



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Number: 8000974/2024

Hearing held by video in Glasgow on 18 and 19 December 2024

Employment Judge M Whitcombe

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Mr R McIntosh

Claimant
Represented by:
Mr A Crammond
(Counsel)

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Western Isles Health Board

Respondent
Represented by:
Mr K Gibson
(Counsel)

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JUDGMENT ON A PRELIMINARY ISSUE

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It was a term of the contract of employment between the claimant and the respondent that the respondent must apply the processes set out in NHS Circular No. 1990 (PCS) 8 when bringing disciplinary proceedings against the claimant involving allegations about professional conduct or competence.

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REASONS

Introduction and background

- 5 1. Mr McIntosh, who I will refer to as “the claimant”, is a dentist who was formerly employed by the respondent health board or its predecessors for over 25 years from 21 August 1998 until 29 January 2024 when his employment was terminated for alleged gross misconduct. The duties, powers and activities of a health board in Scotland are well-known and require no further explanation.
- 10 2. By the end of his employment the claimant was a “Senior Dental Officer” within the respondent’s Public Dental Service, generally known as “a PDS Dentist”. The claimant’s primary base was the Dental Clinic within St Brendan’s Hospital in Castlebay on the Isle of Barra but he delivered primary
- 15 care dental services throughout the southern isles of the Uists and Barra.
3. The claimant has been a member of the British Dental Association since 1979. That is the recognised trade union for all employed dentists in the UK, including those employed by the respondent.

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The preliminary issue for determination at this hearing

4. By a claim form (ET1) received by the Tribunal on 3 July 2024 the claimant brought a complaint of unfair dismissal. Unusually, this preliminary hearing
- 25 concerned a preliminary issue which was neither qualifying service nor the jurisdictional time limit. At a preliminary hearing for case management held on 11 October 2024, EJ Hosie directed that a further 3 day preliminary hearing should be held to determine what he summarised as “the contract issue”, the essential point being whether, as a matter of contract, the
- 30 respondent should have applied the disciplinary procedure in NHS Circular No. 1990 (PCS) 8 or rather that known as the “Once for Scotland Conduct Policy.”

5. The notice of preliminary hearing summarised the preliminary issue simply as the “contract issue”. By agreement, the parties refined it in the following way:

“what was the correct interpretation of the claimant’s contract of employment at the material time and should the respondent have applied PCS8 or the Once for Scotland Conduct Policy when disciplining him.”

6. I understood both sides to agree that however I resolved that question it would not be determinative of fairness assessed in accordance with section 98(4) of the Employment Rights Act 1996. Nevertheless, this hearing has been arranged in the belief that it would be helpful and consistent with the overriding objective to determine it as a preliminary issue.

7. Both sides also agree that the allegations against the claimant included matters of professional conduct or competence. That is important because the disciplinary procedures sometimes recognise a difference between “personal misconduct” and criticisms of “professional conduct or competence”, leading to a different and more elaborate procedure in the latter types of case. I do not need to say anything else about the allegations for the purposes of this decision.

8. At the end of the preliminary hearing I gave an oral judgment on the preliminary issue in favour of the claimant. These are the reserved written reasons for that judgment. My reasoning is also summarised in the diagram in the Appendix.

9. I would also like to record my gratitude to all the representatives on both sides for their skilful advocacy at the hearing and their obvious hard work prior to it. Both sides should know that they have been very well represented.

Evidence

10. I heard from the following witnesses in the following order:

a. Noreen Clancy, Head of Employee Relations for NHS Lothian and also

Chair of the Once for Scotland Programme Policy Development Group
from Autumn 2018;

b. Diane Macdonald, Director of HR and Workforce Development for the
respondent, Western Isles Health Board;

5 c. Robert McIntosh, the claimant;

d. David Paul, the British Dental Association Employment Relations
Officer with responsibilities including Scotland.

11. Witness statements were not used so evidence in chief was given entirely
10 orally. All witnesses gave evidence on oath or affirmation and were cross-
examined. In general, I found all of the witnesses to be credible, although I
did find Noreen Clancy to be evasive and unwilling to answer a direct question
at one point. I got the impression that she was unwilling to give an answer
which she thought might harm the respondent's case. That said, the
15 construction of contractual and quasi-contractual documents had a much
greater bearing on the outcome of this hearing than the credibility of oral
evidence.

12. I was also provided with a joint file of documentary evidence which ran to 617
20 pages once the original file was combined with the supplementary file.

Relevant facts

13. I made the following factual findings for the purposes of the preliminary issue.
25 Many of the relevant facts were agreed and recorded in an extremely helpful
joint chronology. Where facts were disputed, I made my findings on the
balance of probabilities, in other words the "more likely than not" basis
applicable to almost all civil litigation. If I decided that a fact was more likely
to be true than untrue, then for the purposes of this decision it is treated as
30 being true. The converse also applies.

NHS Circular No.1990 (PCS) 8

14. On 19 March 1990 NHS Circular No. 1990 (PCS) 8 was issued. It is headed,

“Disciplinary Procedures for Hospital Medical and Dental Staff, Community Medicine Staff and Doctors in Public Health Medicine.” The opening words are, “This Circular notifies Health Boards of the introduction of new disciplinary procedures for hospital medical and dental staff and community medicine staff and doctors in public health medicine.”

15. The essential scheme was that the position of doctors and dentists covered by 1990 (PCS) 8 would be the same as that of other NHS staff in cases of *personal misconduct*. Personal misconduct meant “*performance or behaviour of practitioners not associated with the exercise of medical or dental skills.*” However, a different and more elaborate procedure would apply to cases concerning *professional misconduct*, which was defined as “*performance or behaviour of practitioners arising from the exercise of medical or dental skills.*”
16. 1990 (PCS) 8 introduced:
- “*professional review machinery*”, an informal mechanism for reviewing the conduct of hospital consultants who were alleged to have repeatedly failed to honour their contractual commitments (Annex A);
 - an “*intermediate procedure*” intended for less serious matters involving professional conduct or competence, which made use of independent professional assessors (Annex B);
 - a procedure for “*serious disciplinary cases involving the professional conduct and professional competence of all hospital medical and dental staff and community doctors and doctors in public health medicine where the outcome of the disciplinary action could be the dismissal of the medical or dental practitioner concerned.*” It involved a highly structured procedure with a specified timetable and could ultimately result in a right of appeal to the Secretary of State (Annex C).

The claimant’s written statement of terms and conditions (2001)

17. The claimant signed a written statement of terms and conditions on 25 September 2001, although his continuous employment began on 21 August 1998. The covering letter stated that the written statement of terms had contractual effect. The claimant's post was "Community Dental Officer", at Dental Officer grade, based at St Brendan's Hospital. The claimant worked in the "Community Dental Service" ("CDS"). General Whitley Council conditions of service and other agreements approved by the Secretary of State for Scotland were incorporated by express reference. That included disciplinary procedures. However, it is not necessary to refer to any of them for the purposes of this judgment.

Creation of the Scottish Public Dental Service

18. On 2 March 2010 the Chief Dental Officer announced on behalf of the Scottish Government Primary and Community Care Directorate a plan to combine the Community Dental Service ("CDS") and the Salaried General Dental Services ("GDS") to form a new Scottish Public Dental Service ("PDS"). The CDS and the salaried GDS had a range of different terms and conditions of employment and work would be undertaken by a sub-group of the Scottish Joint Negotiating Forum to "align" those terms. It was a tripartite body comprising representatives of the Scottish Government Health Directorates, NHS Employers and the British Dental Association (Scotland),

19. The National Health Service (General Dental Services) (Scotland) Regulations 2010 followed later that year to put the new arrangements on a statutory footing.

Management of Employee Conduct PIN Policy (April 2012)

20. The Partnership Information Network ("PIN") was a tripartite body which developed templates in certain areas of policy. It comprised staff side representatives, representatives of NHS management and representatives of the Scottish Government. The intention was that the PIN policies would set minimum standards for the policies of individual health boards. In May 2012

the PIN issued the “*Management of Employee Conduct PIN Policy April 2012*”. It was introduced by the responsible minister Nicola Sturgeon as representing “an exemplar approach to employment policy and practice”. The expectation was that while health boards could develop their own conduct and competence policies they would have to meet the minimum standards of the PIN policy.

21. Paragraph 1.8 states:

This PIN policy applies to all directly employed staff, including bank/temporary staff and NHS Scotland staff on secondment. It applies to all medical and dental staff employed by Boards in cases of personal misconduct (as defined in NHS Circular 1990 (PCS)8). It does not apply to matters concerning the professional conduct or competence of medical and dental staff, which are covered by national agreements...or...the following circulars...

22. NHS Circular 1990 (PCS) 8 is the first such circular referred to and paragraph 1.8 continues:

NHS Circular 1990 (PCS) 8 (and subsequently PCS(DD) 2001/09) sets out the distinction between issues of personal conduct and those related to professional conduct or competence.

23. Appendix 1 contained the “Model Management of Employee Conduct Policy”. In section 2 “Scope” it stated as follows:

This policy applies to all directly employed staff, including bank/temporary staff and [name of organisation] staff on secondment. It applies to all medical and dental staff in cases of personal misconduct. However, it does not apply to matters concerning the professional conduct of medical and dental staff.

24. It goes on to set out detailed procedural rules which it is not necessary to summarise for present purposes. It is sufficient to say that they are very different from the arrangements in 1990 (PCS) 8.

25. The model conduct policy in Appendix 1 of the PIN policy is important because neither side in this case can locate the respondent's own policy which implemented the PIN policy in 2014. This is dealt with further below.

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Scottish Public Dental Service Terms and Conditions of Service (1 April 2013)

26. An important part of the development of a new Scottish Public Dental Service ("PDS") was the agreement and implementation of new terms and conditions for those working within it. The terms were agreed by representatives of NHS employers, the Scottish Government and the British Dental Association. The new terms and conditions were effective from 1 April 2013 and replaced the previous terms for all PDS employees. That was confirmed and notified to NHS employers including the respondent in NHS Circular PCS (DD) 2013/5.

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27. Part 1 ("Introduction"), paragraph 2 of the Scottish Public Dental Service Terms and Conditions of Service stated that:

The terms and conditions of service set out in this handbook shall incorporate, and be read subject to, any amendments which are from time to time the subject of negotiation by the appropriate negotiating bodies, principally the Scottish Joint Negotiating Forum (SJNF) and are approved by Scottish Ministers after considering the results of such negotiations.

28. The full Scottish Public Dental Service Terms and Conditions of Service were included in the documentary evidence at this hearing but it is only necessary to refer to one other section. Section 13 was headed "Disciplinary Procedures" and the parties focussed on paragraphs 1 and 3:

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Personal Conduct

1. *Disciplinary issues relating to personal conduct such as timekeeping, behaviour/conduct etc should be dealt with through the NHS Board's Management of Employee Conduct policy.*

Performance Concerns

2. [Not relevant for present purposes]...

Professional Issues

3. If an adverse report is received from the Dental Reference Officer or from any other source raising professional concerns this will be dealt with through the NHS Board's Employee Conduct policy in the normal way.

The claimant's new terms and conditions of employment with the respondent (19 February 2014)

29. The Scottish Public Dental Service Terms and Conditions of Service effective from 1 April 2013 were implemented by agreed variations to individual contractual terms, including those of the claimant. The claimant signed new terms and conditions of employment with the respondent on 19 February 2014. They confirmed his appointment as a "Senior Dental Officer" and the normal base remained the Barra Dental Clinic within St Brendan's Hospital on the Isle of Barra.

30. Clause 3 provided that, "*This appointment is subject to the national Terms and Conditions of Services (2013) for Dentists employed in the Scottish Public Dental Services ("the TCS") which may be amended by collective agreement from time to time.*"

31. Clause 13 provided that, "*The provision [sic] relating to disciplinary procedures are set out in Section 13 of the Terms and Conditions of Service. A copy of the NHS Western Isles Management of Employee Conduct (Disciplinary) Policy can be obtained from your line manager or HR Department.*"

32. As noted above, that disciplinary policy cannot be found, but both sides

proceed on the basis that it was most likely in substantially similar terms to the PIN policy in that area, which had been intended to set minimum standards from which health boards should not derogate. That was Diane Macdonald's unchallenged evidence. She thought that the only possible changes might have been things like inserting the name of the respondent, and possibly clarifying who at board level had the power to dismiss. She explained that it was simply a question of "Western Isles-ing" the PIN policy. I make the equivalent finding of fact.

- 10 33. The 2013 terms have not so far been varied by collective agreement. The claimant has not agreed to any variation of them either.

The respondent's conduct policy (2014)

- 15 34. For the reasons explained above, I find that while this policy cannot now be found, all relevant terms were the same as those set out in the model conduct policy in Appendix 1 of the PIN policy.

The respondent's conduct policy (2015 & 2017)

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35. The joint file of documentary evidence included a copy of the respondent's Employee Conduct Policy issued in 2015 and revised in 2017. At clause 2.1 ("Scope") it stated as follows:

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This policy applies to all directly employed staff, including bank/temporary staff and NHS Western Isles staff on secondment. It applies to all employed medical and dental staff in cases of personal misconduct. However, it does not apply to matters concerning the professional conduct of medical and dental staff.

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The Once for Scotland Programme (2020)

36. A desire arose for greater consistency of approach among the Scottish health

boards regarding their policies and terms and conditions of employment. There were 22 different health boards and staff would move between them, so it was felt to be inappropriate for different sets of policies or terms and conditions to apply. The Once for Scotland programme was intended to resolve that by devising standard workforce policies which would apply to all staff. However, as Noreen Clancy put it, the approach was to “refresh” the PIN policies rather than to renegotiate them.

37. The policy development group was tripartite, including representatives of staff, employing health boards and government. While there were staff side representatives, they did not include every trade union and they did not include the British Dental Association. The process did not amount to collective bargaining with recognised trade unions. Noreen Clancy described it as a “partnership approach” involving consultation but not collective bargaining. She also accepted that the Once for Scotland Programme had no power or authority to change the terms and conditions of those employed by health boards. It was the responsibility of health boards to implement the policies locally, “jointly with their staff side representatives”. Changes to terms and conditions would need to be effected through the Scottish Joint Negotiating Forum.

38. Diane Macdonald, the respondent’s HR Director, essentially agreed saying, *“Once for Scotland wasn’t about changing any contractual position”, and, “the Programme Board is not about renegotiating terms and conditions, it was a refresh and applying terms and conditions that were already there, rather than renegotiating, was just making clear what the position was.”*

39. The first set of policies went live in March 2020. That set included the conduct policy, the capability policy and the investigation process. The version in the joint file of documents was last updated in November 2021. In the section headed “Scope” it read as follows:

This policy applies to all employees. It also applies to workers i.e. bank,

agency and sessional workers. References to employees should be taken to apply to workers unless otherwise stated.

Where concerns are raised about the professional conduct or competence of medical or dental staff, please refer to the relevant circulars...

40. It is common ground that the list of NHS circulars which followed was intended to include 1990 (PCS) 8, but a typographical error describes it as “1990 (PCS) 81”. The policy must therefore be read as referring to 1990 (PCS) 8.

41. The accompanying “Workforce Policies Investigation Process” stated:

This policy applies to all employees, with the exception of medical and dental staff in relation to their professional conduct or competence, for which the relevant policy applies. It also applies to workers, i.e. bank, agency and sessional workers. References to employees should be taken to apply to workers unless otherwise stated.

Changes approved by the Once for Scotland Programme Board in May 2023

42. The Once for Scotland Programme Board met on 30 May 2023 to consider, among many other things, a “Change Request to the NHS Scotland Conduct and Capability Policies - Public Dental Service”. No representatives of the British Dental Association were present, though there were other staff side representatives. The Programme Board approved the following amendment to the “Scope” section of the NHS Scotland Conduct Policy, so that it would state:

*This policy applies to all employees, with the exception of medical and **some** dental staff in relation to their professional conduct or competence, for which the relevant policy applies. [Emphasis added to highlight the change.]*

43. The change did not pick up the error in relation to circular 1990 (PCS) 8, which was once again referred to erroneously as 1990 (PCS) 81, but both sides agree that it should once again be read as a reference to 1990 (PCS) 8.

5 44. Noreen Clancy confirmed that the status and processes of the Once for Scotland Programme Board were the same in 2023 as they had been in 2020 (see above). It was tripartite, including representatives of staff, employing health boards and government. While there were staff side representatives, those staff side representatives did not include every trade union and they
10 did not include the British Dental Association. The process did not amount to collective bargaining with recognised trade unions. The Once for Scotland Programme had no power or authority to change the terms and conditions of those employed by health boards. It was the responsibility of health boards to implement the policies locally and to make any necessary changes to terms
15 and conditions.

45. By this stage, the disciplinary proceedings against the claimant had commenced and a dispute had arisen regarding the applicable policy. The respondent asserted that matters should be dealt with through its Employee
20 Conduct Policy, which incorporated the November 2021 edition of the Once for Scotland Conduct Policy.

British Dental Association Objection

25 46. On 5 June 2023 David Paul of the BDA wrote to the respondent to express concerns on behalf of his member, the claimant. He was concerned that the respondent's position was that the procedure set out in 1990 (PCS) 8 did not apply to the claimant's situation, and that if the PDS Terms and Conditions of 2013 had intended 1990 (PCS) 8 to apply then they would have said so. Mr
30 Paul said that the BDA officials involved in the negotiations leading to the respondent's 2013 terms and conditions had believed that the wording was temporary pending the adoption in Scotland of the "Maintaining High Professional Standards" arrangements for issues of professional conduct or

competence, or an equivalent. Mr Paul believed that the procedure in 1990 (PCS) 8 should apply.

- 5 47. On 20 June 2023 the respondent replied to David Paul to say that the change approved by the Programme Board on 30 May 2023 “removes any confusion around the applicability of the policies in relation to PDS dentists.”

Revised Workforce Policies Investigation Process (31 July 2023)

- 10 48. This was issued on 31 July 2023. In the section headed “Scope” it stated:

15 *This policy applies to all employees, with the exception of medical and some dental staff, in relation to their professional conduct or competence to which the relevant policy applies. It also applies to workers, such as bank, agency and sessional workers.*

Revised “Once for Scotland” Conduct Policy (1 August 2023)

- 20 49. A revised Conduct Policy was issued on 1 August 2023. The amended provisions in the section headed “Scope” read as follows:

25 *This policy applies to all employees. It also applies to workers i.e. bank, agency and sessional workers. References to employees should be taken to apply to workers unless otherwise stated.*

Where concerns are raised about the professional conduct or competence of medical or some dental staff, please refer to the relevant circulars - 1990 (PCS) 8 amended by 1990 (PCS) 32, PCS (DD) 1994/11, PCS (DD) 1999/7, PCS (DD) 2001/9, SGHD/CMO (2013) 22. For Public Dental Service dentists, see: Scottish Public Dental Service Terms and Conditions of Service 2013.

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It relates to any type of behaviour or conduct that falls below the standard required by the employer or is in breach of organisational policies. Read the

Guide to expected standards of behaviour. Concerns relating to breaches of regulatory standards can only be determined by the relevant regulator. Read the Criteria for referral to external agencies. The employer may be unable to determine the outcome of a conduct process in advance of the regulator considering the referral. However, the employer may be in a position to determine an outcome based on employment standards and contractual obligations.

Further BDA objection

50. Neither the claimant nor representatives of the BDA had agreed to the above changes of policy, or to any change in the claimant's terms and conditions of employment.

51. On 10 May 2024 David Paul wrote to the respondent following a meeting on 3 May 2024. He argued that the BDA should have been consulted on the proposed change, and that PDS dentists should not be treated differently from other salaried dentists or medical colleagues. He contended that the BDA would not have agreed to the change and that the policies should revert to their previous wording.

52. David Paul was invited to a meeting of the Once for Scotland Workforce Policies Programme Board on 31 May 2024. He made the same points. Noreen Clancy's view was that the previous wording of the Once for Scotland Conduct Policy and the PIN policies had not been correct because they failed to reflect the terms and conditions of PDS dentists issued in 2013, so a change had been required.

53. The Programme Board declined to reverse the change they had agreed just over a year earlier on 30 May 2023. That was confirmed in a letter to David Paul dated 29 July 2024.

Legal principles

54. I did not detect any real dispute between the parties as to the applicable legal principles.
- 5
55. The following principles can be derived from the line of cases which includes **Reardon Smith Line Limited v Yngvar Hanser-Tangen** [1976] 1 WLR 989, HL, **Investors Compensation Scheme Limited v West Bromwich Building Society** [1998] 1 WLR 896, HL, **BCCI v Ali** [2001] UKHL 8, 10 **Chartbrook v Persimmon Homes** [2009] UKHL 38, **Rainy Sky SA v Kookmin Bank** [2011] UKSC 50, SC, **Arnold v Britton** [2015] UKSC 36, SC, and **Wood v Capita Insurance Services Ltd** [2017] AC 1173.
56. The representatives agreed that the principles set out below also apply in 15 Scotland: see for example **Fife Council v Royal and Sun Alliance Insurance Plc** [2017] CSOH 28 and **Ashtead Plant Hire Co Ltd v Granton Central Developments Limited** [2020] CISH 2. In the latter case the Inner House of the Court of Session referred to the principles of contractual construction derived from those cases as "well established". I will borrow and 20 adapt the summary of relevant principles set out by Lord Drummond Young in **Ashtead**.
57. The aim of interpreting a provision in a contract is to determine what the 25 parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The hypothetical reasonable person is someone who has all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of contracting.
- 30 58. Two important principles follow from that.
- a. A contract must be construed *contextually*, because language can be ambiguous and a proper view of the meaning of a passage can only

be reached by placing that passage in context. It is necessary to consider all the relevant surrounding circumstances.

5 b. The correct approach to construction is *objective*. It seeks to establish the meaning that a reasonable person in the position of the parties would have understood the contract to have. The meaning of a contract cannot be determined by the *subjective* intentions or understandings of one of the parties and declarations of subjective intent are irrelevant. A court or tribunal must instead take an *objective*
10 view, based on what would have been known to a reasonable person at the time the contract was entered into.

59. A court or tribunal should also adopt a *purposive* approach, having regard to the fundamental objectives that reasonable people in the parties' position
15 would have had in mind. The substance of the parties' agreement, construed objectively, should prevail over niceties of wording, especially where clauses have not been well drafted. In some cases, a purposive construction may justify a conclusion that the parties must have made errors of wording or syntax.

20 60. In a similar way, a court or tribunal may also have regard to "business common sense", though I would observe that this may have more to add as a distinct principle in a commercial context than it does in an employment context. If there are two possible constructions the court or tribunal is entitled
25 to prefer the construction which is consistent with business common sense and to reject the other, even if the rejected option is the more literal interpretation of the words used. Lord Drummond Young observed in ***Ashtead*** that interpretation in light of "commercial common sense" was likely to overlap with the need to consider context and the need to adopt a
30 purposive construction.

61. It is necessary to say a little more about the potential relevance of pre-contractual negotiations. Normally, the law excludes from the relevant context

evidence of the previous negotiations of the parties and their declarations of subjective intent. Such evidence will be inadmissible *for the purpose of drawing inferences about what the contract means*. However, it might be admissible for other purposes, for example, to show that a fact which might be relevant as background was known to the parties at the time of contracting.

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62. The interpretation of words in accordance with their 'ordinary and natural' meaning reflects the common-sense proposition that courts and tribunals do not easily accept that contracting parties have made linguistic mistakes, particularly in formal documents. On the other hand, if the background would lead a reasonable person to conclude that something must have gone wrong with the language or the drafting, then the law does not require Tribunals to attribute to the parties an intention which they plainly could not have had.

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Submissions

63. The representatives provided helpful written submissions prior to the hearing and updated them once the evidence had been completed. They also made concise oral submissions. Since the submissions were made primarily in writing little useful purpose would be served by setting them out or summarising them here too. I will deal with the main points when setting out my own reasoning and conclusions.

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Reasoning and conclusions

The claimant's original contractual terms in 2001

64. Clause 13 of the written statement of terms and conditions of employment signed by the claimant on 25 September 2001 expressly incorporated General Whitley Council conditions of service and "*other agreements which have subsequently been approved by the Secretary of State for Scotland*".

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65. In my judgment that phrase includes the agreement reflected in NHS Circular 1990 (PCS) 8. The reasons are apparent from the section of the circular headed "Background". The circular was issued by the Scottish Home and Health Department following a report to Ministers by a tripartite Joint Working Party in August 1988, a White Paper, and subsequent negotiations with the professions. It was an agreement approved by the Secretary of State.

66. For those reasons, I find that the claimant's original contractual terms incorporated the provisions of 1990 (PCS) 8 by reference.

The scope of 1990 (PCS) 8

67. The respondent argues that the claimant fell outside the scope of 1990 (PCS) 8. I reject that argument and find that the scope of NHS circular 1990 (PCS) 8 included the claimant for the following reasons.

68. Paragraph 1 ("Introduction") stated that it introduced new disciplinary procedures for "*hospital medical and dental staff and community medicine staff and doctors in public health medicine*".

a. The claimant fell within that group because he was a dentist based at a hospital. He was part of the hospital dental staff. There was no evidence of circumstances known to the parties at the time of contracting which might suggest to a reasonable observer that dentists such as the claimant were intended to be *excluded* from that phrase. There is nothing about the context which suggests that the parties intended to depart from the plain and simple meaning of those words.

b. Alternatively, or additionally, the claimant was a member of "community medicine staff", another aspect of the definition. Once again, I have not heard any evidence of background or context at the time of contracting which might suggest that it was intended that the claimant should be excluded from that definition. In my judgment the natural meaning of "community medicine" includes community dentistry, in so far as the claimant's work was done in the community

or for the community served by the respondent health board.

c. I also find that a purposive construction favours those interpretations.

The purpose of 1990 (PCS) 8 was to extend a carefully negotiated and approved procedure to employed doctors and dentists delivering services on behalf of the employing health board.

d. A reasonable observer would inevitably conclude that the claimant was a type of dentist who had been intended to benefit from the procedures in 1990 (PCS) 8.

69. Although at this hearing the respondent argued that the claimant fell outside the scope of 1990 (PCS) 8, that was not an argument raised in the response (ET3 and attachment) and it appears to have been raised for the first time at the hearing. It was also striking that the respondent's HR Director gave evidence which directly contradicted the argument. Both in her evidence in chief and in cross-examination, Diane Macdonald said that the Community Dental Service, which included the claimant, was within the scope of the 1990 (PCS) 8 definition. She accepted that it had applied to the claimant prior to 2013, at which point she said that the position changed. While Noreen Clancy thought that the claimant probably fell outside the scope of the circular, she is employed by a different health board, had no personal knowledge of the claimant's work or circumstances and did not seem to have appreciated that the claimant's main base was located at a hospital. Noreen Clancy is the only witness in the case who thought that the claimant's role fell outside the scope of the circular. The other three witnesses, including the respondent's HR Director, disagreed.

70. To the extent that those witnesses were offering a subjective opinion as to the meaning of a contractual term, those opinions should be irrelevant on a correct application of the principles of contractual interpretation set out above. However, Diane Macdonald's evidence could be regarded as confirming the important contemporaneous facts of which both sides were aware at the time of contracting. In other words, the fact that the claimant was a dentist based at a hospital, and the fact that he was also part of community medical staff.

On either or both bases he was properly regarded as falling within the scope of circular 1990 (PCS) 8.

5 71. In my judgment that outcome is also consistent with a purposive interpretation of the contract, which was to apply a different and more elaborate disciplinary procedure to (among others) dental professionals who faced allegations raising issues of professional conduct or competence. There is nothing about the wording or the context of 1990 (PCS) 8 to suggest that there was an intention to apply those procedures to some employed dentists but not others, 10 still less any explanation of the logic of such a position.

The Scottish Public Dental Service Terms and Conditions of Service (1 April 2013) and the claimant's contract of employment (19 February 2014)

15 72. It was a recurring submission on behalf of the respondent that the collectively agreed Scottish Public Dental Service Terms and Conditions of Service included an agreement that 1990 (PCS) 8 would not apply to dentists who were to become PDS dentists. There is no witness evidence to support that submission. The respondent did not call any witnesses with personal involvement in the negotiation or agreement of those terms, and the 20 submission was directly contradicted by the evidence of David Paul. While the respondent argued that David Paul's evidence should not be accepted on that point, it gave no reason for doing so except for the words used in Mr Paul's email of 5 June 2023. I note that those words post-date the agreement of the terms by a decade, so they could only be weak evidence of 25 circumstances in existence at the time of contracting anyway. Further, I do not read them as supporting the respondent's submission. Mr Paul was clearly arguing in correspondence that 1990 (PCS) 8 should apply, and he did not concede that it was ever agreed that 1990 (PCS) 8 should not apply. 30 It is implausible that a recognised trade union would agree to even a temporary removal of the procedural benefits of 1990 (PCS) 8 without replacement. I read Mr Paul's words as arguing that 1990 (PCS) 8 applied pending the agreement of a replacement.

73. The written contract of employment signed by the claimant on 19 February 2014 was expressly subject to the National Terms and Conditions of Service “*which may be amended by collective agreement from time to time*” (clause 3). In my view that shows a joint intention that any *collectively agreed* changes to the National Terms and Conditions of Service in the future should be incorporated without the need for further agreement by individual employees such as the claimant.
74. There was no variation clause, and so the only routes to binding varied terms would be:
- a. express agreement between the claimant and the respondent; or
 - b. collectively agreed variations to the Scottish PDS Terms and Conditions of Service, as envisaged by clause 3 of the claimant’s contract of employment and Part 1 Paragraph 2 of the Scottish PDS Terms and Conditions of Service themselves.
75. As for the first limb, no other written terms were agreed by the claimant and the respondent prior to the termination of the claimant’s contract of employment, nor did the parties subsequently agree any variation of the contract signed by the claimant on 19 February 2014. As for the second limb, the relevant recognised trade union was the British Dental Association. As the respondent’s witnesses accepted, the BDA were not consulted on any contractual changes at all, and no such collective agreement was reached. The respondent does not suggest that the Scottish PDS Terms and Conditions of Service were varied by the Scottish Joint Negotiating Forum or any other body constituting “the appropriate negotiating bodies” referred to in Part 1 Paragraph 2 of the Terms. The respondent accepted and emphasised that the Once for Scotland Programme Board had no power or authority to agree variations to contractual terms and conditions.
76. Clause 13 of the claimant’s contract of employment incorporated section 13 of the National Terms and Conditions of Service dated 1 April 2013 and

highlighted the availability of the respondent's own "Management of Employee Conduct (Disciplinary) Policy" from line management or HR.

The applicable disciplinary policy for professional conduct or competence allegations after 19 February 2014

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77. I accept the claimant's submission that the procedure set out in 1990 (PCS) 8 applied. While neither side have been able to find a copy of the respondent's Employee Conduct Policy in force in 2014, it is accepted on both sides that it
10 must have been in substantially the same form as the "Management of Employee Conduct PIN policy April 2012", which was the latest version in existence at that time.

78. For full details I refer to the findings set out above in relation to paragraph 1.8
15 of that policy. I will set out a more limited extract to explain my reasoning.

79. It was said to apply to "*all medical and dental staff employed by Boards in cases of personal misconduct (as defined in NHS Circular 1990 (PCS) 8). It does not apply to matters concerning the professional conduct or competence
20 of medical and dental staff, which are...[so far as relevant] set out in the following circulars: NHS Circular 1990 (PCS) 8 [and others]...*"

80. Consistent with that approach, the model policy at Appendix 1 said:
25 *This policy applies to all directly employed staff, including bank/temporary staff and [name of organisation] staff on secondment. It applies to all medical and dental staff in cases of personal misconduct. However, it does not apply to matters concerning the professional conduct of medical and dental staff.*

30 81. I find that the 2012 PIN policy was clear, and that it only applied to employed dental staff in cases of *personal misconduct* (as defined by Circular 1990 (PCS) 8). In cases raising issues of *professional conduct or competence*, the procedures in Circular 1990 (PCS) 8 applied. That was the clear personal/professional distinction recognised by the PIN policy, so it was likely

to be reflected in the respondent's own conduct policy applicable in 2014.

82. I also note that the PIN policy did not purport to apply 1990 (PCS) 8 only to a limited class of dentist, but rather to an undifferentiated class of "dental staff",
5 provided that the case was one of professional conduct or competence. That supports my findings regarding the interpretation and scope of 1990 (PCS) 8 itself. If the respondent's submission regarding the limited scope of 1990 (PCS) 8 were correct then a similar limitation would be expected in the PIN policy, but there is none.

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83. I find on the balance of probabilities that the respondent's own conduct policy must have been in substantially similar terms in 2014. Since the PIN policies were intended to set minimum standards, the respondent's own policy would not have derogated from the procedural safeguards guaranteed by the PIN
15 policy.

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84. While the respondent's conduct policy dating from 2014 was not before the Tribunal, later versions were. The policy issued in 2015 and updated in 2017 stated, once again:

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This policy applies to all directly employed staff, including bank/temporary staff and NHS Western Isles staff on secondment. It applies to all employed medical and dental staff in cases of personal misconduct. However, it does not apply to matters concerning the professional conduct of medical and dental staff.

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85. That makes it even more likely that the 2014 version of the respondent's conduct policy drew the same distinction.

86. The "Once for Scotland" successor policies initially preserved the personal/professional distinction. I refer to my findings of fact above for full details, so I will set out a more condensed summary here. The "Scope" section of the Once for Scotland policy last updated in November 2021 read

as follows:

This policy applies to all employees. It also applies to workers i.e. bank, agency and sessional workers. References to employees should be taken to apply to workers unless otherwise stated.

Where concerns are raised about the professional conduct or competence of medical or dental staff, please refer to the relevant circulars...

10 87. Once allowance is made for a typo, it is common ground that one of the “relevant circulars” referred to was 1990 (PCS) 8. It follows that “Once for Scotland” policies continued (at least prior to 2023) to apply 1990 (PCS) 8 procedures to cases raising issues of professional conduct or competence in relation to “dental staff”, without distinction between types of dentist.

15 88. Similarly, the Workplace Investigation Process of the same period said, “*This policy applies to all employees, with the exception of medical and dental staff in relation to their professional conduct or competence, for which the relevant policy applies.*” That strengthens the conclusion that 1990 (PCS) 8 procedures were to apply to professional conduct or competence allegations against dentists. It has not been suggested that any other policy filled the gap which would otherwise exist.

20 89. While those policies in 2015, 2017 and 2021 were not in existence at the time the claimant agreed to the 2013 terms, they nevertheless show the respondent adopting a consistent approach to issues of professional conduct or competence in the years that immediately followed, right up until the changes made in 2023. The only plausible explanation is that they correctly reflected the agreed position. I reject the respondent’s submission that the wording was based on a repeated mistake which went uncorrected until 2023, and that it had never been the intention to allow PDS dentists to benefit from the enhanced procedures in 1990 (PCS) 8. There is no evidence to support that submission, even if evidence of subjective intention were properly

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admissible on the point.

90. That leads to the conclusion that the contract agreed by the claimant on 19 February 2014 incorporated the procedures in Circular 1990 (PCS) 8 where
5 allegations were made about his professional conduct or competence. The claimant's individual terms incorporated clause 13 of The Scottish Public Dental Service Terms and Conditions of Service which stated:

Professional Issues

10 *3. If an adverse report is received from the Dental Reference Officer or from any other source raising professional concerns this will be dealt with through the NHS Board's Employee Conduct policy in the normal way.*

- 15 91. For those purposes the potentially ambiguous phrase "the normal way", must have been intended to apply the procedures in 1990 (PCS) 8, and not those intended to deal with personal misconduct. It was the "normal way" mandated by the PIN policy and known to the parties at the time of contracting. Diane Macdonald accepted that 1990 (PCS) 8 would have applied to someone in
20 the claimant's situation until 2013.

92. It is difficult to see why section 13 ("Disciplinary Procedures") of the Scottish PDS Terms and Conditions of service should have preserved the distinction between "Personal Conduct" and "Professional Issues" if the intention were
25 not to apply 1990 (PCS) 8 or some other scheme drawing the same distinction. No other scheme of that sort has been identified at the relevant time, so it must refer to 1990 (PCS) 8. If it had been intended that issues of *professional* conduct and competence were to be dealt with in the same way as matters of *personal* misconduct, then there would be no need to split and
30 structure clause 13 in that way at all, and the phrase "normal way" would instead be "same way".

93. The counter-argument might be to say that if clause 13 of The Scottish Public Dental Service Terms and Conditions of Service had been intended to

incorporate 1990 PCS 8 then it could easily have done so explicitly, and that the failure to do so is telling. However, I think there is a cogent explanation for the use of the words “in the normal way”. I accept Mr Paul’s evidence that the expectation at the time was that 1990 (PCS) 8 would be replaced in Scotland at some point by something equivalent to the “Maintaining High Professional Standards” regime applicable in England. The words “in the normal way” were most likely intended to have meant, in effect, “1990 (PCS) 8 or any replacement for it”. While the words are ambiguous when considered in isolation, that is the objective interpretation that a reasonable observer, aware of the context, would have adopted.

94. I also find that the continued use of 1990 (PCS) 8 after 2013 made both common sense and industrial sense. There had been a long-established practice of treating issues of professional conduct and competence differently from personal misconduct. There is no evidence to suggest a common desire to reduce the procedural safeguards for dentists in professional conduct and competence cases. On the contrary, the long-term objective was to come up with a replacement for 1990 (PCS) 8, and not to abolish the personal/professional distinction altogether.

Changes to the Once for Scotland Policy on 1 August 2023

95. I can deal with this shortly. The policy changes were insufficient to effect a change in the claimant’s terms and conditions, including the contractually guaranteed procedure for handling allegations of professional conduct or competence.

a. There was no express agreement between the parties (i.e. the claimant and the respondent) to vary the claimant’s contractual terms in that respect.

b. I did not understand the respondent to argue that the claimant had acquiesced through conduct or silence to a variation proposed unilaterally by the respondent. I see no evidence to support such an argument.

- 5 c. The claimant's individual contractual terms did not provide for variations of his contractual terms merely through the publication of policies by the respondent or any other body, such as the "Once for Scotland" Programme Board. That was not a permissible mechanism of variation.
- 10 d. There was no collective agreement varying terms and conditions in that respect. The 2013 terms envisaged the possibility of variation by collective agreement by "*the appropriate negotiating bodies, principally the Scottish Joint Negotiating Forum (SJNF) and are approved by Scottish Ministers after considering the results of such negotiations.*" The 2014 contract also envisaged the possibility of variation by collective agreement but was not as explicit regarding the procedure. No relevant collective agreement was reached at any point. The recognised trade union, the BDA, was not consulted at all prior to making the changes.
- 15 e. The consistent evidence of the respondent's witnesses was that the Project Board was not engaged in collective bargaining, and that it had no power to vary contractual terms. The claimant's case is precisely the same in that respect.
- 20 f. The claimant's contract of employment did not expressly incorporate *policies* issued after the date of contracting unless they were reflected in *collective agreements*. Clause 13 did not, for example, incorporate "such disciplinary policies as may be issued by the respondent from time to time". Therefore, there is an important difference between
- 25 collective agreements properly so-called, and policies agreed by tripartite working groups. The former would be incorporated by express reference, but the latter would not. The former would gain contractual status as a matter of individual terms and conditions, but the latter would not.
- 30 g. Finally, it was accepted in the respondent's written submissions that "Once for Scotland" policies were neither contractual nor intended to change contractual terms and conditions.

96. Even if the 2023 revision to the Once for Scotland Policy had been effective to vary the claimant's individual terms and conditions of employment, I would have found that the relevant provision was too vague to deprive him of the benefit of 1990 (PCS) 8 which he had formerly enjoyed. It purports to weaken
5 the application of 1990 (PCS) 8 by saying that it applies only to "*some dental staff*", but they are not defined, so it is wholly unclear from that phrase who does qualify and who does not. The ambiguity should be resolved against the respondent, since they seek to rely on it. I find insufficient evidence to support a conclusion that a reasonable observer, aware of all the relevant
10 circumstances in 2023, would think that the parties jointly intended to exclude the claimant's role from the protection of 1990 (PCS) 8 procedures.

97. Further, the disciplinary process had already begun by the time the changes to the Once for Scotland Policy were made. The claimant was notified of an
15 investigation on 13 January 2023 and the conduct was classified in a letter of the same date. Additional allegations were added 10 days later. The claimant was eventually suspended on 12 July 2023. The NHS Scotland Workforce Conduct Policy was updated with revised wording on 1 August 2023. I will go no further for the purposes of this decision, but a Tribunal applying the test of
20 fairness in section 98(4) ERA 1996 would need to consider whether altering the applicable procedure to the employee's detriment during a disciplinary process was an approach which fell within a reasonable range of procedures. I express no view, since that is not something I need to decide to deal with the preliminary issue.

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Conclusion

98. The claimant was contractually entitled to have the charges against him dealt with in accordance with the procedures set out in NHS Circular 1990 (PCS)
30 8. The published alterations to the Once for Scotland conduct policy were ineffective to vary the claimant's contractual terms in that or any other respect. I have summarised my conclusions in the diagram in the attached Appendix.

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M Whitcombe

Employment Judge

29 December 2024

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**Entered in register
and copied to parties**

03 January 2025

APPENDIX

Sources of contractual terms

Policies

