

The logo for Weightmans, featuring the name in white text on a dark teal rectangular background with a wavy top edge.

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HPMA

Navigating MHPS; Ensuring best practice and avoiding High Court litigation

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A decorative graphic at the bottom of the slide consisting of several overlapping, wavy lines in shades of green and blue, flowing from left to right.

1. The background

- MHPS – what is it?
- Disciplinary, capability and health
- In practice, implemented by all trusts
- Usually the local policy broadly mirrors national
- Following the framework is key
- Contractual in effect
- Injunction risk (as well as Tribunal claims)

2. MHPS – The key bits

- Part I – Action when a concern arises
- Part II – Restriction of practice and exclusion
- Part III – Conduct of hearings and disciplinarys
- Part IV – Procedures for dealing with capability
- Part V – Handling concerns about health

NB. Part I is where most people trip up

3. MHPS – Some key cases

- *Kulkarni v Milton Keynes NHS FT – Supreme Court 2009*
 - Right to be accompanied by a lawyer
- *Chhabra v West London Mental Health – Supreme Court 2013*
 - Court can intervene if case is misclassified
- *Ardron v Sussex Partnership NHS FT – High Court 2018*
 - Even where the allegations are potentially gross misconduct under the disciplinary rules, if it is arguable that the case has been misclassified an interim injunction may be granted pending full trial

4. Two new cases we have recently been involved in.....

- *Burn v Alder Hey Children's NHS Foundation Trust* [2021] EWCA 1791 – 30 November 2021. Court of Appeal
- *Kamath v Blackpool Teaching Hospitals NHS Foundation Trust* [2021] EWHC 2811. High Court

5. *Kamath v Blackpool*

- **Background to the case**
 - Claimant is consultant orthopaedic surgeon
 - Allegations concerning on-call cover in October 2019–3 incidents patient harm/potential harm
 - Alleged that consultant cancelled a patient's surgery, gave a potentially misleading reason why he had done so and promptly went on annual leave; factual dispute between consultant and evidence given by his junior team
 - November 2020; consultant excluded (patient safety, integrity of investigation)
 - Nov 2019– Feb 2020; investigation into allegations of potential gross misconduct undertaken

5. Kamath-v- Blackpool

- February 2020 decision that there is a disciplinary case to answer; classification of potential (professional) misconduct
- Internal hearing listed for April 2020; process paused due to C's ill health and new representatives appointed –
- C raises grievance that concerns should be categorised as capability; grievance rejected as it relates to the ongoing disciplinary process
- Sept 2020; C asks Trust to review its decision to categorise concerns as conduct; highlights that some witnesses have not been interviewed
- November 2020; Case Manger gathers additional information and seeks clarity from witnesses to inform review of investigation and categorisation,
- Trust maintains concerns properly categorised as potential misconduct; disciplinary hearing scheduled December 2020
- Sickness absence follows... hearing rescheduled to March 2021; then injunction proceedings issued....

5. *Kamath v Blackpool*

- Claimant's claim was that the Trust was acting in breach of his contract by...
 - Categorising concerns as potential misconduct
 - Pursuing allegations of gross misconduct on the evidence of the investigation
 - Continuing to exclude C from practiceand sought an injunction to prevent the Trust from doing so or convening a disciplinary hearing;

- Trust gave an undertaking; agreed not to proceed with disciplinary hearing pending trial
- Trial – 28 June to 1 July, and 26 to 27 July 2021

5. *Kamath v Blackpool*

- Decision of High Court (Mr Justice Soole) – 22 October 2021
 - High Court concludes:
 - Concerns were properly classified as potential misconduct, not capability;
 - Court rejects that the decision to exclude was made on a false or inaccurate basis; decision to exclude Claimant was therefore justified
 - However, the terms of reference and the resulting investigation report did not contain sufficient detail about the allegations relating to C’s probity and is flawed
 - *Court concludes that the Trust “can only proceed on the basis of fresh Terms of Reference and fresh investigation.”* (Paragraph 301 of the judgment)

5. *Kamath v Blackpool*

- **Consequences/Conclusions/ Key lessons learned so far...**
 - Getting it right from the start.....
 - Decision to exclude requires a legitimate basis; some preliminary enquiries will be necessary in most cases
 - Categorisation is key; clinical decision making can still be relevant to a conduct case and may need clinical input (e.g to disprove that there was a clinical basis for a decision)
 - Terms of Reference; clarity is key...you cannot afford to be polite!
 - Investigation reports; analysis of evidence and opportunity to challenge and allow practitioner to respond
 - Peripheral investigation processes; evidence contained in governance reviews/SUIs of the same incident are likely to be relevant
 - Beware of the grievance about categorisation.....para 278 judgment
 - Discussions with PPA will be documented and shared; no obligation to immediately share with practitioner, but they are entitled to see correspondence relating to the case if they wish; ensure there is a basis to EVERYTHING that goes in the letter...be ready to justify every word otherwise the door is open for allegations of bias or that the decision was for another reason (eg discrimination/detriment)

6. *Burn v Alder Hey*

- **Background**
 - Consultant paediatric neurosurgeon
 - Consultant on-call over weekend. Responsible for care of Patient A
 - Is requested to attend the hospital but does not come in. Patient A subsequently dies
 - Following an RCA and external reviews in early 2020 Trust commences formal MHPS investigation
 - Claimant represented by Medical Protection Society (Lisa Jones)
 - Dispute subsequently arises with regard to disclosure and interpretation of provisions of Trust Policy (paragraph 1.16)

6. *Burn v Alder Hey*

- Paragraph 1.16 reads as follows:

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

(Our emphasis underlined)

6. *Burn v Alder Hey*

- The Claimant argues that she is entitled to see “*all documents related to the investigation*” **before** attending for an investigatory interview
- Particular classes of documents in dispute in the case were as follows:
 - Correspondence with parents of Patient A (which the parents did not consent to being released to the Claimant), and
 - Copies of statements forming part of the RCA
 - NB. The Trust had given the Claimant/MPS a list of documents in the possession of the Case Investigator and provided the remainder of the documents from that list, as requested by the Claimant and her MPS representative

6. *Burn v Alder Hey*

- When the Trust explained that they were unable to release correspondence with the parents and three of the 11 RCA statements due to an absence of consent, Claimant indicated that she would not attend an investigatory interview until she received the documents
- Trust indicated that the investigation would therefore be concluded without the Claimant's further input (the dispute related to only one of seven TOR's)
- Injunction sought at this point on the basis that the Trust was acting in breach of the Claimant's contractual entitlement to see *"all documents related to the investigation"*

6. *Burn v Alder Hey*

- This was irrespective of:
 - the data protection rights and/or consent of third parties
 - the relevance of the documents to the investigation (the Case Investigator and Case Manager had confirmed, for example, that the correspondence with the parents was not relevant to the issues to be determined as part of the investigation)

6. *Burn v Alder Hey*

- Case originally came before Mrs Justice Thornton in the High Court in April 2021
- 18 June 2021 Thornton J. dismisses the application for an injunction
- In essence, she holds that the Case Investigator had been entitled to conclude that the correspondence with the parents was not *relevant* to the investigation and therefore did not need to be disclosed, and that the RCA statements were not “*correspondence relating to the case*” for the simple reason that they were not correspondence at all (being witness statements)

6. *Burn v Alder Hey*

- Claimant seeks and is granted leave to appeal on four out of six grounds
- At this point we decide to issue a Respondent's Notice
- This was because Thornton J. had rejected our argument that the true meaning of "*correspondence relating to the case*" must refer to the MHPS case/investigation and not to the substance of the allegations themselves
- We felt it was important to raise this point as otherwise we foresaw issues in future cases if the only discretion that the Case Investigator had to withhold documents was on the basis that they were "not relevant" to the subject matter of the investigation

6. *Burn v Alder Hey*

- Imagine a situation in which anonymous complaints of sexual harassment had been made, or a situation in which documents are in the possession of the Case Investigator which relate to allegations of fraud
- If the only test upon which the Case Investigator could decide to withhold sight of the documents prior to interview was “relevance” Trust would be obliged to disclose *all* such documentation prior to interview
- We argued that this was clearly a misinterpretation of the meaning/ purpose of MHPS

6. *Burn v Alder Hey*

- **Court of Appeal**
 - Judgment – 30 November 2021
 - Case advanced in Respondent’s Notice is well founded
 - Words in paragraph 1.16 do **not** impose a general disclosure obligation (whether or not limited to “relevant” documents)
 - Paragraph 1.16 is concerned only with correspondence generated by the investigatory process and creates no obligation to disclose correspondence (let alone other documents) on the basis only that it relates to matters which are the subject matter of the investigation

6. *Burn v Alder Hey*

- Court of Appeal (contd)
 - The approach taken by the Trust is commended by Court of Appeal who state in terms (paragraph 40 of the Judgment) *“The Trust did not seek to withhold documents simply on the basis that there is no legal obligation to disclose them: it’s attitude – which was if I may say so, sensible and commendable – was that it would give the Claimant everything on the list unless there were objections on the grounds of confidentiality.”*
 - Resounding endorsement of the Trust’s approach

6. *Burn v Alder Hey*

- Is there a sting in the tail?
 - This remains to be seen but in a supporting Judgment Singh LJ. raises the question of whether there might be an implied “*obligation to act fairly*” when carrying out investigations
 - He states (paragraph 47 of the Judgment) “*However when it comes to procedural fairness I am not presently persuaded that the only way in which this can be implied into the employment relationship is through the implied term of mutual trust and confidence. As similarly suggested in Chakrabarty, there may be a narrower basis for an implied term that disciplinary processes will be conducted fairly, which is not conceptually linked to the implied term of trust and confidence.*”

6. *Burn v Alder Hey*

- Is there a sting in the tail? (contd)
 - He then states *“I would prefer to leave this important issue of principle open for a future case....”*

- Lessons learned from the Burn case?
 - Be very clear as to what your Terms of Reference cover, and who is doing what
 - Make sure you follow Part I of MHPS – Action when a concern arises – to the letter
 - Do not over-promise in terms of pre-interview disclosure

6. *Burn v Alder Hey*

- **Lessons learned from the Burn case? (contd)**
 - If challenged by an employee representative, or if things do not appear to be going smoothly at the outset, seek professional help
 - Co-ordinate internally and remember that the roles of Case Manager and Case Investigator are absolutely key
 - Don't be too soft about these matters – it can cause more trouble than it is worth...Did we really need to give her that list of documents?

Soft (but still very important) guidance

- NHS Improvement – “Learning lessons to Improve our People Practice 2019”
 - Independent review commissioned following death of a nurse who had been subject to disciplinary process
 - Dido Harding wrote to all Trusts requiring a review of their disciplinary culture; this included the use of suspension and exclusion
 - Highlighted in the importance of fairness, plurality of decision makers and safeguards

- April 2022; PPA (NHS Resolution) Report into review of exclusions 2009–2019;
 - Legitimate reason for exclusion are those in MHPS; documenting decision is paramount, keeping exclusions under review; supporting the practitioner throughout <https://resolution.nhs.uk/resources/insights-from-10-years-of-supporting-the-management-of-exclusions/>

Other legal challenges

- R (Professor Taggart) v Royal College of Surgeons (May 2022)
- Cardiothoracic surgeon employed by Oxford UH NHS Trust and subject to MHPS investigation;
- Trust commissions RCS to carry out Invited Review Mechanism (review of surgical standards) as part of capability process
- Professor Taggart disagrees with various aspects; requests that RCS amends or withdraws the report; they refuse
- Application for judicial review of RCS decision; preliminary hearing as to whether the actions/decision of RCS is of sufficient public function so as to make it amenable to a judicial review
- Court says it is not
- Wide implications and number of interested parties; potential appeal pending
- Watch this space

Top 10 tips...cut out and keep!?

1. Get the initial steps right; categorisation and exclusion
2. What would Dido do?
3. Don't forget the designated NED and role of clinical advisors
4. Terms of reference...fail to prepare and...
5. Case management is an active role;
6. Beware the email (& remember SARs) – especially when discussing a draft report;
7. Are the allegations clear; are they in the disciplinary rules) ?
8. Anyone doing a MSOC?
9. Who presents to the panel; CM/CI/Both/Lawyer?
10. Remember – panel chair = tribunal witness.

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