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MHPS disciplinary processes: Dr's application for interim injunction refused

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In the recent case of Colbert v Royal United Hospitals Bath NHS Foundation Trust ('the Trust'), the High Court refused a doctor's application for an interim injunction in relation to the Trust's conduct of disciplinary proceedings against them. If successful, the injunction would have ordered the Trust to ensure unredacted disclosure of all documents and that Trust "management witnesses" attend the disciplinary hearing, so that they could be cross-examined by the doctor.

The facts

The Claimant was employed by the Trust as a consultant in oral and maxillofacial surgery. An external review was commissioned by the Trust to examine the culture in the department following allegations of inappropriate behaviour which had been raised through the Trust's Speak Up policy. Following the review, a report was issued which recommended that the Trust formally investigate the Claimant for alleged bullying / inappropriate behaviour. The Claimant was excluded during the investigation which was conducted in accordance with the Maintaining High Professional Standards in the modern NHS guidance ('MHPS').

In summary, the investigation report found that the Claimant had displayed intimidating and bullying behaviour towards several colleagues. The letter which advised him of the allegations of misconduct enclosed several documents including the investigation report and a redacted copy of the culture report; to remove material that was irrelevant to the disciplinary process against the Claimant. Crucially however, the Disciplinary Panel were only to be provided with the same redacted report as the Claimant so that they both had the same information available to them.

The Claimant was advised that the Trust would be calling the investigating officer to give evidence at the panel hearing and requested the Claimant to provide the names of any witnesses he wished to call.

The Claimant, via his barrister, maintained that the Trust:

1. Must ensure the attendance at the disciplinary hearing of all management witnesses so that they can be subject to cross-examination (they requested 11 named individuals) and
2. Must disclose all documentation un-redacted (including the Culture Review), a requirement of MHPS and the Trust's Managing Conduct Policy.

The Trust's position was that:

1. the Claimant would be given the opportunity to cross-examine the investigating officer in relation to their findings and it was open to the panel to also hear from the witnesses the Claimant said should be called as "management witnesses" if the panel believed their evidence was relevant; and
2. the redacted part of the Culture Review was not relevant as it did not form any part of the allegations against the Claimant.

The Claimant issued an application for an interim injunction, seeking an order to compel the Trust in respect of (1) and (2) above.

The decision

The High Court refused the interim injunction on several grounds.

1. The Court rejected that the Claimant had an unqualified right to call “management witnesses”. The relevant provision in the Trust’s MHPS policy stated:

   "Witnesses employed by the Trust will be required to cooperate in the investigation by providing written statements and attending investigatory interviews.

   Witnesses have a responsibility to ensure that the facts of a case are known and to give an honest account. They may also be required to attend disciplinary hearings unless it can be agreed otherwise how their evidence will be questioned."

   The court was satisfied that the reference to “witness” was to someone who the Trust employed and who it wished to call to give evidence or whom the Trust agreed to call at the request of the panel. Whilst it was open to the Claimant to call any witness in support of his own case, he did not have an unqualified right to compel the attendance of “management witnesses” so that he could cross examine them. It was a matter for the Trust to decide who they called in support of their own case, although they could also call additional witnesses at the request of the panel.

   The Court also highlighted that it was not for the Courts to “micromanage” the disciplinary process and they should allow proceedings to run their course before intervening. It would be open for the Disciplinary Panel to ask to hear from the “management witnesses” the Claimant suggested and if the Claimant was dissatisfied with the outcome of the Disciplinary Panel, he would have an opportunity to appeal. This again would provide a further potential opportunity for the Appeal Panel to ask to hear from the “management witnesses” suggested by the Claimant if they believed their evidence to be relevant.
2. In relation to the request for disclosure of the unredacted culture report, the Court was satisfied that there was no general requirement in MHPS or the Trust’s policy to “disclose all documentation” in a disciplinary process, let alone all documentation that was unredacted. MHPS Part 1 paragraph 13 provides that when it is decided that an investigation is to be undertaken, the subject must be informed in writing and provided with various information as well as being “given the opportunity to see any correspondence relating to case”. However, the Court was satisfied that the Culture Review could not be properly described as “correspondence”, as correspondence refers to “only communications sent by one person to another” which the report clearly was not (notwithstanding that it has been emailed to the Claimant). The Court therefore categorised the report as a “document” and accordingly there was no breach of MHPS.

The Court was satisfied that even if the report was “correspondence”, the Claimant still would not have the right to receive an unredacted version given that MHPS Part 1 paragraph 12 provides that appropriate safeguards must be in place to avoid breaches of confidentiality. Given the redacted parts of the report related to other people and had no relevance to the allegations against the Claimant, confidentiality should be maintained.

What does this mean for healthcare employers?

This case is a helpful reminder that the Courts will generally only intervene in internal disciplinary processes where the proceedings themselves are being conducted in such a way that the process itself is a breach of contract and where breaches are sufficiently serious that they cannot be remedied within the proceedings themselves.

Further, employers should also be open to trying to find a constructive way forward when challenges do arise as the Courts may be less sympathetic to injunction applications where concerted efforts have been made to try and resolve the concerns (as was the case here).

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