



**MAINTAINING HIGH PROFESSIONAL STANDARDS
IN THE MODERN NHS**

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Maintaining High Professional Standards (“MHPS”)

1. As is well-known, in December 2003 the Department of Health issued its framework document, MHPS, for the handling of concerns about doctors and dentists employed in the NHS in England, in two parts, Part I concerned with “action when a concern arises” and Part II concerned with “restriction of practice and exclusion from work”.
2. In February 2005 the DoH issued the final framework document, following national agreement between the DoH, the NHS Confederation, the BMA and the British Dental Association.
3. The Secretary of State for Health issued directions coming into force on 17 February 2005 requiring all NHS bodies in England to “implement the framework by 1 June 2005”. Those directions provided that HC(90)9 and HSE(82)13 were withdrawn.

Is MHPS automatically part of medical professionals’ contracts of employment?

4. Sometimes a doctor or dentist will wish to argue that MHPS remains the procedure that governs his employment, and that MHPS has not superseded it. Sometimes they will wish to argue the opposite.
5. For example, in the first decision in *Mezey v. South West London and St. George’s Mental Health NHS Trust* [2007] IRLR 237, HC, Dr. Mezey had been suspended

from work. It was to her advantage that she be able to rely on MHPS, which more closely limited the circumstances in which he could be suspended when compared with the Trust's specific internal disciplinary procedures.

6. By contrast, in the case of *Nageh v. Southend University Hospital* [2007] EWHC 3375 (QB) the Claimant wished to rely on HC(90)9 for the protection it provided in cases of professional misconduct, and the employer claimed that it did not apply, since it wished to rely on its own internal disciplinary procedures with fewer protections.
7. It is usually a question of fact in each case whether MHPS is incorporated into the employee's contract. Incorporation can be express or implied.
8. As a matter of ordinary contract law, the DoH directions of 17 February 2005 requiring NHS bodies in England to implement MHPS by 1 June 2005 do not have the automatic effect that MHPS is incorporated into the employee's contract of employment.
9. For example, Underhill J. in *Mezey (No.1)* in the HC said at para. 16 that Parts I and II of MHPS issued by the DoH in 2003 "[have] no direct contractual effect as between the Trust and its employees" and in Footnote 5 to his Judgment, in relation both to the 2003 and 2005 MHPS documents stated "The Trusts are not given any power unilaterally to alter existing contractual arrangements".
10. Gray J. in *Gryf-Lowczowski v. Hinchingsbrooke Healthcare NHS Trust* [2006] ICR 425 said something similar at para. 56: "It is for the Trust to satisfy me that the contract was thereafter varied so as to incorporate the procedures set out in Part IV of the framework document."
11. There are several cases which decide that the entirety of MHPS is not apt for incorporation, even if MHPS is incorporated into an employee's contract of employment.

12. An example is *Loizou v Mid-Yorkshire Hospitals NHS Trust* [2010] EWHC 2523 (Admin). That was an application for permission for judicial review. At para. 7 Underhill J. said: “I would observe that the drafting is discursive in character and does not lend itself particularly well to the creation of precise legal obligations”.
13. Another is *Lakshmi v. Mid-Cheshire Hospitals NHS Trust* [2008] IRLR 957, QBD, where Simeon Maskrey QC sitting as a Deputy Judge said at para. 26 “I consider that the breadth of [the Trust’s internal document implementing MHPS] and the language that it uses is inconsistent with it being regarded as a contractual document in itself”.
14. Even in circumstances where the Court has not concluded that MHPS was incorporated into the employee’s contract of employment, it has nevertheless in some cases found that there was an implied term (the implied term of trust and confidence) that the Trust follow that procedure.
15. There are several cases that have reached somewhat doubtful conclusions on the issue of incorporation.
16. One is in *Nageb*. That was an interim relief application. The Judge in that case concluded that there was considerable force in the Trust’s argument that it would have been ultra vires the Trust to have entered into a contract of employment subsequent to MHPS on anything other than MHPS terms.
17. A further example is *Hameed v. Central Manchester University Hospitals NHS Foundation Trust* [2010] EWHC 2009 (QB). In that case it was common ground that the Claimant was employed on the standard doctors’ terms and conditions, including paragraph 189a. That in turn stated that “Issues relating to a practitioner’s conduct, capability or professional competence should be resolved through the employing authority’s disciplinary or capability procedures which would be consistent with the “maintaining high professional standards in the

modern NHS” [MHPS framework]...” In this case, the Trust’s procedure implemented MHPS. The Court went on to find that “the effect of paragraph 189a of the Terms and Conditions of Service was expressly to incorporate the Trust’s Procedure into the Claimant’s contract of employment.” This conclusion must be open to doubt.

18. When analysing and applying these cases it is important to bear in mind the distinction between those which are decisions on interim relief applications and those which are decisions following final hearings. In an application for interim relief a Claimant usually only has to show that there is a serious issue to be tried as to the contractual terms that he claims apply to him. At a final hearing, the Court will decide which terms in fact or law apply to the employment contract.
19. Additionally, the courts will seek via interim remedies to enforce the MHPS procedures where significant departures from them are threatened by the employer, but it will not seek to micro-manage disciplinary hearings where minor departures are threatened or committed.
20. Smith LJ indicated as much in *Kulkarni v Milton Keynes Hospital NHS Trust* [2009] IRLR 829 para. 22, as did Underhill J. in *Loizou* para. 10: “Where proceedings are vitiated by some fundamental procedural flaw ... they should not be allowed to proceed at all.”

Unfairness in the Employment Tribunal: Unfair Dismissal Claims

Basic outline of an unfair dismissal claim

21. Where an employee has been dismissed, he has the right, if he has sufficient qualifying period, to bring a claim for unfair dismissal in the Employment Tribunal, under the Employment Rights Act 1996.

22. Dismissal includes a situation where the employee resigns in response to a repudiatory breach of contract by the employer, and also where a fixed term contract comes to an end.
23. It is for the employer to demonstrate the reason for the dismissal, and that it is a potentially fair reason. Two of the reasons that are potentially fair reasons for dismissal are conduct and capability. A residual category is called “some other substantial reason”, usually shortened to SOSR.
24. Whether the dismissal is fair or unfair depends on whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal, having regard amongst other things to equity and the merits of the case, and the size and administrative resources of the employer. This test is different from the test applicable to a claim for wrongful dismissal.
25. It is the case law on these three reasons that is potentially of relevance to conduct and capability dismissals under MHPS.

ACAS Code of Practice and Guide

26. The Advisory Conciliatory Arbitration Services (“ACAS”) has issued a Code of Practice on disciplinary and grievance procedures. The current Code was issued in 2009 and is the fifth version of the Code originally produced in 1977. The Code is a statutory code, and may be referred to in the Employment Tribunal.
27. In 2009 ACAS issued a Guide on Discipline and Grievances at Work to supplement the statutory guidance provided by the Code of Practice. It has no statutory force but provides detailed guidance as to the application of the Code of Practice.
28. The ACAS Code of Practice (for reasons that need not be explored in this paper) is brief in the extreme. The Guide offers more detailed guidance

29. The Guide provides that the employer's rules will often cover matters such as time keeping, absence, health and safety, use of organisational facilities, discrimination, bullying and harassment, personal appearance and the types of conduct that might be considered as gross misconduct.
30. The Guide provides that when drawing up and applying procedures employers should always bear in mind principles of fairness. There should be an opportunity to challenge allegations before decisions are reached, and employees should be provided with a right of appeal.
31. The Guide advises that good disciplinary procedures should be in writing, be non-discriminatory, provide for matters to be dealt with speedily, allow for information to be kept confidential, tell employees what disciplinary action might be taken, say what levels of management have the authority to take the various forms of disciplinary action, require employees to be informed of the complaints against them and supporting evidence before a disciplinary meeting, give employees a chance to have their say before management reaches a decision, provide employees with a right to be accompanied, provide that no employee is dismissed for a first breach of discipline, except in cases of gross misconduct, require management to investigate fully before any disciplinary action is taken, ensure that employees are given an explanation for any sanction and allow employees to appeal against the decision and apply to all employees, irrespective of their length of service, status or say that there are different rules for different groups.

The Burchell test

32. The leading case on the basic procedure to be followed in conduct dismissals is *Burchell v. British Home Stores* [1980] ICR 303: prior to a dismissal, there should be a reasonable investigation, there must be reasonable grounds for the employer to hold the view that the employee is guilty of misconduct justifying his dismissal,

and the employer must himself subjectively hold that belief. *Burchell* has been followed in capability cases.

33. The requirement for an investigation into misconduct only arises where the misconduct is not admitted. If it is admitted, or if there has been a guilty plea in a criminal court, or the employee has been found guilty, it is only in exceptional circumstances that an Employment Tribunal will find it unreasonable not to take the admission or plea or conviction at face value.
34. As part of a reasonable investigation an employer will make all proper enquiries into the allegations. The purpose of a reasonable investigation is to seek to ascertain the facts underlying the allegations, to identify any facts that may assist the employee and to seek to identify any mitigation that the employee may put forward.
35. Delay in carrying out that investigation may render the dismissal unfair. The ACAS Code of Practice and Guide require action to be taken without unreasonable delay.

The Hearing

36. There is no single rule that can be stated about the content of a fair hearing. It will in each case depend on the facts. Nevertheless, some broad areas of relevance to MHPS can be identified.
37. One issue that frequently arises is as to the composition of the Disciplinary Panel. For some employers it may be difficult to include a panel member who is an employee of sufficient seniority and who has not had some involvement with the matters of complaint. In that case, fairness may require the employer to include amongst the panel one or more individuals from outside.
38. Another is cross-examination of witnesses. It used to be thought, following a case called *Ulsterbus Limited v. Henderson* [1989] IRLR 251, Northern Ireland Court

of Appeal, that there could never be a requirement for an employer, in order to be found to have dismissed fairly, to permit the employee to cross-examine witnesses.

39. That approach is not now thought to be correct, particularly in light of a later decision, *Santamera v. Express Cargo Forwarding* [2003] IRLR 273, EAT. In that case the Employment Appeal Tribunal said that the test remains one of reasonableness.
40. Usually the person hearing the case is expected by the Employment Tribunal to be the person who makes the decision whether to dismiss. That will not always be the case. However, it is usually thought unfair by an Employment Tribunal for a dismissal decision to be taken by someone other than the hearing officer. The Employment Appeal Tribunal found the dismissal unfair where the decision to dismiss was taken by a person other than the hearing officer in *Budgen & Co v. Thomas* [1976] ICR 344.
41. Another difficulty is where information has been provided by a potential witness in confidence, and that individual is unwilling for his statement to be disclosed to the employee, or to attend for cross-examination. Guidelines on that situation were laid down in *Linfood Cash & Carry Limited v. Thomson* [1989] IRLR 235, EAT. These are appended to this paper.
42. A problem that has sometimes arisen is where the employer does not follow its own procedures. This will not always be unfair. That was decided by the Court of Appeal in *Westminster City Council v. Cabaj* [1996] IRLR 397. The contract provided for a right of appeal to three councillors. The appeal hearing was conducted by only two. The Employment Tribunal found the dismissal fair. The Employment Appeal Tribunal reversed the decision and found the breach so serious that the dismissal was unfair. The Court of Appeal restored the decision of the Employment Tribunal. The Court of Appeal analysed it on the basis that the appeal to two Councils instead of three did not deprive the

Claimant of the opportunity to show that the original decision to dismiss was unfair.

Appeal

43. It is essential, in order for there to be fairness, that there be a right of appeal against dismissal. Employment cases have held that where there is a procedurally defective disciplinary hearing that results in dismissal, the unfairness can be cured on appeal if the appeal hearing is sufficiently thorough. This will often require an appeal by way of a rehearing as opposed to an appeal by way of review.

Particular parts and paragraphs of MHPS and Employment Tribunal fairness

Part III: Guidance on conduct hearings and disciplinary procedures

General overview

44. Part III of MHPS, concerning conduct issues, contains no detailed guidance as to the procedures to be followed. This is in contrast to the detailed guidance provided in Part IV, which is concerned with capability procedures. The expectation is that the NHS employer will have in place a disciplinary policy or procedure that covers conduct cases, whether that procedure is contractual or not, and that that policy or procedure will be followed.
45. Of course, many of the procedures laid down in detail in Part IV could apply equally to Part III. The Court of Appeal in *Kulkarni* para.48 famously concluded (following an inevitable concession by counsel for the employer and the SOS) that the right of representation in Part IV must also apply to Part III even though the latter is silent about it. There will in future probably be other areas where the courts hold that such parallelism applies.

Paragraph 4

46. Paragraph 4 provides that each employer will have a Code of Conduct, misconduct can cover a very wide range of behaviour and can be classified in a number of ways, but will generally fall into one of four distinct categories. Paragraph 5 provides that the Code should also set out details of some of the acts that will constitute gross misconduct.
47. In practice there can be considerable variation between employers' disciplinary codes, including as to those acts classified as gross misconduct.
48. If the disciplinary procedure is contractual, with the effect that the employee has agreed to the definitions of gross misconduct contained within it, it will often be difficult, if not impossible, for the employee at an Employment Tribunal to argue successfully that an act that falls within one of those definitions does not amount to gross misconduct.
49. This has the effect that the employer can, if it wishes, classify as gross misconduct acts which other employers would consider to be minor only, and amount only to misconduct.

Paragraph 9

50. Paragraph 9 provides that it is for the employer to decide on the most appropriate way forward and that if the employee considers that his case has been wrongly classified as misconduct he can raise a grievance about it.
51. It might be thought that any situation in which an employee finds himself would fall within either the employer's conduct procedure, or its capability procedure, or its ill-health procedure or any combination of them, but not outside them.
52. A recent decision of the Employment Appeal Tribunal, shows that this is not so. In *Ezysias v. North Glamorgan NHS Trust* EAT/0399/09, 18/3/11, the employee, a

Consultant Oral and Maxillo-Facial Surgeon, who had the assistance of the BMA during internal hearings, but who represented himself at the Employment Tribunal, was found to have been fairly dismissed by the Trust because of a breakdown of working relationships between himself and his colleagues, in circumstances where the Trust concluded that it was not necessary to apply to him any conduct procedures before his dismissal. That conclusion was upheld by the Employment Appeal Tribunal (N.B. this is a case in Wales. MHPS accordingly does not apply, although the principles expressed by the *Ezsias* decision are applicable to English Employment Tribunal claims.)

53. The essence of the decision is that the Trust fairly dismissed him in consequence of the breakdown of working relationships irrespective of whether Mr Ezsias had been responsible for or had contributed to that breakdown. Plainly, that can be a worrying decision for employees.
54. It can have the consequence that an employee may be dismissed, without the protection of conduct procedures, where there is a breakdown of relationships, even though that employee was not responsible and did not contribute in any way to the breakdown.
55. It was a concern expressed by the Employment Appeal Tribunal at the preliminary hearing stage of the case when allowing the claim to proceed to a substantive appeal hearing. HHJ Serota QC said this: “My colleagues, who have considerable industrial experience take the view that an employer in the position of the [Trust] would have considered itself bound to implement [the Whitley Council procedures], if it intended to assert (as the [Trust] did) that [Mr Ezsias] was at fault for the breakdown in relationships with his colleagues and to dismiss him on that ground, whether or not that ground might be classified as “some other substantial reason”... In the case of a consultant who is given significant protection from dismissal on the grounds of misconduct by virtue of [the] Whitley Council Terms and Conditions, which are negotiated nationally and issued through a Government agency, an employer should not be able to avoid

implementation of the disciplinary and investigatory procedures by relying on [some other substantial reason] as grounds for dismissal, when the employee's conduct is blamed for the breakdown.”

56. No doubt the consequence of the *Ezsis* decision is likely to be an increase in cases where employers seek to avoid the use of conduct procedures, and dismiss for “some other substantial reason”.
57. There is therefore likely to be a return to employees making applications for interim relief seeking to compel employers to use conduct procedures.

Paragraph 13

58. Paragraph 13 is concerned with cases where criminal charges are brought not connected with an investigation by an NHS employer. It provides that the employer will have to give serious consideration whether the employee can continue in their job once criminal charges have been made. In other words, it is not concerned with the situation where criminal charges have been admitted or proved.
59. The ACAS Guide provides, under the heading “Criminal Charges or Convictions”, that: “An employee should not be dismissed or otherwise disciplined solely because he or she has been charged with or convicted of a criminal offence. The question to be asked in such cases is whether the employee's conduct or conviction merits action because of its employment implications.” It also provides that: “In some cases the nature of the alleged offence may not justify disciplinary action – for example, off-duty conduct which has no bearing on employment – but the employee may not be available for work because he or she is in custody or on remand. In these cases employers should decide whether, in the light of the needs of the organisation, the employee's job can be held open.”

60. The ACAS Guide has further provisions, which ought to be consulted in cases of criminal charges unconnected with an investigation by an NHS employer. Care must be taken over paragraph 13 of MHPS, since there is some confusion in the drafting, or at least a lack of clarity, as between charges and conviction.
61. The standard of proof required of an employer in an Employment Tribunal is the balance of probabilities, not the criminal standard of beyond reasonable doubt. However, there are at least two qualifications to that approach.
62. One is that where it is alleged that conduct has taken place which, if true, would amount to serious dishonesty or some other serious offence, the employee is usually entitled to require that the evidence be more cogent than in another case.
63. The other qualification is where the individual (which will often be the case with the medical profession) is working with others, such as vulnerable adults or children, such that even the suspicion or allegation of wrongdoing might be sufficient to justify dismissal. That was the situation in the case of *A v. B* [2010] ICR 849, EAT. The employer was an organisation with responsibilities for children in its work. The claimant was a senior employee. The employee was arrested in Cambodia for suspected child abuse, but was acquitted of any offence. However, the police made a disclosure to the employer that they still had suspicions that he had committed paedophilia. The employer dismissed the employee on the basis of these suspicions. The Employment Tribunal held that that was a fair dismissal, and the fairness was upheld by the Employment Appeal Tribunal.

Paragraph 15

64. This paragraph contains certain “good practice principles set out as guidance” for the employer on agreeing terms for settlement on termination of employment.

65. Bullet point 4 provides that “Expenditure on termination payments must represent value for money for example, the Trust should be able to defend the settlement on the basis that it could conclude the matter at less cost than other options.”
66. However, it need not be thought that an employer is limited to making a payment by way of settlement that would be lower than the amount that the employee could receive by way of award from an Employment Tribunal or the Court.
67. An illustration of this is *Gibb v. Maidstone and Tunbridge Wells NHS Trust* [2010] IRLR 786, CA. This was the well-known case where the Trust dispensed with the services of its long-serving Chief Executive following the outbreak of C Difficile at the Trust, which resulted in a number of deaths.
68. Ms Gibb was entitled under her contract to six months’ notice of termination. Her basic salary was approximately £150,000. A reasonable assessment by the Trust of its maximum liabilities to Ms. Gibb arising out of termination of her contract for notice and an unfair dismissal claim would have been approximately £145,000. (This was not the assessment the Trust made).
69. In fact, on advice that the possible band of recovery was greater, the Trust agreed to pay £250,000. It paid part of that sum to her, and then declined to pay the balance. Ms. Gibb sought payment of the balance by a claim in the court. The Trust argued that the agreement was void as being irrationally generous and hence ultra vires.
70. The Judge dismissed Ms. Gibb’s claim. The Court of Appeal allowed her appeal. The Court of Appeal was fairly scathing of the Trust’s approach. Laws LJ said: “I do not see why an employer such as the Trust, faced in difficult and perhaps controversial circumstances with the need to terminate a long-standing employee’s contract, should be obliged in settling terms of severance to disregard

past service and the employee's future likely difficulties. In such a case a reasonable employer is not limited to the replication of the statutory maximum available to the employee through legal redress. He will not show undue favour; but the constraint of rationality will not close the door on some degree of generosity for the sake of good relations and mutual respect between employer and employee: not only for the sake of the employee in question, but it may be also for the employer's standing and reputation as such. This position is unaffected by the terms of guidance or instructions from the Treasury, neither of which is a source of law." The Judgment of Sedley LJ also repays reading.

Part IV: Procedures for dealing with issues of capability

71. This part of the paper considers some of the paragraphs contained within Part IV of MHPS. However, the comments made are not necessarily limited to procedures for dealing with capability, but will apply also to conduct and ill-health procedures.

Paragraph 11

72. Paragraph 11 provides that employers must ensure that investigations and capability procedures are conducted in a way that does not discriminate on the grounds of race, gender, disability or indeed on other grounds.
73. Two particular points stand out from the Employment Tribunal experience: where the employee has a disability, the employer will come under a duty to make reasonable adjustments in its procedures for dealing with capability (as well as conduct and ill-health). Additionally, it is sometimes the case that statistical evidence will demonstrate a tendency towards disciplinary charges being disproportionately brought against those of a particular racial group (race claims). These issues are discussed briefly below.
74. As for the duty to make reasonable adjustments, the first question is always whether the employee has a disability. A person has a disability where he has a

physical or mental impairment, which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. This is the definition contained within Section 6 Equality Act 2010. The Office for Disability Issues has issued statutory guidance that must be taken into account in deciding whether a person has a disability. It is entitled “Equality Act 2010 Guidance”, and can be downloaded from www.odi.gov.uk/equalityact.

75. Many physical and mental impairments will come within the definition of disability. It is not uncommon in employment situations for an individual suffering from depression to have a disability. In contrast to the requirement in a claim for personal injury, it is not necessary for a disability claim in the Employment Tribunal that the mental impairment to be a clinically well-recognised condition. It is sufficient that an impairment exists. Equally, subject to exceptions provided for in the definition of disability and contained within the Guidance, the cause of such impairment is immaterial.
76. Where a person has a disability, and a provision, criterion or practice of the employer puts him at a substantial disadvantage, the employer is under a duty to make reasonable adjustments. That duty is contained within Section 20 Equality Act 2010. The duty is to “take such steps as it is reasonable to have to take to avoid the disadvantage.”
77. A provision, criterion or practice will include the arrangements made for holding investigatory, disciplinary and other meetings, as well as the terms on which a person holds his job.
78. On 26 January 2011 the Equality and Human Rights Commission issued a Code of Practice on Employment under the Equality Act 2010. It has not yet been approved by Parliament, but shortly will be. The Code is 326 pages long. It is essential to have regard to the provisions of the Code when considering what adjustments if any might be required of an employer.

79. The Act does not identify the factors that require to be taken into account in determining whether a step is reasonable for an employer to have to take. However, paragraph 6.28 of the draft EHRC Code provides that some of the factors that might be taken into account include: whether taking any particular step would be effective in preventing a substantial disadvantage, the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources, the availability to the employer financial or other assistance to help make an adjustment (such as advice through Access to Work), and the type and size of the employer.
80. The provisions of the draft EHRC Code relating to disciplinary and grievance procedures are brief (they are the same as the provisions in the current Code, shortly to become the predecessor Code, issued by the Disability Rights Commission.) They are found at page 89.
81. The provisions of the Code may also be relevant in cases concerning return to work arrangements for employees. These may in practice occur more frequently for non-clinicians than for clinicians, but this will not necessarily be the case. In the case of a non-clinician, for example a lecturer, it may be that adjustments have to be made for amplification of his lectures. Adjustments may need to be made to lighting. Adjustments may involve provision of particular seating.
82. The second matter mentioned above is race. In all discrimination claims in the Employment Tribunal, including those on grounds of race, there is a reversal of the burden of proof. This means that where the employee proves facts from which a Tribunal could infer that an act has occurred because of a protected characteristic of the employee (such as race), the Employment Tribunal must conclude that that is the reason, unless the employer provides a non-discriminatory reason that the Employment Tribunal accepts as true.

83. Importantly, an act occurs because of a protected characteristic where the protected characteristic is any part whatsoever of the reason for the act (other than a de minimis reason).
84. It is open to the Employment Tribunal to infer that the act occurred because of a protected characteristic. Such an inference can be drawn through a failure to answer statutory questionnaires. If it is suspected that disciplinary charges have been brought because of a protected characteristic such as race, a statutory questionnaire is a useful tool. It does not need to await the presentation of Employment Tribunal proceedings, but can be served within 3 months of the act complained of (alternatively within 8 weeks of Employment Tribunal proceedings).

Paragraph 12

85. This paragraph provides that those undertaking investigations or sitting on capability or appeals panels must have had formal equal opportunities training before undertaking such duties.
86. This approach must apply equally in conduct and other types of procedure.
87. It will often be an important question in an Employment Tribunal to identify precisely the nature of the equal opportunities training undertaken by the Panel. Where a question of race discrimination arises, it is common sense that formal equal opportunities training in relation to other protected characteristics, such as disability or religion or belief, may not necessarily be directly relevant. It is often a useful to ask the employer to provide details of the training received by those sitting on the relevant panel, including dates, duration of course, and course contents.

Paragraph 17

88. Paragraph 17 provides for the procedure that should be followed before the capability hearing. The first bullet provides that the notification of the hearing should be at least 20 working days before it takes place and include details of the allegations and the arrangements for proceeding including the practitioner's rights to be accompanied and copies of any documentation and/or evidence that will be made available to the capability panel.
89. Employment Tribunal experience demonstrates that there are frequently communications made between a panel and the case manager, either in writing or orally, the contents of which are not conveyed to the employee prior to the hearing. Inevitably many of these communications will amount to no more than procedural communications concerned with arrangements for the hearing itself. However, they can not infrequently include substantive communications concerned with the merits perceived by the manager of the complaints against the employee. In appropriate cases the employee should seek disclosure of the contents of all such communications.

Paragraph 28ff

90. Paragraphs 28 to 46, and Annexe A, concern appeal panels in capability cases.
91. There is no doubt that a fair procedure in a conduct case also requires a right of appeal. The right of appeal may be similar to or the same as the capability procedures within MHPS, although the composition of the appeal panel in a non-capability case may well not include an external member, and not a member of a chairman on a national list.

Interim Relief

92. There are little-known provisions contained within the Employment Rights Act 1996 that confer power on an Employment Tribunal to order an employer to reinstate or re-engage a dismissed employee, in certain circumstances.
93. The circumstances are that the application for interim relief is presented in the Employment Tribunal within seven days following the effective date of termination of the employment, and that the reason claimed by the employee for his dismissal is one of a specified number of reasons.
94. The full list of reasons for the dismissal for which an application for interim relief can be brought is: health and safety activities, Working Time Regulations, activities as a workforce representative, Trustee of an Occupational Pension Scheme, activities as a TUPE workforce representative, whistle-blowing and workforce recognition.
95. In practice, as regards practitioners in the NHS, an important reason claimed for dismissal is often whistle-blowing. If an employee claims that he has been dismissed for blowing the whistle he may apply for interim relief. This can be a useful weapon against the employer. Naturally, time is of the essence. The case needs to be passed immediately to those advisers dealing with Employment Tribunals.

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GUIDELINES

Where allegations concerning an employee's conduct are made by an informant, a careful balance must be maintained between the desirability to protect informants who are genuinely in fear and providing a fair hearing of issues for employees who are accused of misconduct. Whilst every case must depend upon its own facts and circumstances may vary widely, employers may find the following guidance to be of assistance:

1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others, in order to prevent identification.
2. In taking statements, the following seem important: (a) Date, time and place of each or any observation or incident. (b) The opportunity and ability to observe clearly and with accuracy. (c) The circumstantial evidence, such as knowledge of a system or arrangement or the reason for the presence of the informer and why certain small details are memorable. (d) Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.
3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.
4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.
5. If the informant is prepared to attend a disciplinary hearing no problem will arise but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.
6. If it is to continue, it is desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself that weight is to be given to the information.
7. The written statement of the informant, if necessary with omissions to avoid identification, should be made available to the employee and his representatives.
8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, it may be desirable to adjourn for the chairman to make further inquiries of the informant.
9. Although it is always desirable for notes to be taken during disciplinary procedures, it is particularly important in these cases that full and careful notes should be taken.
10. Whilst not peculiar to cases where informants have been the cause for the initiation of an investigation, it is important that if evidence from an investigating officer is to be taken at a hearing, it should where possible be prepared in a written form.