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Case No: KB-2023-002507

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 July 2023

Before:

Dan Squires KC
(sitting as Deputy High Court Judge)

- -

Between:

Dr Serryth Colbert	**Applicant / Claimant**
- and -	
Royal United Hospitals Bath NHS Foundation Trust	**Respondent / Defendant**

- -
- -

David Welch (instructed by ARAG Plc) for the **Applicant / Claimant**
Nicola Newbegin (instructed by Bevan Brittan LLP) for the **Respondent / Defendant**

Hearing dates: 19 June 2023

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Approved Judgment

This judgment was handed down remotely at 4pm on 4 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Dan Squires KC sitting as a Deputy High Court Judge:

Introduction

1. The Claimant, Dr Serryth Colbert, is a consultant in oral and maxillofacial surgery. He is employed by the Defendant, the Royal United Hospitals Bath NHS Foundation Trust. The Claimant is currently the subject of disciplinary proceedings brought by the Defendant following allegations that he intimidated and bullied colleagues and other allegations of misconduct. The Claimant issued proceedings on 30 May 2023 seeking an interim injunction relating to the conduct by the Defendant of the disciplinary process.

2. By the time the proceedings came before me, there were two issues in dispute. The first is whether the Claimant has a right to require the attendance of individuals at a disciplinary hearing, who were interviewed as part of the investigation of allegations against him, but who the Defendant, at present, is not proposing to call to give evidence. The second issue is whether the Claimant is entitled to disclosure of specific documents as part of the disciplinary process, and in particular to an unredacted report that had been produced into alleged misconduct in his department. The Claimant claims that the way the Defendant has dealt with those two matters breaches express contractual obligations, contained in two documents. The documents are: (1) "Maintaining High Professional Standards in the Modern NHS" ("MHPS") published by the Department of Health and which the Claimant contends has been incorporated into his contract of employment with the Defendant; and (2) "Managing Conduct Policy" ("MCP"), the Defendant's policy for dealing with allegations of misconduct, which the Claimant also contends forms a part of his contract of employment. The claim raises narrow but potentially far-reaching issues of interpretation of the relevant contractual provisions.

3. I am grateful for the clear and helpful way counsel put the case before me and set out my conclusions below.

Factual background

4. The Claimant commenced work as a consultant in oral and maxillofacial surgery with the Defendant on 15 March 2015.

5. In December 2020 the Defendant commissioned an external review to examine the department in which the Claimant worked. The review was not targeted at the Claimant, but sought to examine conduct in the department generally. It was commissioned after allegations were raised of inappropriate workplace behaviour. These were made through the Defendant's whistleblowing policy, "Freedom to Speak Up". The Defendant appointed an external reviewer, Simon Atkinson, to conduct the review.

6. Mr Atkinson completed his review and provided a report on 17 February 2021 ("the Atkinson Report"). The Report considered the behaviour of a number of individuals, including the Claimant, and made recommendations. One of the recommendations was that the Defendant formally investigate the Claimant for alleged bullying / inappropriate behaviour. As a result of the Atkinson Report, the Claimant was excluded from work from 8 March 2021 while further investigations were carried out.

7. The investigation which followed was specifically targeted at the Claimant. It was conducted, according to the Defendant, pursuant to the MHPS. In order to carry out the investigation, in March 2021 the Defendant commissioned an external report by Elizabeth Cunningham.

8. During the course of her investigation Ms Cunningham interviewed 21 witnesses, including the Claimant. Ms Cunningham submitted a report on September 2021 with a further report submitted in December 2021 ("the Cunningham Report"). The Report made a number of critical findings about the Claimant including that he had displayed intimidating and bullying behaviour towards a number of colleagues.

9. On 16 December 2021 a letter was sent to the Claimant. It set out the "Outcome of Formal Investigation". It concluded that the Claimant had a case to answer in relation to a series of allegations, and that the matter would proceed to a disciplinary panel to consider allegations of "misconduct amounting to bullying / inappropriate behaviour". The allegations included subjecting colleagues to bullying and intimidating behaviour; subverting and publicly dissenting from the authority of departmental and divisional leadership and Trust processes; undermining colleagues and being openly critical of their practice; and exhibiting coercive behaviours to manipulate others into supporting him.

10. The letter of 16 December 2021 enclosed a number of documents including the Cunningham Report and a redacted copy of the Atkinson Report. The Atkinson Report, as it examined conduct within the Claimant's department as a whole, included material related to other individuals. According to a witness statement of Jane Dudley, the Defendant's Deputy Director for People and Culture, the redactions were to remove material that was irrelevant to the disciplinary process against the Claimant. The Claimant was, according to Ms Dudley, provided with those "parts of the … Report (and notes of conversations that had been conducted with individuals as part of [Mr Atkinson's] review) that were relevant to the matter to be considered by the disciplinary panel [examining the Claimant's conduct]".

11. The Claimant was at this stage represented by Mr Duffy, a solicitor at RadcliffesLeBrasseur, and by the British Medical Association. During the first half of 2022 Mr Duffy corresponded with the Defendant's solicitors, Bevan Brittan LLP. The parties explored whether some kind of agreement could be reached to resolve matters, but that proved unsuccessful, and on 5 August 2022 Mr Duffy wrote to Bevan Brittan indicating he was no longer acting in the case.

12. On 20 December 2022 the Defendant wrote to the Claimant inviting him to attend a disciplinary hearing on 25 and 26 January 2023. The letter stated that the hearing would be held in accordance with the Defendant's MCP. It noted that if the Claimant was found to have committed misconduct he could be issued with a warning, and if found to have committed gross misconduct he could be dismissed. The letter stated that the Defendant would be calling Ms Cunningham to give evidence and that she would present her report to the panel. It asked that, if the Claimant wished to call his own witnesses, their names should be provided by 13 January 2023. The letter identified the three members of the disciplinary panel, including its chair, who was the Defendant's Deputy Chief Executive and Director of Finance. The letter further stated that the Claimant had already received Ms Cunningham's investigation report and relevant appendices, which would be provided to the panel, and stated "should you require

anything further please let me know as soon as possible. If there is anything further which you believe needs to be sent to you, we will send that as soon as possible."

13. On 12 January 2023 a letter was sent to the Defendant by a barrister, Mr David Welch. It was sent from the "Doctors Defence Service" which described itself as an "independent legal defence service for medical doctors." Mr Welch stated that he had now been instructed to represent the Claimant at the disciplinary hearing, in place of Mr Duffy, and that there was no reason why he should not be permitted to do so. Mr Welch referred to paragraph 7.13 of the Defendant's MCP, which I set out further below, which requires that the documents that "will be considered at the [disciplinary] hearing" should be "enclosed with the invitation letter" to the hearing. He stated that the invitation letter of 20 December 2022 had failed to enclose the documents which would be considered by the panel (as set out above, the 20 December 2022 letter had referred to material that the Claimant had already received, such as the Cunningham Report, rather than enclosing it again). Mr Welch's letter continued: "it is self-evident that an unredacted version of the report and appendices by Simon Atkinson must be disclosed. Copies of all the documents provided to witnesses before they were interviewed must also disclosed." The letter further stated that the Claimant required that 11 named individuals, described as "management witnesses", should be present so they could be questioned, and that the Claimant intended to call "around 30 additional witnesses subject to their availability." The letter concluded: "it follows that the hearing [of 25 January 2023] needs to be rescheduled for a date at least 6 weeks in advance and the likely duration is 2 weeks at least".

14. The Defendant acceded to the Claimant's request that the hearing scheduled for 25 January 2023 be postponed. The Defendant responded to the substance of Mr Welch's letter of 12 January 2023 on 27 February 2023. It declined to permit Mr Welch to attend the disciplinary hearing. As set out further below, that issue has now been resolved and I do not deal with it further. As to the "documents" the Claimant sought, the letter stated: "we confirm that you will be provided with a full list and bundle of documents in good time prior to the [rescheduled hearing]." The letter continued:

> "[the Defendant] does not believe it is necessary or appropriate to provide an un-redacted version of the Atkinson Report where concerns were raised more generally in the context of the review into the department. The investigation into the specific matters before the disciplinary panel was carried out by Liz Cunningham who will be available to answer questioned regarding methodology and conclusions."

As to "witnesses", the letter indicated that the Defendant "will not be calling the witnesses [the Claimant] list[ed] other than Ms Cunningham", and asked Mr Welch to confirm "who the additional 30 witnesses are your client intends to call in support of his case". The letter stated that the re-scheduled hearing would take place over 5 days in May 2023 commencing on 9 May.

15. On 16 March 2023 Mr Welch sent the Defendant a letter before claim. It stated:

> 1. Grounds: The alleged Breaches of Contract by the Defendants are the failure to follow its disciplinary procedures, and to hold a disciplinary hearing in accordance with the Claimant's

> contractual rights. These rights are confirmed in the doctor's employment contract, in [the MHPS] and in the [MCP].
>
> 2. The failure to require the Defendant's primary witnesses (see list below) to attend the disciplinary hearing so that they can be cross examined by the Claimant's chosen representative.
>
> 3. The failure to allow the Claimant to bring his chosen representative to represent him at the hearing in breach of the amended procedure.
>
> 4. The failure to disclose documents pertaining to the disciplinary case in line with MHPS.

As to "disclosure", the letter repeated the complaint of the 12 January 2023 letter that the relevant documents had not been "enclosed" with the invitation letter to the disciplinary hearing, and stated that an unredacted version of the Atkinson Report and all appendices, as well as all documents provided to witnesses before they were interviewed, should be disclosed. The letter repeated the list of 11 named individuals who the Claimant said the Defendant should call as "management witnesses". It stated that unless these matters were remedied an interim injunction would be sought.

16. Bevan Brittan responded on behalf of the Defendant on 28 March 2023. They stated in relation to "disclosure":

> "Please provide a full list of the specific documents you believe should have been disclosed which your client seeks for the purpose of the disciplinary hearing by reference to relevance to the specific disciplinary allegations. We repeat our position on the unredacted version of the Atkinson report (that it should not be disclosed). We confirm that this will not be going in front of the disciplinary panel either as we accept the principle that, generally, the panel should not have sight of a report which you do not have sight of. You already have a redacted version of the document. The redactions do not relate to your client's disciplinary."

As to "witnesses" they stated:

> "The Trust's position is that Liz Cunningham, who interviewed all witnesses relevant to the allegations, will give evidence at the disciplinary hearing. As you are aware, Ms Cunningham interviewed witnesses and put their evidence to your client in a number of interviews at which he had opportunity to respond.
>
> The Trust does not intend at this stage to call any further witnesses, but your client will have an opportunity to question Ms Cunningham about her methodology and conclusions in arriving at her factual findings including as to where it is alleged that she did not have a basis for making a finding or her finding is said to be wrong. The panel will also be able to interrogate her

> on those findings before reaching its own independent conclusions.
>
> Ultimately, it is a matter for the panel as to the evidence they wish to hear and, should they decide that it would be appropriate for them to hear from some or all of the witnesses you suggest, arrangements will be made for their attendance. In those circumstances it may be that some safeguards should properly be put in place, for example, allowing some individuals to give evidence remotely or behind screens so as to obviate the need to come face to face with your client mindful of the distress this is likely to cause. Again, this is something for the panel to consider if relevant and no doubt would depend on which particular witnesses they thought they should hear from…
>
> It is important that your client makes representations to the panel as to the relevance of the witness(es) in question and what area of factual dispute their evidence is likely to address. The panel will then be able to exercise its discretion in a proper and reasoned way when considering any such requests. It would not be appropriate or proportionate or consistent with the overriding objective to use the High Court as case manager; it is not for the Court to micromanage internal disciplinary proceedings and as parties it is important that no-one loses sight of this."

17. Mr Welch replied on 24 April 2023. He set out the various provisions of the MHPS and MCP identifying the express contractual provisions the Claimant was relying on. He did not, however, further identify any documents he sought or give any indication of the relevance of the witnesses he suggested needed to be called or what areas of factual dispute their evidence would address. He wrote:

> "Please note that we will be issuing injunction proceedings after 4pm on Monday the 24th April unless you confirm that following receipt of this further information that you accept the following: I can represent [the Claimant] at any disciplinary hearing, that the full list of management witnesses will be required to attend the disciplinary hearing, that the hearing listed for the 9th May 2023 will be adjourned in order to accommodate the time required for these witnesses, and that there will be full unredacted disclosure of all documentation."

18. Bevan Brittan responded later on 24 April 2023 and stated that they had not been able to take instructions but would respond as soon as practicable. Mr Welch responded on 25 April 2023 and stated that "because of the tight time table I have had to submit the claim/injunction application and attach copies of the documentation submitted." Copies of the documents the Claimant stated he was relying on for the injunction application were attached to the email. Bevan Brittan replied later that day and stated that they did not accept service by email and that the sealed copy of any application should be provided by post. In another email of the same day Bevan Brittan wrote that they

considered the application for an injunction to be "premature, unwarranted and a poor use of resources". They invited Mr Welch to "attend a round-table … to seek to resolve the matter." Mr Welch responded and stated that he would "organise postal service" of the application. The application was not, however, served on Bevan Brittan and it appears may never, in fact, have been issued.

19. There was further correspondence between the parties over the following days in which it was agreed to postpone the disciplinary hearing which had been due to commence on 9 May 2023, so that further discussion could take place. Without prejudice discussions between the parties then followed. There was some dispute between the parties as to whether, and if so why, they broke down. In any event, on 30 May 2023, and without notice to the Defendant, the Claimant issued the interim injunction application that is before me.

20. The Claimant's application stated that the order sought was:

> Interim injunction for breach of Claimant's contract – the order seeks … to ensure un-redacted disclosure of all documents, to ensure that all the Defendant's management witnesses attend the disciplinary hearing and the Claimant's chosen representative is allowed to represent him at the disciplinary hearing and conduct cross-examination.

The Claimant also issued a Claim Form setting out his Particulars of Claim as follows:

> 1. The Defendant must permit live representation of the Claimant by his chosen defence organisation representative, David Welch of Doctors Defence Services, at any rescheduled disciplinary hearing.
>
> 2. The Defendant must ensure the attendance at any rescheduled disciplinary hearing of all management witnesses so that they can be subject to cross-examination
>
> 3. The Defendant must disclose all documentation un-redacted in accordance with Maintaining High Professional Standards in the Modern NHS (MHPS) and the Defendant's Managing Conduct Policy.
>
> 3. (sic) The Claimant relies on the two documents (MHPS) and the Defendant's Managing Conduct Policy and that the Defendant permitted Mr Stuart Duffy, Solicitor to attend three investigation meetings but has denied the same rights to Mr Welch, Barrister.
>
> 4. The MHPS paragraphs relied on are 13, 14, 11, Part II – 4, 5, 24, 29. The Managing Conduct paragraphs relied on are 5.9, 7.6, 7.13.

The application contained a draft order. It sought, inter alia, orders that:

> The Defendant must ensure the attendance at any rescheduled disciplinary hearing of all management witnesses so that they can be subject to cross examination. (LIST NAMES)
>
> The Defendant must disclose all documentation in the case unredacted in accordance with [MHPS] and the Defendant's [MCP].

21. Despite the Claimant's application being issued on 30 May 2023 it was not, as required by CPR 23.7, served as soon as practicable on the Defendant. On 5 June 2023, Mr Welch was contacted by the Court office to enquire about listing the case. He replied giving three dates he said were "suitable". The case was then fixed for one of those dates: 19 June 2023. The first time the Defendant was made aware of the application for injunctive relief was on 7 June 2023 when Mr Welch forwarded to Bevan Brittan the Court's email indicating that the hearing had been fixed.

22. On 9 June 2023 Bevan Brittan wrote to Mr Welch to express their concern that they had been served with no documents in relation to the application and that no effort had been made to liaise with them around the availability of counsel to attend the hearing. Mr Welch responded on 10 June 2023 and stated that the documents that accompanied the application were the same as those that had been sent on 25 April 2023, save that the application form and draft order had been amended. He attached revised versions to his email. Bevan Brittan replied on 13 June 2023. They repeated that they did not accept service by email and stated that there had been a series of failures to comply with the CPR. On 14 June 2023 Mr Welch delivered the application and accompanying documentation. He thus affected proper service.

23. On 15 June 2023 Bevan Brittan wrote to Mr Welch dealing with the substance of the injunction application. The letter stated: "whilst we consider that your application is without merit, nonetheless, in spirit of seeking to resolve matters … we are prepared to agree the following as a way of taking matters forward." As to Mr Welch representing the Claimant at any disciplinary hearing, Bevan Brittan stated:

> "Despite [the Claimant] having no contractual or other legal entitlement to be represented by you, we have, on this occasion and in respect of this disciplinary hearing only, decided that you may represent [the Claimant] at this disciplinary hearing (when it is convened). This does not amount to agreeing that [the Claimant] has such a right of representation. It should also not be taken as applying to any other proceedings concerning [the Claimant] (or indeed to any other member of staff)."

24. In relation to "calling of management witnesses", the letter repeated the Defendant's position that there was no contractual provision which entitled the Claimant to require 'management witnesses' be called, but stated "ultimately … it is for the [disciplinary] panel to decide what evidence is relevant and which witnesses they wish to hear from", and that any arrangements for calling witnesses "would be at the discretion of the chair of the panel." It further stated:

> "It is not helpful that you have failed to set out why you consider that the [11 'management witnesses'] that your client has listed

> … are relevant or need to be heard from by the disciplinary panel. Please explain by return why you consider, in respect of each witness, (a) why their evidence is relevant and (b) why it is necessary for them to be called to give evidence."

As to "disclosure of documents", the letter noted that the Claimant had previously been invited to provide a list of the documents he was seeking but that he had not done so. He was again asked to identify the documents he sought. I was not provided with any response to Bevan Brittan's letter.

Relevant contractual provisions

25. The Claimant's case is that the Defendant is in breach of express provisions in his employment contract with the Trust contained in the MHPS and the MCP. Before turning to them, it may assist to say a few words about the MHPS and MCP. MHPS is a document produced by the Department of Health. It deals, *inter alia*, with "action when a concern arises" and "conduct hearings and disciplinary processes" and sets out how NHS bodies should deal with conduct and capability concerns about doctors and dentists. Some NHS bodies have reproduced parts of the MHPS in doctors and dentists' employment contracts. Others have treated the MHPS as incorporated into contracts. The MCP is a policy of the Defendant. It sets out how "misconduct matters" should be managed by the Trust.

26. The Claimant's case is that the relevant provisions of the MHPS and MCP are incorporated into his contract of employment. The Claimant's contract states that any conduct issues "will be resolved through our disciplinary … procedures (which will be consistent with the [MHPS] framework)" and the Defendant's letter of 16 December 2021, setting out the outcome of the investigation, stated that the disciplinary hearing would be conducted in line with the MCP. Ms Newbegin for the Defendant accepted, at least for the purpose of these interim injunction proceedings, that there was a serious issue to be tried as to whether the relevant provision of the MHPS and MCP could be taken to be incorporated into and forming a part of the Claimant's contract of employment with the Defendant. I will proceed accordingly and assume the provisions were incorporated for the purpose of this application.

27. A number of provisions in the MHPS and MCP were listed in the Claimant's Claim Form as being relied upon. Some do not appear relevant to the injunction, and Mr Welch did not refer to them at the hearing before me. Those provisions relevant to the issues before me are as follows.

28. In relation to disclosure, the Claimant relies on MHPS Part 1 paragraph 13. It provides:

> "The practitioner concerned must be informed in writing by the case manager, as soon it has been decided, that investigation is to be undertaken, the name of the case investigator and made aware of the specific allegations or concerns that have been raised. The practitioner must be given the opportunity to see any correspondence relating to case together with a list of the people that the case investigator will interview. The practitioner must also be afforded the opportunity to put their view of events to the case investigator and given the opportunity to be accompanied."

29. Further in relation to disclosure, the Claimant relies upon MCP paragraph 7.13. It provides where material:

> "Before any formal disciplinary hearing the employee will be written to and advised in writing of the allegations which will be considered at the hearing. All the documents which will be considered at the hearing will be enclosed with the invitation letter in the form of a management case. The letter will also remind the employee of their right to be accompanied and will be sent to the employee at least five working days before the date of the meeting.
>
> If there are references to other employees, patients, or third parties or to other issues not directly related to the employee who is subject to the formal action in the material to be circulated these must be removed prior to its being sent out in the interests of confidentiality."

30. In relation to witness attendance, the Claimant relies on MCP paragraph 5.9. It provides:

> "Witnesses employed by the [Defendant] 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."

31. In addition in relation to witnesses, MCP Appendix 6 sets out "guidelines for conducting a disciplinary hearing". It provides under the heading "during the hearing":

> • The Investigating Manager will present the Management Case, accompanied by the HR representative who supported the investigation.
>
> • The employee and their representative will be entitled to question the Investigating Manager, and any witnesses that are called on their behalf.
>
> • The panel conducting the Disciplinary Hearing will be entitled to question the Investigating Manager, or any witnesses.
>
> • Any witnesses may be recalled for further questioning if areas of clarification are needed by either party.
>
> • The employee and their representative will state their case and call any witnesses they request and the above process will repeated.

• The Investigating Manager and the panel conducting the Disciplinary Hearing will be entitled to question the employee, or any witnesses.

Legal principles

32. The principles applicable to interim injunctions are well known and are set out in *American Cyanamid v Ethicom* [1975] AC 396, 406-409. Pursuant to *American Cyanamid* the issues for the court are: whether there is a serious question to be tried (or, as it was also put in *American Cyanamid*, whether the claimant can show he or she has a "real prospect of succeeding" at trial); if so whether damages would be an adequate remedy; if not, whether the "balance of convenience" favours granting or withholding an injunction.

33. A number of authorities have considered how these principles apply in the context of applications for interim injunctions brought by employees during the course of disciplinary proceedings where the employee is seeking to compel their employer to act, or to preclude their employer from acting, in particular ways. The key principles can be summarised as follows.

34. First, the power to investigate allegations of misconduct and to discipline employee is conferred "by reason of the hierarchical nature of the relationship" between employer and employee (*Christou and Ward v London Borough of Haringey* [2013] EWCA Civ 178 paragraph 48). It exists as part of the "power vested in the employer to manage employees" (*Al-Mishlab v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC 3096 paragraph 16). That has two consequences. It means that contractual provisions dealing with disciplinary processes should be interpreted on the basis that their underpinning "purpose … is to facilitate the employer's managerial power" (*Al-Mishlab* paragraph 16). It also means that where contractual procedures are silent on a point, the fallback position is that they are determined as a matter of the employer's managerial discretion (*Al-Mishlab* paragraph 16 and *McMillan v Airedale NHS Foundation Trust* [2014] EWCA Civ 1031 paragraph 54).

35. Second, the fact that the underlying purpose of disciplinary processes is to facilitate the employer's managerial power, does not mean there is no obligation on the employer to act fairly. In contracts such as the present, that contain detailed disciplinary procedures, the purpose of many of the provisions is likely to be to secure a fair process. That is not inconsistent with the purpose of the disciplinary process as a whole being to facilitate the exercise of managerial power. A key role of procedural provisions that ensure a fair process (for example provisions that individuals are given adequate notice of allegations against them and a proper opportunity to respond) is to help secure accurate factual findings, and to ensure that those subject to a complaint accept outcomes as fair and appropriate. That is important to good management of employment relationships as well as for securing fairness for individual employees.

36. Third, obligations to act fairly in the disciplinary process may be imposed on employers not only through express contractual provision, but though an implied duty that neither party to an employment contract will act, without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of trust confidence between employer and employee (*Gregg v North West Anglia Foundation Trust* [2019] ICR 1279 paragraph 97 and *Al-Mishlab* paragraph 17). Implied contractual

duties to act fairly may, however, go further. There has been discussion in the authorities as to whether, in the context of disciplinary proceedings, employers can be regarded as being subject to an implied duty to act fairly because of the nature of the disciplinary process. That duty would be freestanding, and exist independent of, and in addition to, the duty to maintain trust and confidence. In *Burn v Alder Hey Children's NHS Foundation Trust* [2022] ICR 492 the Court of Appeal suggested recognition of such a freestanding duty maybe appropriate (per Underhill LJ paragraphs 35 and 42 and per Singh LJ paragraphs 44-48). The Court left the matter open, however, as it did not need to decide the point in the case before it. If a freestanding duty to act fairly in disciplinary proceedings is implied into contracts of employment, it raises some potentially difficult questions. Should the complete panoply of procedural protections developed in public law and applicable to public bodies be read across and implied in full into private contracts? If an employee asserts a breach of an implied duty to act fairly, is it for the court or the decision-maker to decide what is "fair"? In the public law context it is the former (see *R (Osborn) v Parole Board* [2014] AC 1115 paragraph 55). That is understandable where requirements of procedural fairness are imposed by the courts because of the public nature of the relevant decision-making. The issue may be more difficult where the obligation to act fairly is regarded as being implied into a contract that parties have chosen to enter. Ultimately, this is not an issue I need to determine. While some of Mr Welch's submissions made general complaints of unfairness, he made clear that he was relying only upon express contractual provisions. The scope of any implied terms, and whether there is a freestanding duty of procedural fairness implied into disciplinary proceedings, is not a matter I, therefore, need to determine.

37. Fourth, the courts have repeatedly stressed the importance of not engaging in the "micro-management" of disciplinary proceedings and of it being inappropriate to "intervene to remedy minor irregularities in the course of disciplinary proceedings" (*Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 per Lord Hodge paragraph 39, and see also *Kulkarni v Milton Keynes Hospital NHS Trust* [2010] ICR 101 paragraph 22). That is relevant in an application for an interim injunction in two ways. It will be relevant in determining whether claimants can show they have a real prospect of succeeding at trial. A relatively minor failure to follow contractual procedure is unlikely to constitute a breach of contract, sufficient to justify the court's intervention, where doing so would be micro-managing the disciplinary process. It is also relevant in determining where the balance of convenience lies in an interim injunction. If an interim injunction would constitute the micro-management of an ongoing disciplinary process, that will indicate that the balance of convenience is likely to favour its refusal.

38. Fifth, disciplinary procedures should be read as a whole, including any appeal process, and courts should be slow to intervene when procedures, which may resolve the dispute between the parties, are still continuing. There is a "public interest in allowing internal processes to run their course" (*Al-Mishlab* paragraph 19). As Beatson J held in *Makhdum v Norfolk and Suffolk NHS Foundation Trust* [2102] EWHC 4015 at paragraph 52 "the parties have agreed to a process [through applicable contractual provisions] and part of the agreement involves letting the process take its place". As Mann J observed in *Hendy v Ministry of Justice* [2014] EWHC 2535 paragraph 87 "if the [disciplinary] procedure is capable of ironing out [any] unfairness then the court may well leave it do so." That does not mean the court will never intervene while

disciplinary proceedings are ongoing to correct a breach of contract. It does, however, mean that the "courts should be slow to interfere if disputed issues can be sorted out and resolved within the framework of the internal procedure itself" (*Al-Mishlab* paragraph 19). A court should thus generally only intervene where "[disciplinary] proceedings are being conducted on a basis which makes their conduct a breach of contract such that the pursuit would also be a breach", and where breaches are "sufficiently serious" such that they "cannot be remedied within the proceedings themselves" *(Hendy* paragraph 49). Again, this fits within the principles for determining interim relief in two ways. A failure to follow some part of a process which can be remedied later within the contractually agreed proceedings is unlikely to constitute a breach of contract. Unless and until the process is at an end, or the procedural error is one that is incapable of being later remedied, it will be difficult for a claimant to show he or she has real prospects of establishing that the contract, read as a whole, has been breached. The issue is also relevant to the balance of convenience. If procedural errors can be rectified within the disciplinary process, the balance of convenience is likely to favour allowing the procedures to run their course, and not to intervene too early in the process.

Analysis

Issue for determination

39. Two live issues are before me: (i) the approach taken by the Defendant to "management witnesses", and (ii) the approach taken to disclosure. I will consider below: (a) whether there is a serious issue to be tried in relation to each; (b) if so, whether damages would be an adequate remedy, and if not, whether the "balance of convenience" favours granting or withholding an injunction. I will also consider (c) an argument made by the Defendant that I should withhold a remedy from the Claimant, in any event, because of breaches of the CPR and other procedural failures in the conduct of these proceedings.

(a) Serious issue to be tried

(i) Calling of witnesses

40. The issue concerning calling witnesses does not involve those witnesses the Claimant may himself wish to call in his defence. It is concerned with witnesses the Claimant describes as "management witnesses" but who the Defendant has indicated, at present, it is not intending to call. The Claimant has been informed by the Defendant that, currently, it is intended to call Ms Cunningham to give evidence at the disciplinary hearing, but not the various Trust employees whom she interviewed. The Claimant has, however, been told that, ultimately, it will be for the Disciplinary Panel, once its constitution has been announced, to decide which witnesses it wishes to hear. The Claimant has been told that he should make representations to the Panel if there are one or more additional individuals who he considers should be called to give evidence, and, if the Panel consider it appropriate, their attendance will be arranged. The Claimant has been invited to indicate on what basis he considers such witnesses are relevant and what factual dispute their evidence goes to. He has not done so to date.

41. The Claimant's case on the calling of witnesses is a simple one. He relies on the second bullet point of MCP paragraph 5.9 which provides "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" (emphasis added). The Claimant contends that anyone who Ms Conningham interviewed is a "management witness", and that the second sentence of MCP paragraph 5.9 quoted above means that unless he, the Claimant, "agrees" that such a witness should not be required to attend the disciplinary hearing, they can be compelled to attend and be subject to cross-examination. The Claimant therefore seeks an order that "The Defendant must ensure the attendance at any rescheduled disciplinary hearing of all management witnesses so that they can be subject to cross examination".

42. There are two possible interpretations of the second sentence of the second bullet point in MCP paragraph 5.9. The Claimant's case is that "agree[ment]" in the second sentence refers to agreement between him and the Defendant, such that he, the Claimant, can require attendance of any "witness" of the Defendant he selects to attend the disciplinary hearing to be cross-examined. The Defendant's case is that "agree[ment]" refers to an agreement between it, the Trust, as employer and any "witnesses" who are employees, such that it can require witnesses to attend a disciplinary hearing unless it, the Trust, "agrees" with the witness that their evidence can be questioned in some other way. In my view there is no serious issue to be tried. That is so both because I consider the Claimant has no real prospect of establishing that his interpretation of MCP paragraph 5.9 is correct, and because I think there is a good argument that the proceedings should run their course before it would be appropriate for the court to intervene.

Interpretation of MCP paragraph 5.9

43. There are three reasons I do not consider that the Claimant interpretation of paragraph 5.9 is correct.

44. First, it is important to read the MCP as a whole, and, in my view, it is clear, read in context, that the correct meaning of the relevant sentence of paragraph 5.9 is that put forward by the Defendant, and not that an employee has an unqualified right to insist any "management witness" can be required to attend a disciplinary hearing to be cross-examined.

45. MCP paragraph 3 sets out the "purpose" of the MCP which is to "provide a non-discriminatory, fair and timely process for the management of misconduct matters in the Trust." The MCP as a whole sets out, not simply how the employee who is the subject of the disciplinary proceedings should be treated, but how the process should be managed. Paragraph 5.9 is contained in Part 5 of the MCP which is headed "duties". Part 5 sets out a series of "duties" imposed on different individuals in the disciplinary process. For example, "employees" are "required to cooperate in the investigation [of misconduct] by providing written statements and attending investigatory interview meetings" (paragraph 5.1). "Line managers" are required to "release staff from duty to take part in disciplinary processes when required" (paragraph 5.2). The first bullet point of paragraph 5.9 provides "Witnesses employed by the [Defendant] will be required to cooperate in the investigation by providing written statements and attending investigatory interviews."

46. Read in context, paragraph 5.9 is intended to impose "duties" on individuals who are employed by the Defendant which are owed *to the Defendant*, as employer, to enable it to facilitate its managerial powers to manage misconduct. It is the Defendant that can "require" its employees to "cooperate" in an investigation into misconduct (see paragraph 5.1 and the first bullet point of paragraph 5.9) and "require" line managers to release staff. It is the Defendant that can "require" a witness to attend the disciplinary hearing, and it is the Defendant that can decide to "agree" with the witness that his or her evidence can be questioned without requiring attendance (see the second sentence of the second bullet point of paragraph 5.9). The second bullet point of paragraph 5.9 is not, in my view, intended to confer on an employee who is subject to the disciplinary process a right to insist that individuals, who the Defendant does not wish to call as witnesses, be made available for the employee to cross-examine.

47. The Defendant's interpretation of paragraph 5.9 is fortified by the location of MCP paragraph 5.9 within the MCP. As set out above, paragraph 5.9 falls within MCP Part 5 which is concerned with "duties" owed to the Defendant by employees to enable it to manage misconduct. Another part of the MCP, Part 7, is concerned with the "procedure" of the disciplinary process. It includes a "right to be accompanied" to a disciplinary hearing (paragraph 7.6), processes for "preparing a management case and the hearing process" (paragraph 7.13) which contains rights of those subject to the process to receive information. Part 7 also sets out the potential outcomes following the disciplinary process (paragraph 7.15), and rights of appeal (paragraph 7.16). If the MCP was intended to confer a far-reaching right on employees who were subject to disciplinary proceedings to require attendance of individuals so they could be cross-examined, one would have expected that to fall within Part 7. Instead, the location of paragraph 5.9, as well as the language of the section, suggests it is concerned with the "duties" owed by employees to the Defendant as their employer.

48. Provisions in Appendix 6 of the MCP further support the Defendant's interpretation of paragraph 5.9. Appendix 6 sets out "guidelines for conducting a disciplinary hearing". Under the heading "during the hearing" the first six bullet points deal with witnesses. The first four bullet points relate to the presentation of the case against the employee. The first bullet point provides that the Investigating Manager will present "the Management Case". The second bullet point states that "The employee and their representative will be entitled to question the Investigating Manager, and any witnesses that are called on their behalf." That envisages that the Investigating Manager will "call" the witnesses he or she wishes to rely on and the employee and the Panel can question them. The fourth and fifth bullet points deal with the employee's witnesses, and provides that the employee and their representative can "call any witnesses they request" who can then be questioned by the Investigating Manager and the Panel. That suggests a process in which the Investigation Manager "calls" witnesses he or she chooses, and the employee can call witnesses that support their case. There is no suggestion there is a third category of witnesses, namely individuals who are interviewed as part of preparation of the Management Case and are "management witnesses", who the Investigating Manager does not decide to "call", but whose attendance the employee nevertheless has an unqualified right to compel.

49. A second reason for preferring the Defendant's interpretation of paragraph 5.9 is that, on the Claimant's interpretation, it is very difficult to see what the word "witness" in paragraph 5.9 means or to restrict in any sensible way.

50. The Claimant's case could be that "witness" in paragraph 5.9 means anyone who the Claimant wishes to cross examine, and that he can therefore require any employee of the Defendant to be called to give evidence. The Claimant evidently recognised that would be too far reaching. Instead his argument is that an employee subject to disciplinary proceedings is entitled by paragraph 5.9 to require the attendance of "management witnesses". By definition, however, the individuals in question will be someone who the "management" does not intend to call as "witnesses", but who the employee wishes to attend so he or she can cross examine them. It is not clear on that basis how they can be described as a "*management* witness". To avoid this difficulty Mr Welch further narrowed his case, and he submitted that anyone who was interviewed during the course of the investigation is a "management witness". The problem with that is that individuals who are interviewed as part of an investigation may have had nothing useful to say. It is very difficult to see how such an individual can be regarded as a "witness".

51. By contrast, on the Defendant's interpretation of paragraph 5.9, it is clear who is a "witness". A "witness" in paragraph 5.9 is someone employed by the Defendant who the Defendant wishes to call to give evidence (or who the Defendant agrees to call at the request of the Disciplinary Panel). Such an individual is, on any ordinary understanding, a "witness". They can be "required" to attend the disciplinary hearing unless agreement is reached that their evidence be questioned in some other way. The fact that is a more straightforward and workable interpretation of paragraph 5.9, suggests it is correct.

52. Third, the Claimant's interpretation of paragraph 5.9 would have surprisingly far-reaching and potentially unworkable consequences.

53. The Claimant's interpretation of paragraph 5.9 means that an employee who is subject to disciplinary proceedings has an unqualified right to insist that any individual who was interviewed as part of an investigation be required to attend a disciplinary hearing to be cross-examined. That is so even if the Defendant does not rely upon them and even if the Disciplinary Panel considers it unnecessary to hear from them. As set out below, the Defendant has indicated to the Claimant that it is ultimately a question for the Panel who it wishes to hear from, and that he should explain to the Panel why he considers a certain witness to be relevant, and that if the Panel concludes that it should hear from that person their attendance will be arranged. That is a workable and sensible approach.

54. The Claimant's interpretation of paragraph 5.9, by contrast, means that an employee subject to disciplinary proceedings does not need to explain why a certain individual should be compelled to attend, and even if the Panel considers that it is unnecessary for that individual to be called and that their evidence is irrelevant to the issues the Panel needs to determine, the employee will have an unqualified right to compel the witness' attendance. That could result in a large number of unnecessary witnesses being called, and the significant lengthening of proceedings. A contract could, of course, contain such a provision. It would, however, be surprising, and if that was the intention one would expect it to be clearly spelt out. In my view paragraph 5.9, on an ordinary reading of the language, does not make such a far-reaching provision. It simply imposes a duty on employees of the Defendant, who are required by the Defendant to attend a disciplinary hearing, to do so unless an agreement is reached between the witness and the Defendant that their evidence can be given in some other way. That is an

unsurprising provision and intended to facilitate the exercise of the Defendant's managerial power to deal with allegations of misconduct.

Avoiding micromanaging the disciplinary process and allowing proceedings to run their course

55. There is a second reason why I do not consider the Claimant has a real prospect of establishing a breach of contract. As set out above, the authorities make clear that courts should not become involved in the "micromanagement" of disciplinary proceedings. They have also stressed the importance of "allowing internal processes to run their course", including any appeals processes, and that there is unlikely to be a breach of contract in which the court should intervene where the contractual disciplinary procedure is "capable of ironing out [any] unfairness". In my view that applies to the Claimant's claim regarding witness attendance.

56. As the Defendant stated in its letter of 28 March 2023, "it is a matter for the [disciplinary] panel as to the evidence they wish to hear, and should they decide that it would be appropriate for them to hear from some or all of the witnesses you suggest arrangements will be made for their attendance." The letter continued: "It is important that your client makes representations to the panel as to the relevance of the witness(es) in question and what area of factual dispute their evidence is likely to address. The panel will then be able to exercise its discretion in a proper and reasoned way when considering any such requests." If the Claimant is unsatisfied with Panel's decision in that regard, he has a right to appeal pursuant to MCP paragraph 7.16 and Appendix 1. Those provisions create an unqualified right to appeal against "all sanctions" imposed by the Panel. If the Claimant considers that he was unfairly sanctioned because the Disciplinary Panel declined to call a particular witness to give evidence, that can be raised on appeal, and the Appeal Panel itself has a "right to call witnesses" if it wishes to do so (see MCP Appendix 1).

57. It may well be that if the Claimant requests the Disciplinary Panel to do so, it will call some or all of the witnesses he seeks. Or it may be that if it refuses, and an Appeal Panel concludes it was wrong to do so, the Appeal Panel will allow his appeal or call the witnesses itself. On that basis I do not consider that the Claimant has any real prospect of establishing, at this stage and while no final decision has been taken on witness attendance, that there has been a breach of contract. The subject of his complaint is clearly capable of being "ironed out" during the proceedings and there is no basis for the court to intervene.

58. Mr Welch submitted before me that any application to the Disciplinary Panel to call witnesses was unlikely to be successful. He noted that the Claimant might only be told of the constitution of the Panel five working days before the hearing when he received the "invitation letter" to attend the hearing (see MCP paragraph 7.13), and that the Panel was unlikely at that stage to call the relevant witnesses. He also suggested that the Panel was unlikely to act fairly in considering any application. I do not accept those arguments. On 20 December 2022, the previous occasion on which the Claimant received an "invitation letter" to attend a disciplinary hearing, he received the invitation letter more than a month before the scheduled disciplinary hearing. If a request was made by the Claimant at any time before, or indeed at, a disciplinary hearing, for witnesses to be called, explaining the relevance of the witnesses and why their examination was necessary, there is no reason to conclude the request would be

improperly or unfairly refused. And, if the request were unfairly or improperly refused, that could be corrected on appeal. I consider that, at this stage, and before any such request has been made and considered by the Disciplinary Panel, there is not a real prospect of the Claimant establishing a breach of contract. To do so would be micro-management of the agreed contractual process which may well resolve the issues in dispute in due course.

(ii) Disclosure

59. As to disclosure, the Claimant's case is not entirely clear. The order he seeks is that: "The Defendant must disclose all documentation in the case unredacted in accordance with [MHPS] and the Defendant's [MCP]." There is, however, no general requirement in MHPS or the MCP to "disclose all documentation" in a disciplinary process, let alone all such documentation "unredacted". In the hearing before me Mr Welch refined the complaint and made clear it was two-fold. The first complaint was that MCP paragraph 7.13 had been breached. Paragraph 7.13 states that "all the documents which will be considered at the [disciplinary] hearing will be enclosed with the invitation letter." Mr Welch complaint was that had not occurred. The second complaint relates to the unredacted copy of the Atkinson Report which the Claimant contends should have been disclosed pursuant to MHPS paragraph 13 without any redactions. I will deal with each in turn.

MCP paragraph 7.13

60. As to the first way Mr Welch put his case, I do not consider there is a serious issue to be tried that MCP paragraph 7.13 has been breached.

61. The relevant part of paragraph 7.13 provides "Before any formal disciplinary hearing the employee will be written to and advised in writing of the allegations which will be considered at the hearing" and that "all the documents which will be considered at the hearing will be enclosed with the invitation letter in the form of a management case." Paragraph 7.13 continues: "The letter … will be sent to the employee at least five working days before the date of the meeting."

62. The Claimant claims there has been a breach of paragraph 7.13. It is difficult to see how that can be correct. The Claimant had various complaints about the provision of documents prior to the disciplinary hearing then scheduled for 25 January 2023. That did not, however, take place and the issue is whether there is currently a breach of contract or serious prospect of one. There is, at present, no date set for the disciplinary hearing and no invitation letter has been sent. After the hearing that had been scheduled for 25-26 January 2023 was adjourned, the Defendant wrote to the Claimant on 27 February 2023. It stated "we confirm that you will be provided with a full list and bundle of documents in good time prior to the [rescheduled hearing]." In the witness statement prepared for the hearing before me, Ms Dudley quoted from the relevant section of MCP paragraph 7.13, and repeated that "all documents that are to go before the disciplinary panel will of course be provided to [the Claimant]." On that basis there is no real prospect of the Claimant establishing there has been, or will be, a breach of MCP paragraph 7.13 if the proceedings are allowed to continue. Paragraph 7.13 requires that the Claimant be provided with the "documents that will be considered at the [disciplinary hearing]" at least five working days in advance, and the Defendant has assured the Claimant that will be occur before the rescheduled hearing.

MHPS Part 1 paragraph 13

63. The second way in which the Claimant puts his case on disclosure is by reliance on MHPS Part 1 paragraph 13. 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" (emphasis added). Mr Welch argues that the Atkinson Report is "correspondence" and that the Claimant should have been provided an unredacted copy of the report at the time it was decided to instigate an investigation. I do not consider the Claimant has any real prospect of establishing that the failure to provide the Atkinson Report in unredacted form is a breach of MHPS Part 1 paragraph 13.

64. The difficulty with Mr Welch's argument is three-fold.

i) First, I do not consider that the Claimant has any real prospects of establishing that the Atkinson Report constitutes "correspondence" within the meaning of MHPS Part 1 paragraph 13. The meaning of "correspondence" in a contract that included a provision identical to paragraph 13 was considered by the Court of Appeal in *Burn v Alder Hey Children's NHS Foundation Trust* [2022] ICR 492. Underhill LJ held at paragraph 28 that "correspondence" refers "only to communications sent by one person to another". As Thornton J held at first instance (see [2021 EWHC 1674) at paragraph 97, "'correspondence' has a distinct and separate meaning from the broader term 'document'". It is intended to cover correspondence in which allegations are made about a doctor, by professional bodies or potentially patients or their relatives. I do not consider that an investigative report that has been commissioned by a Trust into a department at a hospital constitutes "correspondence" as the word is ordinarily understood or as it is intended to be used in paragraph 13. Mr Welch argued that the Atkinson Report will have been emailed or otherwise sent by one individual to another, therefore, he said, it constitutes "correspondence". That is a creative argument, but I do not consider it can be correct. A very large number of documents will have been sent at some point by one individual to another. If that meant all of them then became "correspondence" so as to require disclosure, the obligation in MHPS paragraph 13 would then become essentially a general disclosure obligation, which the Court in *Burn* made clear was not the correct reading of the provision (see per Underhill LJ paragraphs 28 and 32).

ii) Second, MHPS Part 1 paragraph 13 requires only that correspondence "relating to the case" needs to be disclosed. In *Burn*, Thornton J at first instance held that that wording "impose[d] a test of relevance" (paragraph 99), and she held that "the test of relevance" is "prima facie a decision for the Case Investigator and not the Court" subject to an over-arching requirement on the Case Investigator to act rationally (paragraph 100). Applied to the present case I do not consider the Claimant has any real prospect of establishing that the redacted parts of the Atkinson Report are "relevant" to his disciplinary proceedings. The Atkinson Report was an investigation into workplace behaviour generally in the department in which the Claimant was a member, and was not targeted at the Claimant. It thus included allegations made about other individuals. It was confirmed in a letter from the Defendant to the Claimant of 28 March 2023 that any "redactions do not relate to [the Claimant's] disciplinary [proceedings]".

That was also confirmed in Ms Dudley's witness statement. The Atkinson Report is not going to be placed in unredacted form before the Disciplinary Panel. Where the redactions do not relate to the Claimant's disciplinary proceedings, but to other people. I cannot see how they can be regarded as relevant and "relating to [his] case]". The Claimant does not suggest the Defendant's conclusion in this regard was irrational, and there is no real prospect of his establishing that "relevant" material has been withheld from him.

iii) Third, even if the Atkinson Report was "correspondence" and even if some of the redactions did "relat[e]" to the Claimant's case, I do not consider that he would have an unqualified right to have the unredacted report disclosed to him. MHPS Part 1 paragraph 12 provides that the Case Investigator "must ensure that safeguards are in place throughout the investigation so that breaches of confidentiality are avoided as far as possible." It seems likely that the Atkinson Report contains confidential information about other individuals given that it was a report on allegations of bullying and other inappropriate behaviour in relation to a range of individuals. If there was material relating to the Claimant, but which raised confidentiality concerns about other individuals, the Defendant would be entitled to provide the relevant information in such a way that the Claimant could fairly respond to it, but without providing an entirely unredacted document.

(b) Whether damages would be an adequate remedy and if not whether the "balance of convenience" favours granting or withholding injunctive relief

65. The Defendant argues that even if there is a serious issue to be tried, damages would be an adequate remedy, and that, in any event, the balance of convenience favours withholding injunctive relief. I will deal with the latter argument first.

66. In my view, even if the Claimant had real prospects of succeeding at trial, the balance of convenience would favour refusing interim relief. The disciplinary proceedings are still ongoing, and the Claimant has been expressly told that he can seek the attendance of witnesses or the provision of further documents from the Disciplinary Panel. He can also appeal against the decision of the Panel if not satisfied with the outcome. As set out above, there is a "public interest in allowing internal processes to run their course" without interference by the courts. As I indicated, that is relevant to the question of whether there has been a breach of contract. It is also relevant to balance of convenience. In my view the balance of convenience favours withholding interim relief while the disciplinary process is ongoing and in circumstances in which the complaints raised by the Claimant may well be resolved during the disciplinary process, and if necessary on appeal.

67. Given that conclusion, and my conclusion above on whether there is a serious issue to be tried, I do not consider it necessary to determine the Defendant's alternative argument that damages would be an adequate remedy.

(c) The Claimant's conduct of the litigation

68. The Defendant argues that even if the Claimant otherwise meets the *American Cyanamid* test, I should nevertheless withhold relief because of the manner in which he

has conducted the present litigation. As Ms Newbegin observed, interim injunctions are an equitable remedy, and, she submitted, I would be entitled to refuse relief on that basis.

69. There is force in the Defendant's criticism of the Claimant's conduct of the litigation. The Claimant issued the application of 30 May 2023 without notice and without informing the Defendant that he had done so. He had written a pre-action letter on 16 March 2023 which had been answered on 28 March 2023. Proceedings were not then issued. It is, in my view, at least contrary to the spirit of the pre-action process to issue proceedings more than two months later without notice. In addition, the Claimant failed to notify the Defendant that the application had been made until 7 June 2023, and did not serve it until 14 June 2023 in breach of CPR Part 23. Rule 23.4 of the CPR requires that notices of application "must be served on each respondent". Rule 23.7 requires that to occur "as soon as practicable after [the application] is filed" and "in any event … at least 3 days before the court is due to deal with the application." The Claimant failed to serve the application, it appears, because Mr Welch believed that the court would do so. That is not correct. As the Kings Bench Guide states at paragraph 6.26: "The party who makes an application must serve it on the other parties. The court will not do so." The application was thus not properly served as soon as reasonably practicable, or, indeed, 3 working days before the court hearing, which would have required service on 13 June 2023 at the latest for a hearing on 19 June.

70. Ms Newbegin submitted that there was prejudice to the Defendant in the way the Claimant conducted the litigation. The Defendant found out about the injunction application on 7 June 2023 when Mr Welch sent the Defendant's solicitors the notification of the hearing. The date had been fixed taking into account Mr Welch's availability but not that of the Defendant's counsel. As a result, Ms Newbegin informed me that the counsel originally instructed by the Defendant was unable to attend the hearing. The late notice also meant that preparation for the hearing had to take place on a short timescale. It is regrettable that the Claimant conducted the litigation in this way. That said, the Defendant was able to appear before me and helpfully provide me with detailed witness statements and documents and a fully argued skeleton. If I had concluded that the Claimant had real prospect of succeeding at trial, that damages would not be an adequate remedy and that the balance of convenience favoured granting an injunction, I would not have been minded to refuse relief because of the procedural failures. For the reasons set out above, however, the application is refused for other reasons.

Conclusion

71. For the reasons set out above, I would dismiss the Claimant's application for an interim injunction.