

## The meaning of “Correspondence” under MHPS

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### What was the claimant seeking?

Miss Burn, a consultant paediatric neurosurgeon, was asserting that she had a contractual right (either by virtue of MHPS or the implied term of trust and confidence) to (a) be provided with a number of documents that she had sought from the trust prior to her being interviewed about the matter in question; and (b) be consulted by the case investigator about the information to be collected as part of the investigation. The claimant was seeking an injunction to prevent the investigation from being concluded until the documents that had been requested were provided.

### Does “correspondence” actually mean correspondence?

Under the trust’s disciplinary policy and the MHPS, “*the practitioner must be given the opportunity to see any correspondence relating to the case*”. The claimant asserted that “correspondence” should be given a wide meaning to include any documentation – in particular, the claimant was seeking disclosure of certain witness statements which is a request which we have frequently rejected on the basis that MHPS does not expressly require a Trust to do so.

The High Court disagreed with the practitioner’s interpretation and concluded that “Correspondence” should be given its natural and ordinary meaning – for example, a letter, email or similar. The term should not be extended to cover all documents.

The trust did seek to limit correspondence further to mean correspondence with relevant professional bodies, such as the GMC or PPA. This argument was not accepted by the High Court – the inclusion of the word “any” meant that correspondence with other parties – such as with the relatives of a patient – could be caught.

### The meaning “relating to”?

The claimant sought to argue that “relating to” would encompass every single piece of correspondence (or, on her case, document) that would pass the case investigator’s desk. The High Court did not agree with this interpretation and held that a test of relevance must be imposed – only correspondence relevant to the case would be deemed to relate to it and need to be disclosed. Further, the decision as to whether a piece of correspondence is relevant is one for the case investigator to make – the court cannot be asked to “micro-manage” the internal investigation. Under MHPS framework itself the case investigator has a wide degree of discretion as to how the investigation is carried out. The court’s assessment was therefore limited to whether the case investigator’s exercise of discretion was rational (which, in this case, it was found to be).

### When must correspondence be disclosed?

As set out above, the claimant sought disclosure of the witness statements and correspondence prior to any interview taking place. The MHPS does not, however, include an express right to pre-interview disclosure and the High Court felt that such a right would be inconsistent with the other applicable obligations at this stage of the process. Although it was not necessary for this point to be formally determined by the High Court (as it had determined the claimant did not have any contractual right to the disclosure of documents, nor to correspondence deemed by the case investigator to be irrelevant), it did indicate that any timetable would likely fall within the case investigator's discretion.

## Consultation obligations

The trust's policy included wording which doesn't appear within the MHPS stating that "the investigator will approach the practitioner concerned to seek views on information that should be collected". The High Court was asked to consider whether this wording had contractual force. However, it declined to do so on the ground that it was satisfied that the trust had not breached this provision in any event. The claimant's case appeared to be that there would be a breach of this provision unless the trust could show an express statement asking for the practitioner's view; the High Court disagreed – such a requirement would not be consistent with the flexibility of the procedure permitted by the MHPS.

## Trust and confidence

Given that the High Court had held that the claimant had no contractual right to the documents sought, the effect of permitting her to see them by virtue of the implied term of trust and confidence would be to modify the express terms. The High Court commented that it had not seen any evidence to suggest that the trust took into account irrelevant matters, ignored relevant matters, or acted otherwise unreasonably. As there was reason and proper cause for its actions, the High Court was also not persuaded that the trust had acted in a manner calculated to destroy or seriously damage the relationship of trust and confidence. On the contrary, the High Court commented that the Trust had gone to considerable efforts to accommodate the claimant's request in the context of a sensitive investigation at an early stage of the disciplinary process.

## Final thoughts

As part of any fair disciplinary process, employees should be able to understand the allegations against them and be clear on the evidence available. These protections are built into the MHPS process. However, the High Court in this case was at pains to stress, as the High Court has in other similar cases, the limited role that courts should play within internal employment processes, and the inherent discretion and flexibilities available to case investigators tasked with carrying out MHPS investigations. This case demonstrates again the High Court reluctance to micro-manage internal employer processes.

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