Our Employment Law Digest of Cases is for Doctors in the United Kingdom who may have an employment law problem or who wish to clarify the law on an employment law matter. The cases below may have general effect but each case turns on its own facts, and each country of the United Kingdom will have slightly different legal frameworks. The cases are just a selection of employment law cases that may be relevant to doctors.

A GP who provided ad hoc but regular medical services was found to be a ‘worker’ within s.230 Employment Rights Act 1996: Community Based Care Health Ltd v Narayan [2019] UKEAT 0162_18_0209 (September 2019)

In Michalak v General Medical Council and others [2017] UKSC 71 – the Supreme Court held that the employment tribunal was the appropriate forum in which to bring a claim of racial discrimination against the General Medical Council (GMC). (November 2017)

In Lamey v Belfast Health and Social Care Trust [2013] NIQB 91 – application refused for the granting of an injunction, to prevent an employer from moving to a disciplinary hearing prior to a regulator having concluded their own fitness to
practise processes. (August 2013)

**An Employee can Face More than One Disciplinary Hearing where the Subject Matter is Similar**

In *Christou v Haringey London Borough Council [2013] 3 WLR 796 CA* – (a Baby P related disciplinary case) it was held to be lawful for an employer to bring a second disciplinary hearing, which subsequently led to dismissal, despite the fact that the appellant had been given a disciplinary warning previously, within a previous disciplinary process. The court held that the factual substratum while the same in both disciplinaries, the first disciplinary process had focussed on procedural errors, while the second disciplinary process had focussed on errors of judgement and breaches of a care plan for Baby P. (March 2013)

**Suspensions of Doctors by Healthcare Employers Pending Disciplinary Inquiry – Employers Should Not Suspend Every Doctor**

In *A Crawford & Anor Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138* – the Court of Appeal, in an obiter footnote, expressed concern about the over-use of suspensions pending enquiries by employers looking into alleged misconduct, where, it was clear from the outset that the employee had acted in good faith even if they had acted in error. In the *Crawford* case the employer was examining whether nurses had “restrained” a patient (inappropriately). Elias LJ stated:

“This case raises a matter which causes me some concern. It appears to be the almost automatic response of many employers to allegations of this kind to suspend the employees concerned, and to forbid them from contacting anyone, as soon as a complaint is made, and quite
irrespective of the likelihood of the complaint being established. As Lady Justice Hale, as she was, pointed out in Gogay v Herfordshire County Council [2000] IRLR 703 (external link), even where there is evidence supporting an investigation, that does not mean that suspension is automatically justified. It should not be a knee jerk reaction, and it will be a breach of the duty of trust and confidence towards the employee if it is. I appreciate that suspension is often said to be in the employee’s best interests; but many employees would question that, and in my view they would often be right to do so. They will frequently feel belittled and demoralised by the total exclusion from work and the enforced removal from their work colleagues, many of whom will be friends. This can be psychologically very damaging. Even if they are subsequently cleared of the charges, the suspicions are likely to linger, not least I suspect because the suspension appears to add credence to them. It would be an interesting piece of social research to discover to what extent those conducting disciplinary hearings subconsciously start from the assumption that the employee suspended in this way is guilty and look for evidence to confirm it. It was partly to correct that danger that the courts have imposed an obligation on the employers to ensure that they focus as much on evidence which exculpates the employee as on that which inculpates him.

I am not suggesting that the decision to suspend in this case was a knee jerk reaction. The evidence about it, such as we have, suggests that there was some consideration given to that issue. I do, however, find it difficult to believe that the relevant body could have thought that there was any real risk of treatment of this kind being repeated, given that it had resulted in these charges. Moreover, I would expect the committee to have paid close attention to the unblemished service of the relevant staff when assessing future risk; and perhaps they did. " (February 2012)
Employers’ Failures to Adhere to Contractual Disciplinary Procedures

Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham (FC) v Ministry of Defence [2011] UKSC 58

Doctors who are sacked for gross misconduct, without the employer initiating the formal contractual disciplinary process, are now (in most cases) restricted in the levels of damages they can claim. In most instances, the employment tribunal will be the forum for the claim to be made, with the statutory cap being the upper limit of what a doctor might recover (limit of £72,300 as of February 2012). There is a legitimate concern among doctors that unscrupulous employers will now take advantage of doctors by sacking them in circumstances that give them few remedies, other than a standard employment tribunal claim.

It may still be possible for a doctor to obtain an injunction, to prevent an employer from sacking a doctor without first complying with the contractual disciplinary procedure, yet a doctor has to be on some notice that that is a likely outcome to be able to take action in good time and for a court to have sufficient evidence to consider the merits of the application.

Doctors will need to take legal advice early on in a dispute with their employer, if they suspect that their employer is going to sack them without sticking to the appropriate procedure. Doctors who earn significantly more than the statutory cap are particularly at risk of financial damage if they are sacked outwith the contractual disciplinary arrangements that they and their employer have agreed to. [Read Full Law Report (External Link) Supreme Court Decision]

Employer Disciplinary Cases

Raj Mattu v University Hospitals of Coventry and Warwickshire NHS Trust [2011] EWHC 2068 (QB) (August 2011)

Civil right to work as a doctor was not affected by the
decision of a NHS Disciplinary Panel. A doctor could still practise as a doctor in a private or public clinical position, following dismissal. The NHS disciplinary process did not affect the doctor’s registration. The GMC, in comparison, has responsibility for determining a doctor’s civil rights to practise as a doctor, and the GMC process provides Article 6 protections. The court observed that there is no civil right to work in a particular job or role. [Read Full Law Report (External Link)] See also the case of Kulkarni (2009) below, which may remain good law if the doctor would be likely to lose a training contract, so preventing the doctor from completing training.

**Employer Approaches to Doctors Capability / Performance**


An NHS Trust could not move straight to a capability disciplinary hearing without first referring the doctor to the National Clinical Assessment Service (NCAS) for an assessment of the doctor’s clinical performance. To do otherwise would be in breach of the doctor’s contractual terms of employment that apply to NHS employed doctors. Nationally agreed terms that statutorily became implied contractual terms, demand that the independent assessment procedure must be respected. A finding that a doctor’s performance was so flawed that any Action Plan would have no realistic chance of success, without having referred the doctor to NCAS was in breach of contract. Matters concerning misconduct were a separate matter that were not affected by the implied contractual terms. [Read Full Law Report]

{Relevant Case Law: Restrictions of Practice and Exclusion from Work Directions 2003; NCAS Capability Procedure; Parts I and II of ‘Maintaining High Professional Standards in the Modern NHS’ (‘MHPS’)}
**Alert Letters**

The NHS issues an Alert Notice to NHS bodies where a doctor is considered to be a significant risk to patients and staff, which in turn creates a pressing need to alert other NHS employers. There is sparse case law on the statutory scheme. However, the case of *R (D) v SoS for Health* [2006] EWCA Civ 989 [at 31] [View Law Report (external link)], which relates to the NHS alerts under the pre-2006 regime, is useful for its exploration of the concept of “pressing need” and confirmation that it was the test to be applied.

See also our articles on: **Alert Letters in the NHS**

**References for Former Employees**

A duty of care exists, in that an employer must give a former employee a reference that is a true representation of their employees conduct and abilities. An employer may be liable for negligent mistatement if they get it wrong *Spring v Guardian Assurance* [1994] 3 WLR 354; see also *Cox v Sun Alliance Life ltd* [2001] IRLR 448 (reasonable care must be taken to give a fair and accurate reference); and *Kidd v Axa Equity & Law Life Assurance Society Plc* [2000] IRLR 301 (a reference should not create a misleading impression).

**Discrimination Cases**

Employment Tribunals must look at both the individual incidents complained of and the totality of the matters complained of (“the evidence as a whole”) in a case of alleged discrimination, to determine whether the facts alleged give rise to a prima facie case, which the employer must then prove (with the burden being on the employer) that the acts complained of were not discriminatory: *Doctor Ghosh v Williams and Trafford Healthcare NHS Trust* [2005] UKEAT 0149_05_0408 [View Employment Law Report (External Link)] (August 2005)
Disciplinary Action Outside of the MHPS Framework

In Kerslake v North West London Hospitals NHS Trust [2012] EWHC 1999 (QB) the court held that a doctor could be disciplined outside of the Maintaining High Professional Standards (MHPS) process, where relationships had broken down with colleagues, and despite the National Clinical Assessment Service’s (NCAS) assessment of the doctor, that found that she was operating at a level consistent with the consultant role she held. The appeal court declined to grant an injunction to prevent the disciplinary hearing from taking place. There was no breach of contract.

Exclusions Generally under the MHPS Scheme

Also in Kerslake, the appeal court confirmed that exclusions of doctors from the workplace must comply with the Maintaining High Professional Standards (MHPS) framework, as set out in Part II MHPS (pdf).

(July 2012) (Case not available on Bailii, but is reported at (2012) Med LR 568.)

Injunction in Health Related Contract Claim

In Dr A v HTX [2012] EWHC 857 (QB), Blair, J., determined that the court would not make a (final order) injunction restraining an employing health authority from holding an ill-health panel meeting at Trust level, to determine an unwell doctor’s future employment terms (whether to: retain the doctor (making adjustments); move the doctor to another setting; dismiss the doctor). The contractual terms were sufficient for such a hearing to be convened and there were pragmatic reasons why an injunction would be unhelpful in the circumstances. [The judgment may also be relevant to when the court might determine to anonymise the names of doctors and health trusts who are parties to an action.] [See full Employment Contract Injunction Law Report] (03 April 2012)
**Injunctions for Disciplinary Hearings and Disciplinary Investigations**

In Makhdum v Norfolk and Suffold NHS Foundation Trust (2012) unreported the High Court declined to issue an injunction to prevent disciplinary proceedings from continuing. It was held that the doctor applicant had not acted promptly in making the application for an injunction, and that delay could have a negative impact on obtaining the equitable relief of injunction. Moreover, the issues in the case did not reach the American Cynamid threshold for injunctive relief. The courts in any event would not micro-manage employment disciplinary investigations and employment disciplinary hearings. The doctor had sought to argue that the disciplinary process and investigation were unfair/unjust for various reasons.

**Legal Representation at Employee Disciplinary and Appeal Hearings**

In Kulkarni v Milton Keynes Hospital NHS Foundation Trust & Anor [2009] EWCA Civ 789 (July 2009) the Supreme Court held that generally speaking employees are not entitled to be represented by an independently instructed lawyer (save where a doctors’ union instructs a lawyer) [59 to 60, 62], or, other than in the most exceptional of circumstances. In Obiter comments the court held [63 to 65] that natural justice principles and Article 6 (if engaged) might require an employee to instruct a lawyer to represent them at a disciplinary or appeal hearing. In essence, following Le Compte v Belgium [1981] 4 EHRR an ECtHR case, where a doctor was merely facing the loss of a job without wider implications, Article 6 would not be engaged. Where, however, the outcome of the hearing could have an impact on the doctor’s ability to practise his or her profession, Article 6 would be engaged. Being effectively barred from working in the NHS, and taking into consideration the impact of Alert Letters, the court was of the view that in the Kulkarni case, Article 6 would be engaged. The court acknowledged that there
may be some cases where it is difficult to make such a
determination. It observed that where an ‘employer does engage
**Article 6**, his refusal will be unlawful. It may be that an
employer who receives such a request would be well advised to
give it fair consideration and when doing so to bear in mind
the possibility that a denial of full rights of representation
might be held to be a breach of **Article 6**’ [75].

The Court also determined that the GMC’s statutory role was
not relevant to the consideration [72]. Nor was the employment
tribunal’s process, as it was tasked with evaluating whether
the employer could properly have arrived at the determination
they arrived at and not wider questions of the impact of the
determination on the doctor’s wider ability to practise [73].
An employer may also disapply the contractual restriction by
agreement and permit on request a doctor to attend with a
lawyer, even where **Article 6** is not engaged [74] This judgment
is now qualified by the judgment of **Kulkarni (2011)** above.

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