to carry out my full research duties, which requires me to be present at the Unit and supervising the research fellows.

*(iv) Impact of my exclusion on my reputation*

... I was instructed to leave the Defendant's premises after the exclusion meeting and carried my personal belongings and paperwork with me in three plastic bags. Several of the Defendant's employees witnessed me leaving, including a group of registrars. As noted above, I was not permitted to hand over my clinical cases, and operations will be cancelled. My research assistant, five research fellows and the theatre staff that I work with have no idea why I have disappeared...

Given the press coverage of the Unit at this time, it is inevitable that staff (and possibly patients) will assume that I am implicated in the negative accounts that have come out of the Bewick Report. An article in *The Times* newspaper on 11 August 2018 [see [46] above]... is misleading and defamatory, and yet I have been expressly prohibited from setting the record straight by explaining the situation... I have been forbidden from speaking to employees or patients, and have been prohibited from attending the Defendant's premises.

The damage caused to my reputation has four facets:

- (1) First, my immediate exclusion without explanation has caused, and will continue to cause, great damage to my reputation in the eyes of colleagues within the Unit. I am sure rumours have already been circulating about the reason for my exclusion, and with each day that passes, the perception will increase that the reason for the exclusion is serious. I have worked very hard over many years to build up respect for my work in the Unit, and this has been and continues to be damaged by my exclusion from the Defendant's premises...
- (2) Second, with each operation that is cancelled as the exclusion continues, the reputation of my practice in the eyes of patients is diminished. I have a substantial NHS practice, and clearly cancelling operations on short notice without explanation will damage this. With each day that passes as the exclusion continues, more operations will need to be cancelled, and the damage caused to the reputation of my practice will increase.
- (3) Third, as explained above, my exclusion is extremely damaging in the eyes of future employers. Clearly given the very specialised nature of my practice and profession, I have very limited opportunities in our speciality. My reputation within the profession is therefore extremely important. This is all the more so given that there are very few Trusts which offer my speciality, and therefore any positions which open for cardiothoracic surgeons are extremely competitive. My exclusions from work, and the ensuing press reports which linked the exclusion to the Bewick Report, has caused and will continue to cause catastrophic damage to my reputation in the eyes of future employers.
- (4) Fourth, my exclusion is also damaging to my excellent standing within professional bodies. Whilst I have been cleared of all complaints against me to date, and am confident that there is no proper cause to exclude me from my work, I am required to declare the fact of the investigations and my exclusion in every grant application and other official form... The damage caused by my exclusion may be limited if the exclusion is lifted immediately, but the longer the exclusion applies (and particularly whilst I am prevented from carrying out clinical work), the more severe the damage will be..."

51. Although bearing "*overall responsibility for overseeing exclusion procedures and for ensuring that cases are properly managed*" (§8 MHPS Policy – see [26] above), Ms Totterdell does not refer in her witness statement to the Claimant's evidence of the impact of her exclusion.

52. Professor Rhodes responds to the evidence as follows:

"It is true that the patient on whom the Claimant was due to operate that morning had their operation cancelled. However, having taken the decision to exclude the Claimant, it was appropriate to make the exclusion immediately.

A full apology was given (verbally and in writing) to the patient who had their operation cancelled that morning. Further care has been taken over by specialists at Guy's and St. Thomas' NHS Foundation Trust. Although specific reasons for the Claimant being unavailable has (sic) not been detailed, the Claimant's inability to operate has been relayed to patients.

All aspects of the Claimant's job are being managed in her absence – this includes training of junior doctors. We have allowed the Claimant to continue to research from home, and the Joint Research and Enterprise Office and the University have been informed of the situation with regards ongoing research studies.

Given the nature of the allegations, of potentially trying to influence inappropriately the outcome of the independent review, exclusion is an appropriate interim measure. It would be inappropriate in the circumstances to allow an individual accused of trying to influence a witness to remain in a situation where they can potentially influence witnesses..."

*The 23 August 2018 review of the Claimant's exclusion*

53. The Claimant's original exclusion was for a period of two weeks. On 23 August 2018, the date on which the exclusion would have come to an end, Ms Daly sent a letter to the Claimant by email:

"... I have reviewed your exclusion as case manager. In doing so I have consulted Mr Brar and Professor Rhodes.

I have spoken to [the investigator] who informs me that her investigation is almost complete. She has completed interviews with all relevant witnesses. She is awaiting some final documentation and transcripts of the interviews, and will then be able to finalise her report. She anticipates being in a position to send this to me by the week commencing 3 September 2018. As soon as I get the report, I will immediately review the conclusions and make a decision whether or not you should return to work with restrictions and undertakings in place or whether you should remain excluded.

... [The investigator] indicated that her initial view with respect to your exclusion was that I could consider whether or not to lift it. She told me that you had indicated that the request for [XK] to come to your office had been made for the purpose of speaking to her about being a witness at the pending MHPS hearing. Ms Brown told me that you said you had been advised to do so by your lawyers. However, we did not discuss the final conclusions of the investigation in any detail...

I have considered carefully how to proceed. I am conscious of the impact that exclusion is likely to have on you as a clinician and personally, but also the need to ensure that this investigation and/or that of Julia Hollywood is not hindered in any way. I am also conscious of the need to protect staff, one of whom the evidence demonstrates has been significantly impacted by the allegations.

I consider that it would be premature to lift the exclusion at this stage, particularly as the [investigation] report will be completed soon and I will be in a position to decide, having seen the evidence gathered, whether or not the allegations are supported by the evidence and whether the exclusion continues to be appropriate. I am also mindful of the seriousness of the issues, given the potential impact on the Julia Hollywood review.

I have therefore decided that you should be formally excluded with effect from today's date, but for a period of two weeks rather than the usual four weeks, to enable me to review the position, as quickly as possible in the light of the investigation report, which I should be able to do prior to the expiry of that two weeks..."

*The exclusion of 24 August 2018*

54. In a move which Mr Quirk described as 'outrageous', on the day of the hearing, Professor Rhodes sent a letter to the Claimant by email excluding her from the hospital on a new basis:

"I am writing to you following receipt of an interim report from Julia Hollywood in relation to her review of working relationships within the Cardiac Surgery Unit. I attach a redacted copy of this report and Ms Hollywood's covering email.

As you can see, this interim report raises a serious concern that relationships between you and other key members of the Cardiac Surgery Unit, and the wider team, have broken down, potentially irreparably. This appears to stem from a number of recent and more historic issues – but my concern is the breakdown of relationships that those events seem to have caused rather than the events themselves, some of which I am aware have been investigated previously.

Although my concern relates to a breakdown of working relationships, rather than conduct or capability, I will deal with this matter in accordance with the initial action and exclusion provisions of the [MHPS Policy] to ensure that you receive appropriate procedural protection...

... I have considered whether or not you should be excluded from work or whether restrictions should be placed on your practice. I note that a formal exclusion is now in place in relation to one of the existing MHPS processes. However, in order to ensure clarity in relation to the distinct processes, I confirm that I have decided to implement a second immediate exclusion in relation to this case. This is on the basis that immediate exclusion is necessary to protect interests of patients (where there is evidence of poor team-working and clinical practice caused by a breakdown in relationships, which can impact on patient care) and other members of staff (where one aspect of the breakdown of relationships is that other staff are concerned about working with you.) There is also the likelihood, identified by the interim report, that your presence in the workplace would hinder the Hollywood review. I have considered whether or not there are any practical alternatives to exclusion, such as work from another site or restrictions on your practice. However, I do not consider that these would properly address the concerns that I have identified..."

The letter included the same imposition of confidentiality and prohibition on speaking to the media as the 9 August 2018 letter. I have been provided with a copy of the Interim Report referred to in the letter but not the covering email.

55. No evidence has been submitted by the Defendant as to the decision-making process behind this further decision to exclude the Claimant. I recognise that the letter was sent on 24 August 2018, but it would have been immediately obvious to the Defendant (and their advisors) that this second exclusion was likely to be challenged

by the Claimant. Mr Quirk has invited me to deal with this second decision to exclude as being embraced by his application for an interim injunction to reinstate the Claimant. Mr Cheetham QC has not objected to that course and it seems to me to be clearly advantageous to both parties to resolve this issue now. The alternative would be that the parties would simply be back in Court, in about a week's time, on a further application by the Claimant for an injunction in relation to this second exclusion.

### **Interim Injunctions: The Law**

56. The Claimant is seeking an interim mandatory injunction in the following terms:

“The Defendant shall immediately lift the exclusion of the Claimant, and take all necessary steps to allow her to return to clinical work and teaching duties forthwith.”

57. Although this is a private law claim for breach of contract, it has obvious parallels with public law cases where the Court is invited to quash decisions of public bodies on the basis that they are alleged to be unlawful. There is no dispute between the parties as to the principles that I have to apply when considering the application.

- i) the Court should apply the familiar three-stage test from *American Cyanamid -v- Ethicon Ltd (No.1)* [1975] AC 396; *Mezey -v- South West London & St. George's Mental Health NHS Trust* [2006] EWHC 3473 (QB); [2007] ICLR 237 [11] (Underhill J):
  - a) is there a serious issue to be tried?
  - b) would damages be an adequate remedy?
  - c) does the balance of convenience favour the grant of an injunction?
- ii) as to whether there is a serious issue to be tried:
  - a) an employer's right to suspend an employee must not be exercised on unreasonable grounds: *McClory -v- Post Office* [1993] 1 AllER 457 (David Neuberger QC); and *Watson -v- Durham University* [2008] EWCA Civ 1266 [22] (Lawrence Collins LJ);
  - b) suspension without reasonable grounds may amount either to a breach of contract: *Watson* [21]; or a breach of the implied term of trust and confidence: *Gogay -v- Hertfordshire County Council* [2000] IRLR 703; and *Watson* [22];
  - c) when the effect of the injunction is to require reinstatement of an employee, the Court must have proper regard to the fact that the decision to exclude requires an assessment of evidence and an exercise of judgment which is likely to require the balancing of several difficult factors and that decision was for the employer to make: *Mezey* [28]. Correspondingly, to succeed in a claim for breach of contract, the claimant would have to demonstrate that the decision to suspend was unreasonable or irrational. That may mean that the Court should give rather more weight to a provisional assessment of the merits than

would be necessary on a pure application of the 'serious issue to be tried' test: *Mezey* [11].

- iii) as to whether damages will be an adequate remedy, in employment cases where the complaint is over suspension, a suspension that is found to be unlawful may well not be capable of being fully healed by an award of damages: *Mezey* [26]; *Watson* [1], [24].

## Submissions

### *Serious issue to be tried*

58. This is the principal battle-ground between the parties on this application.
59. Mr Quirk, on behalf of the Claimant, submits that both exclusions breached the MHPS Policy on exclusion and were a breach of contract and/or a breach of the implied term of trust and confidence. In relation to the 9 August 2018 exclusion, there was no suggestion that there was any risk to patients or other staff by the Claimant continuing in post. Neither exclusion was necessary or proportionate. The test applied at the 9 August 2018 exclusion; the 23 August 2018 extension of exclusion; and the second exclusion on 24 August 2018 was wrong. It was not whether it was "*appropriate*" to exclude the Claimant, but whether it was *necessary* to do so. Further, in relation to the 24 August 2018 exclusion, (a) there was no power to exclude the Claimant because the issues arising from the interim Hollywood Report were not (and were not being treated by the Defendant as) conduct or capability issues and so the power to exclude under the MHPS Policy did not arise; and (b) even if the MHPS Policy did apply, the exclusion was purportedly justified on the basis that the Claimant would hinder the investigation, but this was not the investigation of the alleged conduct matter (there was no allegation of a conduct or capability issue to be investigated) but alleged hindrance of the Hollywood Review. The MHPS Policy could not be used as a basis to exclude the Claimant.
60. Mr Quirk also submits that the entire process and the exclusion of the Claimant is a 'witch-hunt'. He has invited me to conclude that the 24 August 2018 exclusion has only been served because the Defendant recognises that the earlier exclusions are defective, and this is an effort to shore-up the Claimant's exclusion. The Defendant, he contends, is pursuing a campaign to oust the Claimant and this is the latest effort to do so.
61. Mr Cheetham QC for the Defendant submits that it is common ground that the Claimant attempted to contact XK and she was someone who was likely to give evidence as part of the Hollywood Review. That was clear breach of the instruction given orally and in writing to the Claimant on 2 August 2018. The Defendant was entitled to conclude that the attempt to speak to XK was an attempt to influence her. There was no pressing need to speak to XK about the disciplinary hearing; it was clear that XK would have to give evidence to the Hollywood Review; and the Claimant had made no attempt to notify or check with the Defendant before attempting to make contact with XK. Accordingly, the discretion to exclude the Claimant was exercised on reasonable grounds and cannot amount to a breach of contract or of the implied term of trust and confidence. As for the decision to extend the exclusion on 23 August 2018, although Mr Leigh's evidence was relevant, it was

not determinative and, pending the assessment of this and the other evidence, the Claimant's exclusion was justified.

62. Mr Cheetham QC accepts that the timing of the 24 August 2018 exclusion is perhaps unfortunate, but he makes the point that if the Defendant was acting with the malevolence attributed to it by the Claimant, it would have waited for the result of the injunction application before imposing the second exclusion on the basis of the interim Hollywood Report.

*Damages adequate remedy*

63. The parties are agreed that damages would not be an adequate remedy for the Claimant or generally. The Claimant has explained the impact of exclusion on her, her reputation and on third parties (including patients and junior and trainee doctors) (see [50] above). In this case, there is also a wider public interest that doctors should not be excluded from practising unless it is strictly necessary to do so.

*Balance of convenience*

64. The Defendant argued – faintly – in Mr Cheetham QC's skeleton argument that the balance of convenience favoured maintaining the Claimant's exclusion, but at the hearing he frankly recognised that essentially this issue really stands or falls with the assessment of whether there is a serious issue to be tried.

**Decision**

65. It is important to make clear, at the outset, that no attack has been made on the competence of the Claimant as a surgeon. There is no suggestion that she presents any risk to her patients. At the commencement of his submissions, Mr Cheetham QC, on behalf of the Defendant, stated this clearly and paid tribute to the skill and work of the Claimant.

*Serious issue to be tried*

66. I am quite satisfied that the Claimant has demonstrated that she has strong grounds upon which to contend that her exclusion was a breach of contract and/or a breach of the implied term of trust and confidence. This is a higher hurdle than 'serious issue to be tried', but it seems to me that I should apply a more exacting test for the reasons explained in [57(ii)(c)] above. My reasons for this conclusion are set out below.
67. Before I set out my conclusions, it is important that I make clear that I am making only provisional and interim findings on the basis of the evidence before the Court at this stage. Necessarily, at this point, I am deciding only whether the Claimant has satisfied me that she has an arguable case of sufficient strength to justify the grant of an interim injunction. The findings in paragraphs [68]-[70] are made expressly on this basis. It would be cumbersome, and repetitive, for me to preface every factual finding with the words "it is strongly arguable that", but they should all be read subject to that important qualification. At this stage it is neither necessary nor appropriate for me to make firm findings of fact in respect of matters that must be finally adjudicated upon at a trial.

9 August 2018 exclusion

68. In respect of the 9 August 2018 exclusion of the Claimant, it is strongly arguable that:

- i) the approach to evidence was flawed.
  - a) The Defendant had not obtained a clear account from XK as to what she said had happened until after the decision to exclude had been made; even now XK's account is not clear.
  - b) Any urgency in the matter was not so great as to justify proceeding to exclude the Claimant (1) without getting a clear account from XK; and (2) without considering the Claimant's explanation for her attempt to contact XK (and the fact that it was supported by the timing of events and the clear evidence of her solicitor); and (3) without informing XK of the Claimant's response to XK's complaint about the Claimant's effort to contact her and her reaction to that.
  - c) A decision to exclude the Claimant could only be justified on the basis of a conclusion that the presence of the Claimant at work was likely to hinder the investigation into XK's allegations and that it was therefore necessary to exclude. The evidence, as it presently stands, fails to demonstrate an adequate basis upon which the Defendant could reach that conclusion. It also shows a failure properly to investigate and gather relevant information.
  - d) The simplest expedient would have been to tell XK what the Claimant had said about her attempt to contact her. That may well have put her mind at rest that it was not any attempt to influence her or otherwise to act inappropriately, but, on the basis of advice, to obtain a statement that would be taken by the Claimant's solicitor for the purposes of the disciplinary process. If XK was satisfied by the explanation, there was no justification for the conclusion that the presence of the Claimant at work was likely to hinder the investigation.
- ii) the wrong test was applied by the Defendant under the MHPS Policy.

Total exclusion had to be found to be necessary and the Defendant applied a test of whether exclusion would be "appropriate".
- iii) total exclusion was not necessary, and the Defendant failed to consider (properly or at all) whether other measures short of total exclusion could deal with the perceived issue.
  - a) The only justification for exclusion under the MHPS Policy was that the Claimant was likely to hinder the investigation into the allegation made by XK as to the attempt by the Claimant to contact her on 6 August 2018 (none of the other justifications under §9 MHPS policy could apply to the situation).

- b) The purported justification for rejecting (unidentified) alternatives to total exclusion were inadequate (see [39] above). The seriousness of the allegation was relevant only if it arose in the context of a “*critical incident*”. The first justification begged the question whether the evidence supported the conclusion that the attempted contact with XK was “*an attempt to influence a colleague and/or challenge a colleague for having raised concerns*”. Even if it were established that the Claimant had acted in direct contravention of the 2 August 2018 instruction, that was not relevant to the exercise of the power to exclude under §9 MHPS Policy. Consistent with §7, the power to exclude does embrace exclusion to prevent future breaches of instructions given to employees.
- iv) total exclusion was not proportionate and there was a failure to consider (properly or at all) the proportionality of the consequences of it.
- a) The measure adopted by the Defendant to deal with the identified risk (hindering the investigation) had to be proportionate to that risk. An obvious alternative, in the circumstances, was to seek an assurance or undertaking from the Claimant (or to impose a prohibition) that the Claimant would not contact XK until the disciplinary process had been completed. This was apparently not considered. Indeed, Professor Rhodes’ suggestion that he had considered restricting the Claimant’s clinical duties as a response to the risk shows that he was approaching the question incorrectly. No-one suggested that any risk arose from the clinical performance of the Claimant.
- b) An essential element in the assessment of the proportionality of total exclusion of the Claimant was an assessment of the likely impact that exclusion would have on the Claimant, the hospital and third parties (particularly patients) (identified in the essentially unchallenged evidence of the Claimant – see [50] above). The 9 August 2018 letter did not mention any assessment of the likely impact of exclusion, and nor did it set out any reasoning that the consequences of exclusion were nevertheless justified by, and proportionate to, the risk presented by the Claimant. Professor Rhodes’ witness statement also does not indicate that there was any assessment of the impact on, particularly, patients of the decision to exclude the Claimant (see [52] above). The statement deals only with how the Defendant has dealt with the consequences after the event.
- v) overall, the decision to exclude was irrational (in the public law sense) or not reached following the required procedure.

This embraces the above points together with the apparent failure to document the decision-making process, to identify who made each decision and what material s/he had when the decision was made and the failure to obtain (and consider) proper advice from PPAS.

23 August 2018 extension of exclusion

69. The same complaints can be made about the 23 August 2018 extension of the Claimant's exclusion, but in addition, it is strongly arguable that:

- i) the decision to extend the period of exclusion was made because it was expedient, not because it was necessary.

The purported justification for continuing the exclusion was that, as the investigation was nearly complete, it would be "*premature*" to lift the exclusion. As the investigator had completed interviews with all relevant witnesses, the justification for the original decision to exclude was substantially weakened. The risk of the Claimant hindering the investigation was diminished because evidence-gathering was complete. It is notable that the investigator herself had not suggested that it was necessary for the purposes of her investigation to continue the exclusion of the Claimant. Ms Daly does not appear to have attached any weight to that consideration.

- ii) the decision was based on irrelevant considerations.

Excluding of the Claimant on the basis that she might hinder the Hollywood Review was not a permissible basis upon which to justify exclusion in accordance with the MHPS Policy. The risk of hindering by the Claimant had to be to the investigation of allegations of misconduct.

- iii) the decision did not properly consider relevant material.

Although the letter recorded the Claimant's explanation for contacting XK was because she had been advised to do so by her solicitor to ask her about providing a statement for the pending disciplinary proceedings, Ms Daly did not consider whether that explanation required the decision to exclude to be reconsidered. Instead, she approached the issue on the basis that that was something that the investigator would consider. It is perhaps surprising that Ms Daly learned of the Claimant's explanation for attempting to contact XK from the investigator when the Claimant (and her solicitor) had made the point at the meeting of 9 August 2018.

- iv) the decision did not consider alternatives to continuing the exclusion.

Ms Daly did not consider whether the concerns she identified could have been adequately addressed by any other measures, for example undertakings from the Claimant, short of total exclusion.

- v) the decision failed to consider the proportionality of continued exclusion

By 23 August 2018, the Defendant would have been able to assess the actual impact of the exclusion of the Claimant (rather than attempting to forecast it prior to exclusion). There is no reference to any assessment being made of the impact or the proportionality of it.

24 August 2018 second exclusion

70. The same complaints can be made about the second exclusion of the Claimant, but the fundamental point relied upon by the Claimant is that it is strongly arguable that, given that issues of concern that were relied upon did not give rise to a conduct or capability issue (as Professor Rhodes expressly acknowledged in the letter – see [54] above), there was no jurisdiction or power to impose an exclusion under the MHPS Policy. In addition, even if the power to exclude was available, it is strongly arguable that the imposition of a second exclusion was not necessary. The Claimant was already excluded. A second exclusion would only be necessary if and when the first came to an end.

*Balance of convenience*

71. I am satisfied that the Claimant has satisfied the first two requirements under *American Cyanamid*. In relation to the third, on the particular facts of this case, it seems to me that it is not really a question of whether it is ‘convenient’ to maintain the exclusion as the Defendant submits. As is clear from the MHPS Policy, and from my analysis above, an exclusion can only be justified where it is necessary. The Defendant has not satisfied me that the exclusion of the Claimant is necessary. Indeed, I am satisfied that the balance of convenience overwhelmingly favours the grant of an injunction.

*What happens next?*

72. Despite Mr Quirk’s invitations that I do so, it is impossible for me to make any findings that the Defendant’s actions are explicable only on the basis of a campaign against the Claimant. I can understand why the Claimant may feel that she is being unfairly targeted, but any such findings (if they were to be made at all) could only be made after a proper consideration of all the evidence at trial. The consequence of this is that the injunctive relief that I am prepared to grant to the Claimant is necessarily limited to the decisions to exclude up to the 24 August 2018. I cannot make any sort of prospective order limiting what the Defendant can do in the future. No doubt, the Defendant and its advisors will consider this judgment and the, albeit provisional and interim, assessment I have made of what has happened so far.
73. I return finally to the public interest. Whilst the impact of exclusion on an individual doctor is always likely to be severe, when a skilled and respected surgeon (about whom there are no concerns as to his/her ability) is excluded the consequences reach far beyond the individual. In this case, Mrs X stands as a salutary example. As reflected in the MHPS Policy, and for sound reasons, the threshold for exclusion is necessity. Nothing less than that will do.
74. I will hear submissions from the parties as to the terms of the order to be made consequent upon this judgment.