

# Suspension and Internal Process: Continuing with internal process before conclusion of criminal proceedings not a breach of contract but suspending a Doctor without pay was.

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## THE FACTS

Dr Gregg began working for the North West Anglia NHS Foundation Trust (the Trust) in 2003. During 2016 and 2017 the Trust became concerned that Dr Gregg had hastened the deaths of a number of patients. The Trust started disciplinary proceedings in line with Maintaining High Professional Standards in the Modern NHS (MHPS). It also notified the police. The doctor was suspended on full pay. The CPS decided there was not enough evidence to charge Dr Gregg on one patient death but its investigation into a second one was ongoing. The General Medical Council's Interim Orders Tribunal suspended the doctor's registration to practice, and the Trust stopped his salary. The Trust maintained Dr Gregg could not fulfil his contractual duty to be ready, willing and able to perform the work he was employed to do. The Trust also relied on MHPS which provides a discretion to suspend a doctor's salary when s/he is unavailable for work.

Dr Gregg's lawyer advised him not to participate in a disciplinary hearing as he would risk prejudicing himself in the criminal investigation. The Trust refused to adjourn the hearing. In addition, it considered convening a separate hearing under Schedule 19 to the employment contract, under which the Trust could dismiss the doctor for his lack of registration. The doctor obtained an interim injunction in the High Court, preventing the Trust from continuing with its investigation until the police investigation was complete.

The Deputy High Court judge found that the Trust had been or would be in breach of contract:

- For not paying Dr Gregg's salary whilst he was subject to an interim suspension.
- For proposing to hold a hearing to consider ending Dr Gregg's contract on the grounds of his failure to hold the requisite registration during the period of suspension.
- For pursuing their own internal disciplinary process alongside the police investigation, rather than delaying it until the police investigation was completed and a decision made by the CPS as to whether or not to charge Dr Gregg with any criminal offences. The judge found that this was a breach of the implied term of trust and confidence.

The Trust appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal on suspension pay but allowed it on progressing the internal processes.

The Court found there was no express right to suspend Dr Gregg without pay. It decided Dr Gregg was ready, willing and able to work but the decision of a third-party tribunal had removed his registration to do so. Where the contract did not address the issue of pay deduction during suspension, the default position should be that an interim suspension does not justify the deduction of pay. Exceptional circumstances, such as a complete or part admission of guilt, might justify such a deduction, but there were no such circumstances here.

The Court found that the Trust was able to invite Dr Gregg to a hearing to discuss the possibility of terminating his contract because of his failure to maintain his licence. That was not prevented by the ongoing disciplinary process.

There was no breach of the implied term of trust and confidence. The Trust's conduct in continuing its contractual disciplinary process was not calculated to destroy or seriously damage the relationship of trust and confidence. There was plainly "reasonable and proper cause" for the Trust to want to operate the process in line with their contract with Dr Gregg.

In assessing whether there had been a breach of this implied term the judge had wrongly considered issues of fairness, that was the wrong legal test. Also, there was no evidence that the internal disciplinary process would have any effect on the criminal investigation, let alone give rise to a real danger of a miscarriage of justice. The fact a solicitor has provided advice to a doctor to say that he should not be involved in the internal disciplinary proceedings while another process is ongoing, would be enough to justify an injunction. That could not be the correct approach.

## WHAT DOES THIS MEANS FOR EMPLOYERS?

Whilst this decision was about a contractual internal process for doctors, MHPS, it has far wider implications. It makes clear it will be a breach of contract to suspend without pay unless:

- There are exceptional circumstances such as an employee admitting his/her guilt;
- There is an express contractual right to do so.

Employers should be buoyed by the decision that the internal process could continue pending a decision on whether or not to charge Dr Gregg with a crime. This argument is often used by employees and their lawyers to seek to delay internal processes. However, employers should take care to ensure that any arguments about prejudice are properly considered and addressed rather than just being dismissed out of hand.

North West Anglia NHS Foundation Trust v Gregg

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