



18 December 2013

## PRESS SUMMARY

### **West London Mental Health NHS Trust (Respondent) v Chhabra (Appellant) [2013] UKSC 80**

*On appeal from [2013] EWCA Civ 11*

**JUSTICES:** Lady Hale (Deputy President), Lord Kerr, Lord Reed, Lord Hughes, Lord Hodge

### **BACKGROUND TO THE APPEALS**

This appeal is concerned with the roles of the case investigator and the case manager when handling concerns about a doctor's performance under the disciplinary procedures introduced over eight years ago for doctors and dentists in the National Health Service. The national policy framework is known as 'Maintaining High Professional Standards in the Modern NHS' (MHPS), which the Trust has implemented through its own policies D4 and D4A.

Dr Chhabra was employed by the Trust as a consultant forensic psychiatrist at Broadmoor Hospital, which is a high security unit, on 3 September 2009. Following concerns about Dr Chhabra's performance, Dr Nicholas Broughton, the Trust's medical director and case manager for these concerns, appointed Dr Amanda Taylor, a consultant forensic psychiatrist from another trust, as case investigator on 15 December 2010. He instructed Dr Taylor to investigate the following: (1) an allegation that Dr Chhabra, travelling on a busy train, discussed an incident involving a patient and read a medical report on a patient whose name and personal details could be clearly seen; (2) an allegation that Dr Chhabra had dictated patient reports when travelling on a train; (3) concerns about Dr Chhabra's working relationship with her clinical team; and (4) a complaint from one of Dr Chhabra's patients, made through a solicitor.

Dr Taylor found, in her report of June 2011, that Dr Chhabra had breached, and admitted breaching, patient confidentiality (1) by having patient documents clearly visible and (2) by dictating sensitive reports on the train. She also found that there were difficulties within Dr Chhabra's clinical team which were issues of capability that needed to be addressed; and that the solicitor's complaint did not have merit. Her report also recorded Dr Chhabra's unchallenged account that she had not appreciated at the time that her practice compromised patient confidentiality and that she believed that she had ensured that no other passengers were close by when she dictated the reports. Dr Taylor also reported on an allegation by Dr Chhabra's former secretary, which had not been expressly included in her terms of reference, that she had made telephone calls when travelling by train to work in which she had discussed patient information. Dr Taylor did not make any finding on the veracity of this allegation.

In response to a concern raised by Dr Chhabra, the Trust had undertaken that Mr Wishart, its associate human resources director, could take no part in the investigation. But, unknown to Dr Chhabra, Dr Taylor had communicated with Mr Wishart during the investigation. Most significantly, Dr Taylor had sent Mr Wishart a draft of her report and Mr Wishart prepared suggested amendments to the draft. The extensive amendments had stiffened the criticism of Dr Chhabra. Dr Taylor had accepted some of the suggested amendments but not others. Among those she had accepted was the characterisation as 'serious' of breaches of confidentiality she had described in her report.

On 12 August 2011 Dr Broughton wrote two letters to Dr Chhabra's solicitors. One informed her that he regarded the concerns about her team working to be matters of capability. The other stated that he proposed to put to a disciplinary panel not only the admitted breaches of confidentiality but also (i) the allegation, on which Dr Taylor had noted there had been a conflict of opinion, that Dr Chhabra, while travelling by train, had telephoned her secretary to discuss patient-related information, and (ii) an allegation, which was not within Dr Taylor's remit and on which she had not reported, that Dr Chhabra had breached patient confidentiality by disclosing information via email to her medical protection society and legal advisers. Dr Broughton expressed the view that the charges were potential gross misconduct and that dismissal was a possible outcome of the hearing before the disciplinary panel.

Dr Chhabra's solicitors objected to the charge of breach of patient confidentiality by disclosing information to her protection society and her legal advisers, which had not been the subject of Dr Taylor's investigation. At their request the Trust agreed to instruct Dr Taylor to investigate that allegation. Dr Taylor carried out this further investigation and reported that there was no complaint to answer. As a result, on 17 January 2012 Dr Broughton informed Dr Chhabra by letter that that charge would not be pursued at the disciplinary hearing.

On 1 June 2012 Judge McMullen QC granted Dr Chhabra a declaration and injunctive relief preventing the disciplinary panel from investigating the confidentiality concerns, including those not grounded in Dr Taylor's report, as matters of gross misconduct. On 25 January 2013 the Court of Appeal upheld the Trust's appeal. The case manager was not confined to the findings of fact of the case investigator but could consider complaints supported by evidence reported by the case investigator, even if denied by the practitioner. The conduct panel would resolve issues of disputed fact. Dr Broughton was entitled to regard the breach of confidentiality as a potentially serious offence and as a result was justified in deciding to convene the conduct panel. Dr Chhabra appeals to this court.

## **JUDGMENT**

The Supreme Court unanimously allows Dr Chhabra's appeal and orders the Trust not to pursue any of the confidentiality concerns contained in the Trust's letter of 12 August 2011 as matters of gross misconduct; and not to pursue any confidentiality concerns without first re-starting and completing an investigation under its policy D4A.

## **REASONS FOR THE JUDGMENT**

The first and most significant issue is the roles of the case investigator and the case manager. The procedures do not allow the case investigator to determine the facts. Their aim is to have someone, who can act in an objective and impartial way, investigate the complaints identified by the case manager to discover if there is a prima facie case of a capability issue or misconduct. It would introduce an unhelpful inflexibility into the procedures if (i) the case investigator were not able to report evidence of misconduct which was closely related to but not precisely within the terms of reference (as in the former secretary's allegations) or (ii) the case manager were to be limited to considering only the case investigator's findings of fact when deciding on further procedure. Similarly, it would be unduly restrictive to require the case manager to formulate the complaint for consideration by a conduct panel precisely in the terms of the case investigator's report. Neither MHPS or the Trust's policies in D4 and D4A are so inflexible or restrictive. But the procedure does not envisage that the case manager can send to a conduct panel complaints not considered by the case investigator or for which the case investigator has gathered no evidence. The Trust was therefore correct in acceding to Dr Chhabra's request for a second report from Dr Taylor in relation to the new allegation of breach of confidentiality in her communications with the protection society and her solicitors.

There were number of irregularities in the proceedings against Dr Chhabra that cumulatively render the convening of the conduct panel unlawful as a material breach of her contract of employment.

First, Dr Taylor's findings were not capable, taken at their highest, of supporting a charge of gross misconduct, defined in the policy as so serious 'as to potentially make any further relationship and trust between the Trust and the employee impossible'. The breaches of confidentiality she recorded, including the former secretary's allegations, were qualitatively different from a deliberate breach of confidentiality such as speaking to the media about a patient.

Secondly, in reaching the view that Dr Chhabra's behaviour could amount to gross misconduct, Dr Broughton founded on the words added to para 13.4.1 with effect from 28 March 2011, after the incidents in this case. The list of misconduct in para 13.4.1 comprised only typical examples of what the Trust saw as amounting to gross misconduct and was not a comprehensive statement of the concept. But Dr Broughton relied on the amended provision in support of his view that the complaints might amount to gross misconduct and quoted it in his letter of 12 August 2011 relating to the disciplinary procedure.

Thirdly, the Trust breached its contract with Dr Chhabra when Mr Wishart continued to take part in the investigatory process in breach of the undertaking the Trust had given. In particular, when Mr Wishart proposed extensive amendments to Dr Taylor's draft report and Dr Taylor accepted some of them, which strengthened her criticism of Dr Chhabra, the Trust went outside the agreed procedures which had contractual effect in ways going beyond clarifying its conclusions. The report had to be the product of the case investigator. It was not. Further, the disregard for the undertaking amounted to a breach of the obligation of good faith in the contract of employment. It was also contrary to policy D4's principle that managers act in a way that an objective observer would consider reasonable: Dr Chhabra had an implied contractual right to a fair process, which Mr Wishart's involvement undermined.

Fourthly, Dr Broughton did not re-assess the decision in his letter of 12 August 2011 that the matters were considered as potential gross misconduct after he departed from the additional complaint once he had received Dr Taylor's second report. He was obliged to do so under para 3.1 of policy D4: an objective observer would not consider it reasonable to fail to do so.

The cumulative effect of those irregularities is that it would be unlawful for the Trust to proceed with the disciplinary procedure and that the Court should grant relief. The categorisation of Dr Chhabra's conduct as gross misconduct is itself a sufficient ground for injunction.

## **NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at [www.supremecourt.gov.uk/decided-cases/index.html](http://www.supremecourt.gov.uk/decided-cases/index.html).**