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Judgment: approved by the Court for handing down

Delivered: **04/12/08**

**2008 No. 101129**

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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION**

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**BETWEEN:**

**MA**

**PLAINTIFF**

**-and-**

**BELFAST HEALTH AND SOCIAL CARE TRUST**

**DEFENDANT**

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**Headnote**

*Medical practitioner – Health and Social Care Trust – contract of employment – disciplinary proceedings – disciplinary code – legal representation – Health and Personal Social Services (NI) Order 1991, Schedule 3, Part II – departmental directions – statutory duty on Trust to comply – common law right to a fair hearing – ingredients – context – propriety of injunctive relief – declaration – costs – discretion.*

**McCLOSKEY J**

**I INTRODUCTION**

[1] This matter comes before the court under the guise of an application for an interlocutory injunction brought by the Plaintiff, MA, against the Defendant, Belfast Health and Social Care Trust ("*the Trust*"). The question of whether this is properly to be treated as such an application, as opposed to the trial of the action proper, in the particular circumstances of this litigation, is considered in paragraphs [5] – [7] below.

[2] This application is pursued in the following litigation context. By Writ of Summons issued on 29<sup>th</sup> September 2008, the Plaintiff claims:

(i) Damages for loss and damage allegedly sustained by him by reason of the alleged breach of contract of the Trust's servants and agents.

(ii) A declaration that the Trust is obliged to permit the Plaintiff to be legally represented at a forthcoming disciplinary hearing (scheduled to commence on 10<sup>th</sup> November 2008).

(iii) An Order that the Trust be restrained from:

(a) adopting a disciplinary procedure which does not allow the Plaintiff to be legally represented; alternatively

(b) adopting a disciplinary procedure which fails to comply with the principles of natural justice and fairness;

(c) adopting a disciplinary procedure which is in breach of the Plaintiff's Article 6 right to a fair hearing.

The context in which the forthcoming disciplinary hearing is scheduled to proceed arises out of the Plaintiff's employment by the Trust and its predecessor as a consultant cardiac surgeon since 4<sup>th</sup> May 2004 and certain charges of misconduct which have been preferred against the Plaintiff by his employer. The charges entail allegations relating to the making, alteration and substitution of operation notes on two occasions.

### **Contract**

[3] The main complaint lying at the heart of these proceedings relates to the Trust's disinclination to permit the Plaintiff to be legally represented at an impending disciplinary hearing by a qualified practicing lawyer of his choice. The Plaintiff also advances certain discrete complaints about the fairness of various aspects of the disciplinary process. The background to these grievances will appear more fully below. At this juncture, I would highlight the causes of action invoked by the Plaintiff. Primarily, he sues in contract. Paragraphs 8 and 9 of the Statement of Claim make the case that the Plaintiff has a contract with the Trust, containing specified express and implied terms. In paragraph 36, it is averred that the Trust is in breach, or anticipatory breach, of the contract. The main breach of contract alleged is the Trust's refusal to permit the Plaintiff to be represented by a lawyer at the forthcoming disciplinary hearing. A further alleged breach of contract is the Trust's asserted failures "*to give the Plaintiff details of the witnesses to be called to give evidence despite repeated requests to do so*" and "*to properly identify the allegations which the Plaintiff faces by making an oblique reference to the Coroner's investigation*". In a Statement of Claim noteworthy for its extensive and detailed pleading, the allegations of breach of contract are couched in strikingly compact terms.

### **Article 6 of the Convention**

[4] Secondly, the Statement of Claim promotes the case that there will be an infringement of the Plaintiff's rights under Article 6 of the Convention. This case is made in paragraphs 35 and 37, encapsulated in the following pleading:

"37. *In proceeding with the disciplinary hearing as proposed, the Defendant will be acting in breach of the Plaintiff's Article 6 right to a fair hearing*".

In the Statement of Claim, no appreciable difference between the core breaches of contract asserted by the Plaintiff and the suggested infringements of his rights under Article 6 is detectable. This is clear from the particulars of the alleged breach of Article 6 which, following an averment that dismissal of the Plaintiff from his post would have catastrophic implications for him, recites:

*"It is precisely such consequences which call for the employee to be fully and properly informed of the case he has to meet, to know precisely what the allegations are, to know who the witnesses are that are to testify in support of the charges and to be able to properly test their evidence"*.

Notably, the Plaintiff's complaint regarding legal representation does not feature in these particulars. Furthermore, there is no dispute between the parties that the Plaintiff enjoys a common law right to a fair hearing in the disciplinary process. This right features in the second of the injunctions pursued by the Plaintiff.

[5] At the outset of the hearing (on 15 October 2008), two particular questions were raised by the court. The first was whether the disciplinary process will entail the determination of any criminal charge against the Plaintiff or any civil right or obligation of the Plaintiff. Decisions in cases such as *Albert and Le Compte –v- Belgium* [1983] 5 EHRR 553 and *Le Compte and Others –v- Belgium* [1982] 4 EHRR 1 seemed potentially relevant. Notably, the Statement of Claim does not plead this important issue with any clarity. The second question was whether, if the disciplinary process *does* entail the determination of any civil right or obligation of the Plaintiff, Article 6 confers on him any right greater than or different from his common law right to a fair hearing. When the trial resumed (on 24<sup>th</sup> October 2008) Mr. Boyle (representing the Plaintiff) informed the court that he was not pursuing any freestanding case under Article 6. As a result, neither party addressed argument to the court on the impact of Strasbourg decisions such as those noted above.

[6] It seems to me that, in the particular circumstances of this case, the concession with regard to Article 6 was well made, for the prosaic reason that in the Statement of Claim, the asserted breaches of Article 6 (quoted above) do not differ in any material respect from the alleged breaches of contract and the alleged infringements of the Plaintiff's common law right to a fair hearing. It might have been otherwise, of course, if the Plaintiff were making the case that, in his particular circumstances, Article 6 confers on him some right or rights greater than or different from those which he asserts in contract and at common law. However, the Plaintiff does not do so.

### **Contract and Common Law Right**

[7] Accordingly, the spotlight falls on two of the three causes of action initially invoked by the Plaintiff. The first is his case in contract against the Trust and the second is his reliance on a common law right to a fair hearing.

## **II INTERLOCUTORY MOTION**

[8] By Notice of Motion dated 29<sup>th</sup> September 2008, which coincided with the issue of the Writ of Summons, the Plaintiff applied for an interlocutory injunction pursuant to Section 91(1)(b) of the Judicature (Northern Ireland) Act 1978 and Order 29, Rule 1 of the Rules of the Supreme Court restraining the Defendant from adopting a disciplinary procedure:

- (a) Which does not permit the Plaintiff to be legally represented;
- (b) Which fails to comply with the principles of natural justice and fairness; and
- (c) Which is in breach of the Plaintiff's right to a fair hearing under Article 6.

While the central focus of these proceedings is the Plaintiff's complaint in relation to (a), certain concerns in respect of (b) also were ventilated before the court. In this respect, I would observe that the court is *not* invited to make any specific ruling, by the grant of injunctive relief, on discrete issues relating to the presentation, reception or consideration of evidence at the disciplinary hearing or, indeed, any of the other criticisms canvassed on the Plaintiff's behalf under the broad banner of unfair hearing. This is clear from the terms of paragraph (ii) of the Notice of Motion, which seeks an order that:

*"The Defendant be restrained from adopting a disciplinary procedure in order to consider the allegations contained in the Notice of Hearing dated 20<sup>th</sup> August 2008 which fails to comply with the principles of natural justice and fairness"*.

The generality of this formulation is in marked distinction to the other form of injunctive relief sought by the Plaintiff viz. an order that:

*"The Defendant be restrained from adopting a disciplinary procedure ... which does not allow the Plaintiff to be legally represented"*.

The third form of injunctive relief sought was an order similarly restraining the Trust, relying on an actual or prospective infringement of the Plaintiff's rights under Article 6: as appears from paragraphs [5] and [6] above, this is now moot.

[9] The disciplinary hearing was scheduled to commence on 10<sup>th</sup> November 2008. If the extensive hearing which I conducted, on 14<sup>th</sup> and 24<sup>th</sup> October 2008, were properly to be treated as an application for an interim injunction only, the question for the court would be whether the Plaintiff has raised a serious issue to be tried, by making out a good arguable case that the Trust is, or will be, acting in breach of contract and/or in breach of the Plaintiff's common law right to a fair hearing; and, if so, whether the balance of convenience favours the making of an injunction restraining the Trust from thus acting. These are the familiar *American Cyanamid v. Ethicon* [1975] AC 396 principles.

[10] On the first day of the hearing before me, (14<sup>th</sup> October 2008), a substantial quantity of evidence, consisting of affidavits and documentary materials emanating from both parties was in existence and was duly considered. When the hearing resumed (on 24<sup>th</sup> October 2008), a further voluminous quantity of additional documentary evidence had been generated and this, too, was considered by the court. These further materials included, in particular, the Trust's amended "Summary of Case"; a list of witnesses; the Trust's amended bundle of documents for the disciplinary hearing; witness statements; and inter-partes correspondence touching on the Plaintiff's representations about a variety of seemingly contentious issues.

Having reflected on the nature and quantity of the evidence ultimately assembled before the court, together with the amount of court time and resources expended in hearing this matter, and having regard to the relief claimed in the Writ and Statement of Claim (on the one hand) and the interim injunctive relief pursued (on the other), a question arose as to whether the hearing conducted before the court should be treated as the trial proper.

[11] The injunctive relief sought by the Plaintiff's Notice of Motion duplicates precisely the final injunctive relief sought in the Writ and the Statement of Claim. While it is correct that the Writ and Statement of Claim also seek a declaration, the terms in which the declaration is formulated add nothing to the first of the injunctions sought, both interim and final. This leaves outstanding the Plaintiff's claim for damages. In these circumstances, the court invited argument on whether the hearings conducted to date should properly be treated as the trial of the substantive action. Unsurprisingly, the Trust responded affirmatively. On behalf of the Plaintiff, three submissions were advanced:

(a) There was "*... a distinct possibility that evidence may need to be called at the trial of this matter to address relevant issues, for example, from the British Medical Association ...*".

(b) Following the disciplinary hearing, further argument might be required on "*... whether there has been a breach of the Plaintiff's rights under Article 6 ...*".

(c) Finally, there are still significant contentious issues between the parties, notwithstanding the developments noted in paragraph [10] above.

[12] I preface my treatment of these three submissions with two observations. The first is that all of the forms of injunctive relief sought by the Plaintiff, both interim and final, seek to restrain the Trust from certain forms of conduct *in advance of the forthcoming disciplinary hearing*. Each of these injunctions will become meaningless and moot following completion of the disciplinary hearing. Secondly, the Plaintiff has at no time sought an expedited trial. Accordingly, as the Plaintiff's case is presently framed, the only remedies claimed which could conceivably survive the completion of the forthcoming disciplinary hearing are a declaration and damages. As already observed, the declaration claimed is identical to the first of the injunctions claimed.

[13] With regard to the three discrete submissions advanced by the Plaintiff:

(a) I consider the first to constitute a bare and unparticularised assertion, which I dismiss as without merit. Moreover, it fails to address the considerations highlighted in paragraph [12] above.

(b) I have dealt fully with the Article 6 issue above: In the circumstances of this case, *as pleaded*, it adds nothing to the Plaintiff's case in contract and at common law.

(c) The "*significant number of issues*" allegedly still in contention between the parties do not, in my view, entitle the Plaintiff to any relief, interim or final, as appears from the further terms of this judgment. Furthermore, these issues now belong to a future framework of which the court is not seized and it is not the function of the court to allow these proceedings to remain in existence with a view to policing possible future events which may or may not occur. Finally, as appears from what follows in this judgment, I have concluded that the

Plaintiff enjoys a contractual right to be accompanied by a legally qualified person of his choosing at the forthcoming hearing.

In the circumstances and for the reasons outlined above, and taking into account the overriding objective enshrined in RSC Order 1, Rule 1A – in particular paragraph (2)(b), (c), (d) and (e) – I have concluded that the hearings already conducted should be treated as the trial of the action proper, subject to permitting the Plaintiff to have liberty to apply, within a specified period, to submit further and fresh evidence in support of his claim for damages, in the event that there should be any real and sustainable basis for doing so.

[14] In the light of my ruling to treat the proceedings before the court as the trial of the action proper, the determination of this matter will not be governed by the *American Cyanimid* principles. Rather, the question for the court is whether, applying the civil standard of the balance of probabilities, the Plaintiff has discharged the onus of establishing that he is entitled to either of the injunctions claimed which, in the light of the disappearance of the claim based on Article 6, are those set out in paragraph [2](iii) (a) and (b) above; or, alternatively, a declaration in the terms claimed viz. a declaration that the Trust is obliged to permit the Plaintiff to be legally represented at the disciplinary hearing. There is no claim for damages by the Plaintiff which the court could determine at this stage.

### **III THE EVIDENCE: A SUMMARY**

[15] The material dates and events are detailed in a helpful chronology supplied to me by counsel for the Plaintiff. They are also documented in the substantial bundles of documentary materials generated as the hearing progressed. It is unnecessary for me to rehearse the evidence exhaustively. I shall, rather, endeavour to highlight the most salient facts forming the background to this application.

#### **The Plaintiff's Contract**

[16] The Plaintiff's contract of employment with the Trust is constituted by a "Statement of Main Terms and Conditions of Employment for Medical Consultants". This records that the Plaintiff's employment with the Trust as a consultant cardiac surgeon began on 4<sup>th</sup> May 2004. Clause 4 specifies a mutual obligation "... *that you and we work in a spirit of mutual trust and confidence*". Clause 16 requires the Plaintiff to comply with the Trust's policies and procedures. Clause 18, under the label of "**Disciplinary Matters**", provides:

*"Wherever possible, any issues relating to conduct, competence and behaviour should be identified and resolved without recourse to formal procedures. However, should we consider that your conduct or behaviour or that your professional competence have been called into question, we will resolve the matter through our disciplinary or capability procedures, subject to the appeal arrangements set out in those procedures"*.

It is evident that the Trust's "*disciplinary or capability procedures*" are not incorporated in this document. Rather, they have a separate existence.

#### **The DHSSPS Circular, the Framework Code and the Trust's Code**

[17] Next, it is appropriate to consider a DHSSPS Circular, dated 30<sup>th</sup> November 2005 ("*the Circular*"). This Circular was made by and emanated from the Department of Health,

Social Services and Public Safety ("*the Department*"), which is the parent body. The first attachment to the Circular is an instrument entitled "Directions on Disciplinary Procedures 2005". I shall examine the status and effect of this instrument below. The Circular also attaches a document, described as "*A new framework for handling concerns about the conduct, clinical performance and health of medical and dental employees*", bearing the title "*Maintaining High Professional Standards in the Modern HPSS*" and dated November 2005 (hereinafter described as "*The Framework Code*"). It further records that this new Code has been agreed with BMA and BDA and that it supersedes specified pre-existing instruments of guidance. The Circular also contains the following statements:

*"The new framework is effective from 1<sup>st</sup> December 2005 ...*

*HSS Trusts, HSS Boards and Special Agencies are required to notify the Department of the action they have taken to comply with the framework by 31<sup>st</sup> January 2006".*

[18] Paragraph 2 of the Framework Code provides:

*"Throughout this framework where the term 'performance' is used, it should be interpreted as referring to all aspects of a practitioner's work, including conduct, health and clinical performance".*

By paragraph 11:

*"All HSS bodies must have procedures for handling concerns about an individual's performance. These procedures **must** reflect the framework in this document ...".*

[My emphasis].

The structure of what follows establishes a dichotomy of the "*informal approach*" and the "*formal approach*". The latter is addressed in paragraphs 28-30. The Framework Code also establishes a further dichotomy of (a) conduct disciplinary proceedings and (b) clinical performance disciplinary proceedings. The proceedings with which this litigation is concerned are of the former type.

[19] Paragraph 28 of the Framework Code contemplates that where the formal approach is adopted, this could lead to "*conduct or clinical performance proceedings*". This has a series of procedural consequences. By paragraph 29, all concerns are to be investigated quickly and properly, with a clear audit route. Paragraph 30 continues:

*"At any stage of this process – or subsequent disciplinary action – the practitioner may be accompanied to any interview or hearing by a companion. The companion may be another employee of the HSS body; an official or lay representative of the BMA, BDA, defence organisation, or friend, work or professional colleague, partner or spouse. The companion may be legally qualified but he or she will not, however, be acting in a legal capacity".*

Finally, Section III of the Framework Code, bearing the title "Guidance on Conduct Hearings and Disciplinary Procedures", provides, in paragraph 1:

*"This section applies when the outcome of an investigation under Section 1 shows that there is a case of misconduct that must be put to a conduct panel ...*

*Misconduct covers both personal and professional misconduct ...*

*All misconduct issues should be dealt with under the employer's procedures covering other staff where conduct is in question".*

[20] The next document to be considered is entitled "Belfast Health and Social Care Trust – Disciplinary Procedure" (which I shall describe as "*the Trust's Code*"). This contains, in its "Introduction", the following passage:

*"This Procedure applies to all Trust staff. It should be noted that in relation to medical and dental staff, issues of general/professional misconduct are dealt with under this Procedure. Further relevant Procedures are contained in Circular HSS (TC8) 6/2005 ."*

Thus the Trust's Code makes direct reference to the departmental Circular, discussed in paragraph [17] above. Further, it is evident from this passage that the Trust's Code postdates the departmental Circular and this is confirmed by the signatures of the Regional Staff and Trust representatives, which are dated 28<sup>th</sup> August and 3<sup>rd</sup> September 2007 respectively.

[21] In paragraph 2 of the Trust's Code, under the banner "Guidance and Definitions", there is the following entry:

*" **'Employee Representative'** is any employee of the Trust who is an accredited representative of a trade union, professional organisation or staff organisation or a full time official of any of the above organisations or a fellow Trust employee. **Legal representation will not be permitted at any stage of this Disciplinary Procedure**".*

[Emphasis added].

Thus a purported prohibition on legal representation finds expression in a definition, but not elsewhere. Amongst the provisions governing the conduct of investigations is paragraph 6.2(a), which provides, *inter alia*:

*"The Investigating Officer should meet with the employee who may be accompanied and/or represented by an employee representative".*

[22] Paragraph 6.3 of the Trust's Code, under the title "Hearing", contains an assortment of provisions governing the constitution and activities of a body described as the "Disciplinary Panel". I would highlight the following aspects in particular:

*"(a) If it is considered that there is a case to be answered, the employee should be called to attend a disciplinary hearing before the appropriate Disciplinary Panel ...*

*The employee should be informed in writing of the allegation and the right to be represented ...*

*(e) The employee shall normally be present during the hearing of all the evidence put before the Panel; however, the employee may choose not to attend the hearing. It should be made clear that the hearing will proceed in his or her absence. Any submission by the employee in writing or by his or her representative will be considered ...*



*(g) At the hearing, the case against the employee and the evidence should be detailed by the presenting officer and the employee should set out his/her case and answer the allegations.*

*(h) Witnesses may be called by either party and can be questioned by the other party and/or by the Disciplinary Panel. The presenting officer and the employee/ representative will have the opportunity to make a final submission to the Disciplinary Panel at the end of the hearing with the presenting officer going first. The Disciplinary Panel has the right to recall any witnesses but both sides and their representatives have the right to be present".*

Finally, paragraph 6.4 ("Disciplinary Decision") provides, in material part:

*"(a) The Disciplinary Panel will review all the evidence presented before taking its decision. The Disciplinary Panel will determine on a balance of probability whether the allegations were or were not proven."*

Many of the passages from the Trust's Code quoted above highlight the importance which is attributed to the employee's right to representation throughout the entirety of the disciplinary process. The question which the court must resolve concerns the precise content and scope of this contractual right in relation to a disciplinary hearing.

### **The Disciplinary Charges**

[23] On 15<sup>th</sup> April 2008, the following disciplinary charges were notified in writing to the Plaintiff:

- 1. Failed to take contemporaneous notes of the operations you performed on the patient MF.*
- 2. Changed the notes for both operations, on 10/4/05 and 30/5/06 of patient MF that were filled in the patient's chart in August 2006.*
- 3. Failed to indicate in the patient's chart that any amendments had been made or record those changes in the patient (MF) records.*
- 4. Removed versions of notes from the patient's chart (MF) and substituted them with other notes without recording in the patient's chart that any alterations or substitutions had been made".*

(In passing, it would appear that the date of the first operation, specified in the second of the charges, should be 10/04/06). In short, in the disciplinary process the Plaintiff is charged with a series of irregularities, undoubtedly serious in nature, relating to the making, maintenance, alteration and substitution of records pertaining to the operative treatment of a particular patient on two separate occasions.

[24] At the time when he was notified of the disciplinary charges, the Plaintiff was served with a bundle of documents described as "*presentation papers*", intended for consideration by the Disciplinary Panel. On the first day of the hearing of this interlocutory application (14<sup>th</sup> October 2008), it became apparent that the parties' legal representatives had not yet exhausted attempts to resolve the differences between them concerning the composition of this bundle. These attempts continued (I was informed) during the period which elapsed before the second

day of hearing (24<sup>th</sup> October 2008). I considered this a matter of no little significance, given that in his pursuit of interlocutory injunctive relief, the Plaintiff was relying substantially on the inclusion of what he claimed were prejudicial, or otherwise improper, materials in both the bundle and its accompanying "Case Summary". I consider that this latter document, properly analysed, contains in essence the particulars, or outworkings, of the charges specified in the communication dated 15<sup>th</sup> April 2008, which are rather sparse in particularity.

[25] On the second day of trial, the further evidence and submissions presented to the court confirmed that some of the differences between the parties relating to the above matters had been resolved. Others endured. I shall give some further consideration to this subject below. At this juncture, I would merely observe that the disciplinary charges remain unchanged.

[26] As regards the Trust's case against the Plaintiff in the disciplinary process (as understood by the court), the pattern of alleged irregularities concerning the record keeping in respect of both operations would appear to be broadly similar. As regards each operation, the bundle contains, *inter alia*, more than one version of each operation note. There are evident differences between these versions. Thus, *for example*, there is an operation note pertaining to the first operation apparently signed only by Mr. Pramond Bonde, a surgical registrar, described in the record as the Plaintiff's "*assistant*". However, there is a second version of this note, which, evidently, purports to represent that the operation was performed by the Plaintiff. Moreover, there is a third version of this note whose contents, relating to matters such as "Findings" and "Closure", differ from the first two versions. This provides a flavour of the issues which will be explored, and determined, by the Disciplinary Panel.

### **The Correspondence**

[27] The evidence includes a detailed letter dated 14<sup>th</sup> July 2008 from the Plaintiff's solicitors to the Trust's Medical Director, Dr. Stevens, which makes a series of representations about certain aspects of the disciplinary process, in particular the contents of the bundle of documentary evidence and the formulation of the "*Case Summary*". This letter contains an extensive menu of requests, including the provision of a list of witnesses to be called at the hearing and the production of witness statements. The letter further makes the case that the Plaintiff should be permitted to have legal representation at the disciplinary hearing, in the following terms:

*"Clearly, in this case, given the nature of the allegations, the credibility of the witnesses is likely to be of crucial importance. We would submit, therefore, that presentation of MA's position and detailed cross-examination of the witnesses at the disciplinary hearing ought (in accordance with MA's Article 6 rights) [to] be performed by a skilled advocate. We are very keen to avoid a situation in which MA is cross-examining colleagues and management staff as this could cause acute embarrassment to both parties ...*

*We consider there is a real risk of unfairness to MA, were he to be reluctant to pursue a line of questioning against one of his colleagues whom he will have to return to work with after the disciplinary hearing. Similarly, the witnesses called by the Trust may be reluctant to speak frankly at the disciplinary hearing if MA is cross-examining them. There will also clearly be a major potential impact on MA's career as a cardiac surgeon in the United Kingdom should an adverse finding be reached ...*

*Finally, we consider that having a skilled advocate represent MA is likely to result in the disciplinary hearing being dealt with more fairly, efficiently and cost-effectively for all concerned".*

[28] This was not the first letter written on the Plaintiff's behalf by his solicitors. Rather, it was preceded by a letter dated 16<sup>th</sup> June 2008, also addressed to Dr. Stevens. While this letter also contained a contention that the Plaintiff should have "*full and proper legal representation*" at the disciplinary hearing, it is noteworthy that it describes the allegations against the Plaintiff in the "*Summary of Case*" as "*very limited and specific*". This characterisation of the allegations was the impetus for the contention that most of the documents in the Trust's bundle for hearing were "*irrelevant and prejudicial*". In response to this letter, Dr. Stevens, *inter alia*, referred to the definition of "*employee representative*" in paragraph 2 of the Trust's Code (see paragraph [21], *supra*).

[29] By letter dated 30<sup>th</sup> July 2008 to Dr. Barclay, Deputy Medical Director of the Medical Protection Society, Dr Stevens, with reference to the discrete issue of legal representation, stated:

*"In relation to legal representation, the Trust does not consider that legal representation is either appropriate or necessary in this case. The case law referred to has been considered, but the circumstances of this case are not considered to be comparable to the complex allegations which were the subject of the cases referred to. As Carson McDowell put it in their letter, the allegations in this case are, by contrast, 'very limited and specific'. The Trust does not accept that there are any special circumstances in this case which give rise to a right to legal representation over and above the right to representation set out in the Trust's Disciplinary Procedure ...*

*The Trust has already conceded that, in the circumstances of this case, and in view of Dr. Barclay's extensive involvement to date, MA can continue to be represented by Dr. Barclay of MPS whom we understand to be an experienced representative."*

The twofold suggestion that Dr. Barclay (a) has been extensively involved in the affair to date and (b) is an experienced representative is unchallenged in the evidence before the court. Moreover, it is common case that Dr. Barclay holds a law degree.

[30] With reference to the "*Case Summary*", Dr. Stevens stated, in his letter dated 30<sup>th</sup> July 2008:

*"It is normal practice for the Presenting Officer to provide his views on the evidence and the conclusions he would invite the Panel to draw from the evidence. These views form part of the management case. No doubt, these views and conclusions will be countered by MA and his representative and it is clearly for the Panel to reach its own conclusions on the basis of all the evidence and representations"*.

The letter further confirmed that all witnesses would be vulnerable to questioning by the Panel members, the Presenting Officer and the Plaintiff's representative. Thus there would be no need for the Plaintiff to question any witness, given Dr. Barclay's role, unless the Plaintiff should choose to do so.

[31] The inter-partes correspondence continued immediately prior to and during the trial of this matter. On 10<sup>th</sup> October 2008, the Plaintiff's solicitors were supplied with a list of the witnesses whom the Presenting Officer intends to call at the impending hearing. Simultaneously, some modifications of certain documentary materials were confirmed. Moreover, the Trust's solicitor reiterated an earlier statement that none of the Disciplinary Panel Members will consider the bundle of documentary evidence in advance of the hearing. The first day of trial then intervened (on 14<sup>th</sup> October 2008). Further letters and communications between the parties' legal representatives ensued. During this period witness statements, an amended bundle for hearing and certain other documentary materials were served on the Plaintiff's solicitors. This process resulted in an ever diminishing number of matters in contention between the parties. The persisting contentious issues, from the Plaintiff's perspective, are set out in a letter dated 22<sup>nd</sup> October 2008 written by his solicitors. In summary, the Plaintiff seeks disclosure of certain documents; he challenges the amended bundle for hearing in certain respects; and he contends that certain passages in the witness statements should be deleted.

[32] It was confirmed to the court by the Plaintiff's counsel that certain of the requests, representations and complaints enshrined in this letter are no longer live. Some of those which remain extant relate to matters which might be considered relatively minor. For example, there is a request for clarification of whether "cleaner" copies of certain operation notes have previously been furnished. To like effect are a query about a blank page in the bundle for hearing and a request concerning who attended a particular meeting. Properly analysed, the Plaintiff's persisting complaints about the bundle for hearing relate in substance to certain references to the issue of reporting the death in question to the Coroner. The other outstanding representations and requests do not bear directly on the question of the composition of the bundle in its current amended form, with the exception of a discrete issue relating to record maintenance and storage policies which, by the second day of trial, remained an evolving, unresolved issue between the parties. The last item of correspondence in the evidence before the court is a letter dated 23<sup>rd</sup> October 2008 from the Trust's solicitor to the Plaintiff's solicitors. The contents of this letter suggested that the process of attempting to narrow the issues between the parties was not necessarily exhausted.

### **The Affidavit Evidence**

[33] In resisting the Plaintiff's case, three affidavits were filed on behalf of the Trust. For present purposes, the most significant of these is that of Dr. Hannon, the Trust's Associate Medical Director who will have the role of presenting officer at the forthcoming disciplinary hearing. Dr. Hannon's affidavit deals with two salient issues in some depth. The first relates to the Framework Code. Dr. Hannon contends that, under the aegis of the Framework Code, legal representation "... *is only available if the charges against the Plaintiff relate to his clinical competence and performance*".

[34] The second noteworthy feature of Dr. Hannon's affidavit is that it highlights the extensive involvement of Dr. Barclay (of the MPS) from an early stage of events, in 2006. Dr. Hannon avers that Dr. Barclay "... *has detailed knowledge of events from June 2006 until the present time ...*". Dr. Hannon rebuts the suggestion that the charges against the Plaintiff give rise to unduly complex issues. Thirdly and finally, Dr. Hannon's averments include the following:

"5(d) ... In the course of the investigation conducted by Professor Nixon and Mr. Brown, the Plaintiff was interviewed and acknowledged that he had altered some of those operation notes, had removed some of the original operation notes and replaced them with later written notes and failed to indicate anywhere that notes had been altered, removed and replaced. The Plaintiff provided a fulsome explanation for his acts but it is the Trust's view that those acts constituted professional misconduct and gave rise to the present charges".

I would observe that the affidavit evidence on behalf of the Plaintiff does not challenge these averments.

[35] The averments in Dr. Hannon's affidavit contrast with certain averments in the affidavit sworn by the Plaintiff's solicitor grounding this application:

*"[24] It should be apparent ... that if the Plaintiff does not have the benefit of a trained advocate, he faces the daunting prospect of preparing for and cross-examining a number of experts and a number of high ranking members of the Trust staff ...*

*[25] Furthermore, the issues to be addressed during the hearing will include, but will not be limited to, the Trust's procedures for completion of medical records, the nature of the surgery performed on MF, the interpretation of documents and the basis and evidence upon which inferences have been drawn by a number of the witnesses above. Then, having cross-examined some or all of the above, the Plaintiff faces the prospect of trying to give his own evidence in a clear and methodical fashion ... [and] faces the prospect of going back to work either directly with or under the auspices of people he has had to ask some very searching questions of ..."*

This affidavit also highlights the potentially serious consequences for the Plaintiff, in the event of an outcome adverse to him. The affidavit does not address the availability of Dr Barclay's services to the Plaintiff or how this might affect the concerns ventilated in the averments quoted above.

[36] The Trust's affidavits were all sworn on 13<sup>th</sup> October 2008. By the date when the hearing of this matter was finalised, 24<sup>th</sup> October 2008, neither the Plaintiff nor anyone on his behalf had rejoined to these affidavits, despite the opportunity which existed to do so. Nor was there any direct challenge during the hearing to of Dr. Hannon's averments set out in paragraph [] above.

#### **IV THE PLAINTIFF'S CASE**

[37] The breadth of the Plaintiff's case, as portrayed in the Statement of Claim and his counsel's skeleton argument, was refined somewhat in the course of oral submissions. As appears from paragraphs [24] – [32] above, there were significant developments following the initiation of these proceedings, with a corresponding diminution in the matters in contention between the parties.

[38] In summary, it was submitted on behalf of the Plaintiff that there are several serious questions to be tried in the action, specifically those relating to whether the Trust had breached the contractual term requiring mutual trust and confidence; had breached its contractual obligation to give effect to the Framework Code and, specifically, the provision concerning legal representation; and was proposing to act in breach of contract by conducting

a disciplinary hearing in contravention of the Plaintiff's common law right to a fair hearing. It was contended that the Plaintiff enjoys a contractual right to legal representation at the forthcoming hearing. The Plaintiff's alternative contention was that, as a minimum, the Trust has a discretion to permit this facility. This alternative contention is, presumably, founded on the Plaintiff's common law right to a fair hearing. The Plaintiff's argument rested heavily on the contention that he will have to grapple with difficult issues concerning the relevance and admissibility of evidence, a submission which Mr. Boyle developed at some length by reference to various passages in the bundle of documentary evidence. To similar effect was the submission relating to hearsay evidence and the burdens which, it was said, this will impose on the Plaintiff.

## **V THE DEFENDANT'S CASE**

[39] On behalf of the Trust, Mr. O'Reilly's main submission was that the case against the Plaintiff in the forum of the disciplinary proceedings is uncomplicated. He developed this submission in the following way:

(a) Mr. Gladstone is the only medical colleague of the Plaintiff who will be testifying at the hearing and his testimony will relate only to the circumstances in which he secured copies of the notes in question.

(b) Three of the other witnesses – Professor Nixon, Mr. Brown and Dr. Stevens – all had the role of investigator and will, in consequence, be witnesses of fact, in common with Mr. Gladstone.

(c) The only witness who will give expert opinion evidence is Dr. Venn, whose testimony will bear on the issues relating to the propriety of the Plaintiff's conduct regarding the operation notes in question and the appropriate standards to be followed.

Mr. O'Reilly's submissions also highlighted that the presenting officer, Dr. Hannon, is a consultant vascular surgeon with no legal qualifications; that ample legal advice will be available to the Plaintiff in advance of the hearing; that the Plaintiff will have the assistance, advice and representation of Dr. Barclay before and throughout the hearing; that the Plaintiff has already been interviewed about the subject matter of the disciplinary charges and has had sufficient time to prepare for the hearing; and that the issues to be explored and determined at the hearing must be evaluated in the light of Dr. Hannon's averments about the acknowledgements which the Plaintiff has already made with regard to the operation notes (paragraph [34] above). Finally, Mr. O'Reilly was disposed to accept that the provisions of the Trust's Code relating to representation at disciplinary hearings are not harmonious with the Framework Code. He submitted, however, that in the particular circumstances of this case this disharmony had been remedied by the Trust's express acknowledgement that the Plaintiff can be represented by Dr. Barclay at the forthcoming hearing.

## **VI CONCLUSIONS: CONTRACT**

[40] The material terms of the Plaintiff's written contract of employment, together with the relevant provisions of the departmental Circular, the departmental Framework Code and the Trust's Code are set out in paragraphs [17] – [22] above. These materials are especially germane to the *first* of the injunctions pursued by the Plaintiff viz. an injunction restraining the disciplinary hearing from proceeding unless the Plaintiff is permitted "*to be legally*

*represented*", together with the corresponding declaration sought. Having regard to the presentation of the Plaintiff's case to the court, this emerged, by a distance, as the main issue to be determined.

[41] The first contention advanced on behalf of the Plaintiff, in Mr. Boyle's skeleton argument, is that the Trust has, in various respects, acted in breach of Clause 4 of the Plaintiff's written contract of employment, which imposes a bilateral obligation of mutual trust and confidence on employer and employee. This contention is duly particularised in the Plaintiff's skeleton argument, but not in the Statement of Claim. In this respect, I refer particularly to the breaches of contract pleaded in paragraph 36. Moreover, this discrete contention and its outworkings are not easily related to the two forms of injunction sought in paragraph 41(a) and (b). Accordingly, I consider that this does not properly form part of the Plaintiff's case, as pleaded. In any event, insofar as the court is properly seised of this contention, I find that it has no substance. Most of its particulars relate to purely historical events which have no enduring significance. While two of its particulars relate to the "Case Summary" and the composition of the bundle for hearing, I find that neither of these discrete complaints constitutes a breach of clause 4 of the contract by the Trust. Where, as here, an employee is charged with serious misconduct, there can be no objection to the Presenting Officer, representing the views of management, adopting the stance that the charges are well founded and will be proved to the satisfaction of the Disciplinary Panel. I find that this does not breach the Trust's obligation to work with the Plaintiff in a spirit of mutual trust and confidence.

[42] The second contention advanced on behalf of the Plaintiff is that he has a contractual entitlement to be legally represented, by a qualified practicing lawyer of his choosing, at the forthcoming disciplinary hearing, with the result that any denial by the Trust of such entitlement gives rise to a breach of contract. There is something incongruous about this aspect of the Plaintiff's case, as it rests on the premise that the Trust's Code – which, the parties are agreed, forms part of the Plaintiff's contract of employment – does *not* contain a provision to this effect: this was the case advanced in argument before the court and it is unambiguously made in paragraph 11 of the Plaintiff's skeleton argument:

*"The Defendant's disciplinary policy, in breach of the requirement to comply, does not reflect the Framework. It is far more restrictive ...*

*It does not allow for a defence organisation representative or a work or professional colleague. It does not allow for anyone legally qualified".*

Notably, the Plaintiff's Statement of Claim does *not* make the case that the Trust is in breach of contract, or is otherwise acting unlawfully, by failing to give adequate effect to the departmental Circular and paragraph 30 of the departmental Framework Code in particular. This is reflected in the breaches of contract particularised (in paragraph 36) and the relief sought (in paragraphs 40 and 41). Moreover, the Plaintiff does not seek either a declaration that the Trust is acting unlawfully by its alleged failure to expressly incorporate paragraph 30 of the Framework Code in its own code or an injunction requiring it to do so.

[43] There is an evident dislocation between the Plaintiff's contention that his contract of employment entitles him to legal representation at the disciplinary hearing (on the one hand) and his supporting argument that the contract does not contain a term to this effect (on the other). In the circumstances, I consider that it is incumbent on the court to both ascertain and

construe the relevant contractual terms. In adopting this approach, I note that in *Arbuthnot Fund Managers –v- Rawlings* [2003] EWCA. Civ 518, a case concerning the grant of interlocutory injunctions in an employment dispute with elements of post-termination contractual restraints, Chadwick LJ stated:

*"[20] The first task of the court – faced with the contention that post-termination restraints on an employee's ability to engage in future business activity are not enforceable – is to construe the contract under which those restraints are said to be imposed. That, as it seems to me, is a task which the court ought to carry out on an application for interim relief (if there is one) if it can properly do so. Unless the court is satisfied that there are disputed facts which bear on the construction of the relevant contractual terms, and that those facts cannot be resolved without a trial, the court at the interlocutory stage is as well able to construe the relevant contractual terms as a court will be at a trial. There is no need to put off until trial determination of the question – what do the contractual terms mean?"*

[My emphasis].

Accordingly, my approach would have been precisely the same irrespective of whether I were to treat this matter as an application for interim injunctive relief or the trial of the action in which the same relief is claimed in final terms.

[44] By Clause 18 of the written contract, disciplinary matters are governed by the Trust's "*disciplinary or capability procedures*", which are not specified and are, therefore, to be found elsewhere, if they exist. If such procedures do exist, I hold that they are, as a matter of law, to be incorporated by reference, thereby giving rise to contractual rights and obligations. In this instance, the "*disciplinary or capability procedures*" are found in the Trust's Code, as outlined in paragraphs [20] - [22] above. It is beyond dispute that this Code does not contain a provision which mirrors paragraph 30 of the departmental Framework Code (cf. paragraph [19] above). Rather, the Trust's Code contains a provision which is positively antithetical to paragraph 30 [*"Legal representation will not be permitted at any stage of this disciplinary procedure"*]. At the hearing before me, Mr. O'Reilly acknowledged, appropriately, that the Trust's Code should not be framed in this way, as it does not properly reflect the departmental Framework Code. In the circumstances, the question which, in my view, must be confronted and determined is whether the departmental Framework Code has been, as a matter of law, incorporated into the Plaintiff's contract of employment.

[45] Underlying this last-mentioned concession was an acknowledgement that the Trust is bound to give effect to the departmental Circular. For reasons which will become clear, I consider that the "Directions" to which the departmental Circular refers and which append the Framework Code provide the key to the correct resolution of the primary issue to be determined by the court. These "Directions" fall to be considered in their statutory context.

[46] Within the elaborate statutory arrangements regulating the provision of health and social services in Northern Ireland, Article 17(1) of the Health and Social Services (Northern Ireland) Order 1972 provides:

*"(1) The Health and Social Services Boards shall –*

*(a) exercise on behalf of the [Department] such functions ... with respect to the administration of such health and personal social services as the [Department] may direct ...*



*and shall do so in accordance with Regulations and directions".*

Thus the Department is empowered to issue *directions* to Boards. Trusts are a more recent creation of statute. In paragraph 6 of Part II of Schedule 3 to the Health and Personal Social Services (Northern Ireland) Order 1991 ("*the 1991 Order*") it is provided:

*"(1) An HSS Trust shall carry out effectively, efficiently and economically the functions for the time being conferred on it by an order under Article 10(1) and by the provisions of this Schedule.*

*(2) An HSS Trust shall comply with any directions given to it by the Department about the exercise of the Trust's functions."*

[Emphasis added].

Thus Trusts have a statutory obligation to comply with directions addressed to them by the Department. This is a reflection of the hierarchical statutory arrangements for the provision of health and social services in Northern Ireland (which, in this sense, are broadly comparable with those in England: see *Halsbury's Laws of England* (5<sup>th</sup> Edition), Volume 54, paragraphs 6-12).

[47] On 29<sup>th</sup> November 2005, the Department made the instrument entitled "Directions on Disciplinary Procedures 2005" (hereinafter "*the 2005 Directions*"). This instrument provides, in material part:

*"1(1) This direction is given to all HSS bodies.*

*(2) This direction shall come into force on 1<sup>st</sup> December 2005 ...*

*(4) In this direction 'HSS body' means ...*

*(ii) A Health and Social Services Trust ...*

*2. Each HSS body shall comply with 'Maintaining High Professional Standards in the Modern HPSS – a Framework for the Handling of Concerns about Doctors and Dentists Employed in the HPSS' – ('the Framework') as set out in the schedule and promulgated in Circular HSS(TC8) 6/2005.*

*3. Each HSS body shall notify the Department of the action they have taken to comply with the Framework by 31<sup>st</sup> January 2006".*

I consider it necessary for the court to construe the 2005 Directions and evaluate their impact and consequences.

[48] Notably, the 2005 Directions are not prescriptive as regards *how* HSS bodies are to perform the central obligation to which they are subject viz. the obligation to comply with the departmental Framework Code. Furthermore, they do not expressly contemplate either a phased introduction of the Framework Code or a time limit for its implementation. Rather, by their terms, the 2005 Directions *shall* come into force on 1<sup>st</sup> December 2005. Paragraph 2 does *not* provide that HSS bodies shall take certain prescribed steps to comply with the

departmental Framework Code. Rather, it provides, unequivocally, that HSS bodies *shall* comply therewith. In my view, paragraph 3 of the Directions is ancillary in nature. I do not construe it as stipulating a deadline for compliance. Rather, I consider that it is to be construed as a means of encouraging immediate compliance *and* a mechanism for departmental supervision of compliance. If I am wrong in these conclusions, I consider the only alternative construction of the 2005 Directions to be that the Framework Code had to be implemented by (*inter alia*) Trusts by, at the latest, 31<sup>st</sup> January 2006. Whichever of these two constructions is correct, the legal consequence which follows in the context of the present litigation is the same.

[49] I consider that the 2005 Directions had the effect of imposing an absolute obligation of compliance with the Framework Code on all agencies to whom they were addressed. The Trust was one of these agencies and, in my view, it had no discretion of any kind in this respect. Nor did the Trust have any legal power to devise a code or procedure or other arrangement in any way non-compliant with or repugnant to any of the provisions in the departmental Framework Code. Accordingly, insofar as any of the provisions of the Trust's Code are of this character, I hold that they are *ultra vires*, unlawful and of no effect. This applies particularly to the definition of "*employee representative*" in paragraph 2 of the Trust's Code, inasmuch that this definition unambiguously forbids legal representation of the Trust employee at any stage of a disciplinary procedure. (While this definition may not be harmonious with paragraph 30 of the departmental Framework Code in certain other additional respects, none of these arises for consideration and determination in the present context).

[50] I consider that the Plaintiff's contract of employment with the Trust, the 2005 Directions and the departmental Framework Code are to be analysed in the following way:

(a) By Clause 18 of the Plaintiff's written contract of employment, the Trust's disciplinary procedures were incorporated by reference. I consider that this clause applies to such disciplinary procedures as may exist from time to time.

(b) By virtue of the statutory provisions noted above, the Department is empowered to give directions to Trusts and Trusts are obliged to comply with such directions.

(c) By a duly made instrument of subordinate legislation dated 29<sup>th</sup> November 2005 viz. the 2005 Directions, the Department directed the Trust (and others) to comply with the departmental Framework Code.

(d) From 1<sup>st</sup> December 2005 (or, at the very latest, 31<sup>st</sup> January 2006), the departmental Framework Code was incorporated into the Plaintiff's contract of employment.

(e) Paragraph 30 of the departmental Framework Code states unequivocally that the medical or dental practitioner concerned may, at any stage of a disciplinary process, be "... *accompanied to any interview or hearing by a companion ... [who] may be legally qualified but he or she will not, however, be acting in a legal capacity*".

(f) It follows that the Plaintiff is legally entitled, as a matter of contractual right, to be accompanied by a legally qualified person of his choosing at the forthcoming disciplinary hearing.

[51] The same conclusion may be reached by a somewhat different route. By its express terms, the Trust's Code does not purport to be exhaustive. Rather, in its Introduction, it makes explicit reference to "*further relevant procedures*", as contained in the departmental Circular which, in turn, refers to and appends the Framework Code. In my view, this passage in the Trust's Code incorporates the Framework Code in its entirety. Furthermore, the provisions of the Framework Code must take precedence over any inconsistent or repugnant provisions in the Trust's Code, given the Trust's legal obligation to comply fully with the Framework Code.

[52] It was argued on behalf of the Plaintiff that paragraph 30 of the Framework Code is to be construed as conferring on the practitioner concerned a right to be accompanied to any interview or hearing by any legally qualified person of the practitioner's choosing. I reject this argument. Paragraph 30 states unambiguously:

(a) The practitioner may be accompanied by "*a companion*".

(b) Companion is defined as "*another employee of the HSS body; an official or lay representative of the BMA, BDA, defence organisation, or friend, work or professional colleague, partner or spouse*".

(c) The "*companion*", the text continues, "*may be legally qualified but he or she will not, however, be acting in a legal capacity*".

I hold that paragraph 30 confers on the practitioner concerned a right to be accompanied by a "*companion*", as defined, who may, at the practitioner's election, be a legally qualified person. The Plaintiff's argument was that paragraph 30 entitles him to be accompanied at the disciplinary hearing by a legally qualified person such as his counsel in the present proceedings. In my opinion, this argument is confounded by the clear language of paragraph 30, which requires no special interpretation and is devoid of ambiguity. The wording of paragraph 30 simply does not bear the construction advocated on behalf of the Plaintiff.

[53] I have held that paragraph 30 of the Framework Code is to be construed as conferring on the practitioner concerned a right to be accompanied by a companion (as defined) *of the practitioner's choosing*. The Trust has denied the Plaintiff this right in the present case. While the Trust is prepared to allow the Plaintiff to be accompanied at the hearing by Dr. Barclay of the Medical Protection Society and while Dr. Barclay holds a law degree, the case made is that he is not the legal representative of the Plaintiff's choice. I consider that paragraph 30, properly construed, does not entitle the Trust to impose on the practitioner concerned a companion of the Trust's choosing. Thus the Trust has not given due effect to paragraph 30 in the present case.

[54] I would add that the contractual right which I have held to be enjoyed by the Plaintiff is a right to be accompanied by a legally qualified person of his choice who, in the language of paragraph 30 of the Framework Code, "*... will not, however, be acting in a legal capacity*". The issues of which the court is seised in these proceedings do not include the definition of these words. They are regrettably opaque and have the potential to give rise to still further controversy between the parties. Clearly, it would be desirable that the parties endeavour to reach agreement on this matter in advance of the hearing. Of course, any such agreement would not be binding on the Disciplinary Panel which, in my view, will be the ultimate arbiter of issues of this kind.

[55] I would offer the following guidance on this discrete issue. While this will not be a clinical performance hearing (rather, a misconduct hearing), I consider that paragraphs 13 and 14 of Section IV of the Framework Code apply to both types of hearing. Paragraph 14 contains the following sentence:

*"The representative will be entitled to present a case on behalf of the practitioner, address the panel and question the management case and any witness evidence".*

This provision *must* be read in conjunction with paragraph 13:

*"The hearing is not a court of law. Whilst the practitioner should be given every reasonable opportunity to present his or her case, the hearing should not be conducted in a legalistic or excessively formal manner".*

I consider that paragraphs 13 and 14 serve to illuminate the opacity highlighted above. The Plaintiff's representative will doubtless bear paragraph 13 carefully in mind at the forthcoming hearing. Simultaneously, the Disciplinary Panel will have to be mindful of the Plaintiff's common law right to a fair hearing. The provisions of both the Framework Code and the Trust's Code are to be considered, construed and applied *in the light of this common law right*. Neither of the Codes takes precedence over or in any way emasculates this right. In this respect, the Panel will undoubtedly be mindful of the seriousness of the charges and what is at stake for the Plaintiff.

[56] Finally, as regards the contractual issues, I reject the suggestion in Dr. Hannon's affidavit that the Framework Code establishes a right to legal representation only if the charges against the employee relate to clinical competence and performance. In my opinion, construing the Framework Code as a whole, this suggested interpretation is unsustainable. I refer particularly to paragraphs 1 and 2 of the "Introduction" and paragraphs 28-30 of Section 1 ("Action When a Concern First Arises"). While paragraphs 13-14 of Section IV are located under the heading "Procedures for Dealing with Issues of Clinical Performance", they do not, in my view, in any way dilute the clear import of paragraphs 28-30 of Section 1, which establish unambiguously a right to be accompanied by a companion (as defined) of one's choosing in the context of both conduct *and* clinical performance proceedings. While the drafting and layout of the Framework Code may be a little clumsy, I consider that its material provisions do not yield any other sustainable or sensible construction.

[57] My finding that the Trust has failed to give full and proper effect to paragraph 30 of the Framework Code gives rise, *prima facie*, to a basis for granting the Plaintiff relief. I shall return to this issue in paragraphs [70] – [71] below.

## **VII CONCLUSIONS: COMMON LAW RIGHT**

[58] The Plaintiff makes the case that, by virtue of his common law right to a fair hearing, he is entitled to the services of a legally qualified person of his choice, outwith the constraints of paragraph 30 of the Framework Code as construed above. Thus he argues that the common law entitles him to legal representation by someone such as his counsel in the present proceedings.

[59] Under this banner, my attention was drawn to two first instance decisions in England. The first is *Regina (Dr. S) –v- Knowsley NHS Primary Care Trust* [2006]

EWHC 26 (Admin), which concerned a Primary Care Trust's procedures when considering the removal of a general practitioner from its statutory list under the relevant Regulations. The decision making agency was an independent appellate authority, acting under a statutory framework. The equation included certain guidance published by the Department of Health. This contained a provision [31.7] which, while purporting to prescribe that "*... there will be no right to legal representation*" for either party, the medical practitioner concerned could be accompanied by a legally qualified person "*... to advise them on questions of procedure, on the validity of any allegations or actions proposed during the hearing, or to take notes for the purpose of any right of appeal that is available ... [but not] to question or cross-examine witnesses or address Panel members directly*". The two Applicants (Dr. S and Dr. Ghosh) were granted leave to apply for judicial review. The Applicants challenged a twofold determination by the Trust which, they claimed, (a) refused to permit them to be legally represented and (b) purported to confine the questioning of witnesses to Panel members only. The Trust's riposte was that the proceedings were premature and misconceived, since all questions of process, procedure and conduct of the hearing would fall to be determined by the Panel Chairperson. Each of the Applicants was a general medical practitioner against whom there were allegations of indecent assaults.

[60] The Administrative Court was seised of a number of issues. On the discrete topic of legal representation, Toulson J stated, firstly:

"[86] *If there is to be cross-examination of the complainants, that would be a powerful reason for permitting legal representation, in order to avoid the complainants being cross-examined by Dr. S himself*".

He continued:

"[93] *On the subject of legal representation, the fundamental question is whether the doctor could fairly be expected to represent himself. In many cases, that may be a quite reasonable expectation. In Dr. Ghosh's case none of the allegations made against him is individually complicated, but taken together the case is sufficiently complex (with the large number of allegations, their diverse nature and the volume of paperwork) that I would be very surprised if a doctor could do himself justice in trying to handle the case unrepresented. A helper sitting beside him would be of some but limited assistance. It would be wrong that witnesses who complain of bullying and intimidation by Dr. Ghosh should feel themselves exposed to the same risk in cross-examination by him ...*".

Having observed that where there are serious disputes of fact between a witness and the practitioner concerned cross-examination is likely to be a more effective method of probing the witness's evidence than questioning by the Panel, his Lordship made the following pronouncement with regard to legal representation:

"[101] *As to legal representation, the statement in paragraph 31.7 of the DOH Advice that there will be no right to legal representation ... is true in the sense that the Regulations do not give the doctor a general right of legal representation, but is liable to be understood as it was by Dr. Fraser in her letter dated 19<sup>th</sup> September 2005 on behalf of the Northumberland PCT, when she wrote that 'the DOH Guidance does not permit legal representation'. That is going too far. It may be that in many cases legal representation would be unnecessary, but the question in each case must be whether the doctor can reasonably be expected to represent himself or whether legal representation is necessary in order to enable him to be*

*able properly to present his case. I do not see that this can be a matter of presumption but must depend on the circumstances, including particularly the complexity of the allegations and the evidence".*

[My emphasis].

As appears from paragraph [102], the outcome of the judicial review proceedings is not entirely clear. However, it is apparent that the court was acceding to the challenge, in this respect at any rate.

[61] The passages set out above serve as a reminder of the intensely contextual and fact sensitive nature of the common law right to a fair hearing. This is one of the dominant themes of Lord Mustill's celebrated statement in *Doody –v- Secretary of State for the Home Department* [1994] 1 AC 531, at p. 560:

*"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name to, or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

Lord Mustill's emphasis on *context* requires no elaboration.

It is also appropriate to recall another landmark pronouncement in this field, that of Lord Bridge in *Lloyd and Others –v- McMahon* [1987] 1 All ER 1118, at p. 1161:

*"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, **the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness**".*

[Emphasis added].

[62] In *Kulkarni –v- Milton Keynes Hospital NHS Trust* [2008] EWHC 1861 (BQ), the proceedings followed a course more akin to that adopted in the present case. The specific complaint of the Claimant, a House Officer, was that he should have legal representation to assist him in disciplinary proceedings. He seems to have brought a private law action (as in the present case) seeking, *inter alia*, a declaration that the Defendant was in breach of contract. In the course of such litigation, he secured an interim injunction. As appears from paragraph 15 of the judgment of Penry-Davey J, the shape and thrust of the Claimant's case were closely comparable to the present action. It would appear from the terms of the judgment that there is some uniformity throughout the United Kingdom with regard to (a) the DHSSPS Framework Code and (b) the Trust's Disciplinary Code: see especially paragraphs [2] – [4]. The burden of the Claimant's case seems to have been that, having regard to various factors, he "... cannot fairly and reasonably be expected to represent himself in order to properly present his case": cf. paragraph [19]. The Claimant (in common with the Plaintiff in the present case) highlighted in particular the seriousness of the allegations against him; the risk of being rendered permanently unemployable; his inability to present his own defence unassisted; the consideration that the cornerstone of his defence would rest on detailed cross-examination of the complainant, whose evidence was the linchpin of the case against him; and, finally, the potential for complex legal arguments including issues concerning the appropriate burden and standard of proof.

[63] In a key passage of his judgment, the learned judge stated, at paragraph [20]:

*"In my judgment it is important to have regard to the reasons for the introduction of MHPS (and in its wake the Defendant's policy) relating to disciplinary hearings and the fact that the new procedures were the subject of negotiation by the professional bodies concerned including the BMA against a background of considerable dissatisfaction with the unsatisfactory nature of the old procedures and a necessity to introduce procedures reflecting the new statutory right to be accompanied. In my judgment considering both the background that I have indicated and the circumstances of this case I do not consider that the exclusion of legal representation was in breach of natural justice and I further conclude that in the light of the express term there is no room for the insertion or addition of an implied term to permit legal representation as part of trust and confidence in the circumstances of this case. Alternatively, in my judgment if there was such a term it has not been demonstrated that the refusal to allow legal representation on the basis that there were no exceptional reasons in this case to justify departure from the laid down procedure was unreasonable or unfair".*

The final issue addressed by the learned judge (again mirroring the present case) related to the composition of the bundle for hearing. His Lordship noted the Defendant's submission that "... the logical conclusion is that in all domestic proceedings there will be a requirement for the High Court to micro-manage such proceedings", with which he concurred, condemning this aspect of the Claimant's case as misconceived:

*"Temporary or permanent injunctive relief in the High Court is in my judgment an inappropriate vehicle for the management of internal proceedings by way of inclusion or exclusion of aspects of the evidence. Even if the evidence on the face of it appeared to be irrelevant and inadmissible, the High Court is not in my judgment the appropriate forum in advance of the proceedings for the resolution of such an issue."*

The outcome was an order discharging the interim injunction and a refusal of the claim for declaratory relief. I was informed that this decision is under appeal.

[64] In my opinion, where domestic disciplinary proceedings are concerned, it will rarely be appropriate for the High Court to intervene by granting declaratory, injunctive or other relief relating to the conduct of such proceedings, in the absence of a clearly formulated issue bearing on contractual rights and obligations (as in the present case). It would be manifestly undesirable for satellite litigation of this kind to occur in the sphere of disciplinary proceedings. In the present case, the Plaintiff, effectively, invited this court to scrutinise and dictate the composition of the presenting officer's case summary and the related bundle for hearing. Moreover, the Plaintiff invited the court to intervene, initially, at a stage when attempts to resolve issues of this kind between the parties were manifestly incomplete. At this juncture, the Plaintiff has certain enduring complaints relating particularly to the composition of the bundle for hearing. In my judgment, if these issues cannot be resolved consensually to the Plaintiff's satisfaction, they will fall to be determined by the Disciplinary Panel. Moreover, these issues are concerned with discrete aspects of the disciplinary process. In my view, the ultimate question will be whether the disciplinary process is, *as a whole*, compatible with the Plaintiff's common law right to a fair hearing. The High Court will very rarely be properly equipped to make a confident and informed forecast of this matter in advance of a scheduled disciplinary hearing. I consider the present case to be no exception in this respect.

[65] Furthermore, the intrinsic undesirability of the High Court intervening in domestic disciplinary proceedings to regulate issues of this kind is underlined by the terms in which the Plaintiff seeks the second of the injunctions claimed:

*"The Plaintiff seeks an order that the Defendant be restrained from ...*

*(b) Adopting a disciplinary procedure ... which fails to comply with the principles of natural justice and fairness".*

In my opinion, an injunction framed in these terms would be devoid of any value or real meaning. It would convey nothing of substance to the audience concerned and would simply be a recipe for uncertainty and further controversy. The Plaintiff did not attempt to particularise this injunction in his Writ of Summons, Statement of Claim or Notice of Motion. Indeed, formulated thus, it was vulnerable to be struck out summarily for want of particularity.

[66] Domestic disciplinary proceedings in an employment context belong to a special category. They are not to be compared, or confused, with formal legal proceedings. They are not designed to be invested with the trappings and formalities of the latter. The golden rule which they must observe at every stage of the process is that of *fairness*. How this rule is duly observed will depend upon the individual context. Informality and flexibility, each of which is an intrinsically contextual value, are well equipped to ensure that the requirements of fairness are fully observed in any given case. In the present case, I have found that the Plaintiff enjoys a contractual right to legal representation. However, the forum of domestic disciplinary proceedings is probably not well suited, in most cases, to intrusion by lawyers. While the virtues and benefits of legal representation are not to be underestimated in many litigation contexts, these do not equate precisely with the context of the domestic disciplinary hearing. Moreover, any tendency to overlook, or undervalue, the independence,



professionalism, integrity, experience and expertise of the members of the Disciplinary Panel in this kind of case must be firmly resisted. To instance but one example in the context of the present litigation, I consider that the Panel members will be perfectly capable of ruling on the fairness, and relevance, of exploring issues bearing on the reporting of the death in question by the Plaintiff to the Coroner. In contrast, I consider that the High Court is singularly ill equipped to do so. Moreover, this would be a clear example of inappropriate micro-management.

[67] In its conduct of the forthcoming disciplinary hearing, the Panel may wish to have regard to the guidance contained in the judgment of Mummery LJ in *Bache -v- Essex County Council* [2000] IRLR 251:

*"(1) At the hearing the tribunal must follow a procedure which is fair to both sides. It must normally allow each side to call relevant evidence, to ask relevant questions of the other side's witnesses and to make relevant submissions on the evidence and the law.*

*(2) The tribunal is responsible for the fair conduct of the hearing. It is in control. Neither the parties nor their representatives are in control of the hearing.*

*(3) Procedural fairness applies to the conduct of all those involved in the hearing. Just as the tribunal is under a duty to behave fairly, so are the parties and their representatives. The tribunal is accordingly entitled to require the parties and their representatives to act in a fair and reasonable way in the presentation of their evidence, in challenging the other side's evidence and in making submissions. The rulings of the tribunal on what is and is not relevant and what is the fair and appropriate procedure ought to be respected even by a party and his representative who do not agree with a ruling."*

[68] In the present case, I have held that the Plaintiff is entitled to be accompanied by a companion (as defined) of his choosing at the forthcoming disciplinary hearing, *as a matter of contractual right*. In short, the Trust is bound to respect the Plaintiff's contractual entitlement. However, the Plaintiff argues that he is entitled to representation by a qualified practicing lawyer of his choice, to vindicate his common law right to a fair hearing. Having regard to all the evidence assembled before the court, which is of substantial volume, I hold against the Plaintiff on this issue. While the gravity of the charges against the Plaintiff and the seriousness of the possible consequences are beyond dispute, I am not persuaded, at this "forecasting" stage, that the complexities and burdens are such that the Plaintiff would be deprived of his common law right to a fair hearing if represented by Dr. Barclay, with his apparent credentials and experience, rather than a legally qualified person of his choice. On this issue, Mr. O'Reilly's submissions, noted in paragraph [39] above, prevail.

[69] Accordingly, the Plaintiff will have the right to be accompanied by a companion (as defined) of his choosing at the forthcoming disciplinary hearing, solely by virtue of his contractual right to this facility. Bearing in mind that the companion may be a legally qualified person, it follows that the Plaintiff's contract of employment, in this respect, confers on him a greater benefit than his common law right to a fair hearing.

## **VIII RELIEF**

[70] On 30<sup>th</sup> October 2008, given the urgency of the matter, I delivered a synopsis of my main findings and conclusions. At that hearing, the question of relief was raised *inter partes*.

My central finding, to the effect that the Plaintiff has a contractual right to be accompanied by a companion (as defined) of his choice at the disciplinary hearing, in accordance with paragraph 30 of the Framework Code, can be related to the declaration sought in paragraph 40 of the Statement of Claim and the first of the three injunctions claimed in paragraph 41(a). I had some reservations about whether the grant of an injunction would be appropriate, bearing in mind the principle that the courts will not grant an injunction to restrain breaches of covenant in a contract of employment if to do so would be tantamount to indirectly or ordering specific performance: see *Bean on Injunctions* (8<sup>th</sup> Edition), paragraphs 4.01-4.05 and the cases discussed therein. While a consideration of some of these cases, such as *Page One Records v. Britton* [1968] 1 WLR 157, suggests that they may belong to a special category, there was insufficient time and opportunity for further detailed argument from the parties.

[71] In the circumstances, it seemed to me that the grant of declaratory relief in terms reflecting my finding regarding the plaintiff's contractual right would provide a suitable and adequate remedy, given that the Trust, a responsible public authority, could be expected to give practical effect to such an order, notwithstanding that a declaration (to be contrasted with an injunction) is not an executory judgment. Confirmation was then provided on behalf of the Trust that it would do so. In the circumstances, I determined that the court would make a declaration reflecting the conclusion expressed in paragraphs [50] - [53] above.

### Costs

[72] I remind myself of the discretion conferred on the court by Section 59 of the Judicature (Northern Ireland) Act 1978, the general rule [enshrined in RSC Order 62, Rule 3(3)] that costs should follow the event and the statement of Carswell LCJ in *Re Kavanagh's Application* [1997] NI 368 that "... *the discretion should be exercised along well settled lines*" [p. 382]. The immediately succeeding quotation from the judgment of Atkin LJ in *Ritter -v- Godfrey* speaks of "*a wholly successful defendant*". In exercising my discretion, I take in to account the following factors in particular:

- (a) The declaration which I have determined to make does not reflect the relief sought by the Plaintiff: rather, it constitutes an outcome which the Plaintiff did not seek.
- (b) I have rejected the construction of paragraph 30 of the Framework Code advocated by the Plaintiff.
- (c) The Plaintiff has failed in the other aspects of his challenge to the disciplinary process: see paragraphs [31]-[32], [41] and [64] above.
- (d) The evidence indicates a failure by the Trust to take steps to incorporate the Framework Code into contracts of employment, in contravention of the "Directions" and the 1991 Order: see paragraphs [44] – [50] above. Stated succinctly, the failure of the Trust's Code to properly implement the departmental Framework Code is unlawful.
- (e) I have held that the Trust is not entitled to impose on the Plaintiff a representative of the Trust's choosing.

(f) However, subject to (e), the Trust's willingness to allow the Plaintiff to be represented by Dr. Barclay does fall within paragraph 50 of the Framework Code, as construed in this judgment.

Overall, I consider that there is no clear winner in this litigation. There has been some limited success and failure on both sides. Moreover, the declaration to be made has certain elements of elucidation and education, in circumstances where the Trust does not appear to have been aware of its statutory obligation to give effect to the departmental Directions. I am satisfied that, in all the circumstances, the fair and reasonable exercise of the court's discretion is to make no order as to costs *inter-partes*.

[73] Finally, I record my thanks to counsel for the quality of their submissions, both written and oral.