

JERSEY / JUDGMENT

States Employment Board v Alwitry

[2019] JCA 134 (10 July 2019)

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Court of Appeal 10 July 2019 Before : Sir William Bailhache, Bailiff, President Jonathan Crow, Q. C. Lord Anderson of Ipswich, K. B. E. Q. C. Between The States Employment Board Appellant And Amar Alwitry Respondent M. Temple Esq., Solicitor General, for the Appellant. Advocate S. M. J. Chiddicks for the Respondent.

judgment

CROW JA: This is the judgment of the court.

INTRODUCTION

1. This is an appeal against the judgment of the Royal Court (Samedi Division), Clyde-Smith, Commissioner, with Jurats Olsen and Grime, dated 6 February 2019 (Alwitry v States Employment Board

[2019] JRC 014 " the Royal Court's Judgment "). There is also a Respondent's Notice seeking to uphold the overall outcome of the Royal Court's Judgment but at the same time to overturn five findings of fact on which one part of it is based. THE FACTS 2. The Royal Court set out the relevant evidence in §6 - 266 of its Judgement which we will not repeat, but which should be treated as incorporated into this

judgment.

[i] It is sufficient for present purposes to record the following salient features. 3. By letter dated 8 August 2012, the Health and Social Services Department (" the HSSD "), acting with delegated authority from the Appellant (" the SEB "), offered the Respondent (" Mr Alwitry ") an appointment as a Consultant Ophthalmologist at the General Hospital. There were then some negotiations regarding the start-date, Mr Alwitry having stated in his application that he needed to give six months' notice in relation to his existing appointment, and the HSSD initially asking him to start on 12 November 2012. The negotiations resulted in a compromise with Mr Alwitry agreeing to start work on 3 December 2012 on a part-time basis, moving to full-time work on 11 February 2013. The employment contract (" the Contract ") reflecting these terms was signed by the HSSD on 21 August and by Mr Alwitry on 24 August 2012, at which point it became

unconditionally binding. 4. Clause 1 of the Contract described it as a " permanent contract ". Clause 3 recorded that it was " essential ... that the Employee and the Employer work in a spirit of mutual trust and confidence " and to that end the parties agreed " to co-operate with each other " and " to maintain goodwill ". Clause 17 provided that " Wherever possible, any issues relating to conduct, competence and behavior should be identified and resolved without recourse to formal procedures. However, should the Employer consider that the Employee's conduct or behavior may be in breach of the Consultant Disciplinary Code ... the Employer will resolve the matter through the disciplinary procedures ". Clause 30 provided that the Contract " and associated Terms and Conditions contain the entire terms and conditions of the Employee's employment ". Clause 29 provided that Schedule 18 of the Terms & Conditions (" T&C ") contained provisions governing termination of employment. Schedule 18 is headed " Termination of Employment ". Under §18.1, the Employee was entitled to a minimum of three months' notice, unless (pursuant to §18.2.4) the Contract was terminated without notice for gross misconduct (among other things). Under the heading " Grounds for Termination of Employment ", §18.2.1 provides that: "A consultant's employment may be terminated for the following reasons: · conduct ... · where there is some other substantial reason to do so in a particular case." 5. Both before and after signature of the Contract, there were prolonged negotiations between the parties as to the exact terms of Mr Alwitry's Job Plan, i.e. his working timetable. Mr Alwitry also raised concerns about the level of his Programmed Activities (" PAs "), i.e. his working hours each week, but those concerns were not addressed by the hospital management. In the event, the inter-actions between Mr Alwitry and both hospital management and hospital staff caused the HSSD to reconsider its willingness to employ him at all, and in late October 2012 it consulted the Law Officers regarding the implications of terminating the Contract before Mr Alwitry had started work. The Law Officers advised on 30 October that any withdrawal of an unconditional offer would be likely to amount to a breach of contract, in which case the employee would be entitled to sue for damages, namely " an amount corresponding to payment for the period of notice to which the employee would have been entitled had he or she started work and then been dismissed ". 6. Meanwhile, Mr Alwitry contacted the British Medical Association (" BMA ") regarding his PAs, and the BMA in turn made contact with Mr Jones, the Medical Staffing Manager at the General Hospital, by email on 12 November 2012. This approach by the BMA was interpreted by the hospital management as indicating that a complaint had been made by Mr Alwitry against Mr Downes, a Consultant Ophthalmologist and Clinical Director at the General Hospital. On that basis, the contact from the BMA precipitated a decision being taken the next day by the HSSD to terminate the Contract. Three days later, on 15 November 2012, the HSSD sought approval from the SEB for its decision, which was given. As a result, on 22 November 2012 the HSSD wrote to Mr Alwitry withdrawing what was described as the offer of employment and stating that any contractual relationship, to the extent that it existed, was to be treated as terminated. 7. The impact of this decision on Mr Alwitry was described by the Royal Court as " understandably severe ", and it quoted his evidence at length in §100 of its

Judgment.

Mr Alwitry initially sought reinstatement, submitting a claim with the Jersey Employment Tribunal on 8 July 2013. That claim was, however, withdrawn by letter dated 4 December 2014. THE CLAIM & THE ROYAL COURT'S JUDGMENT 8. These proceedings were issued on 13 January 2017. Mr Alwitry initially sought damages for conspiracy, breach of contract, inducing breach of contract, and defamation. His Schedule of Loss itemised pecuniary damages approaching £8 million, but in addition he also sought punitive or exemplary damages. By the end of the trial, all of his claims had been abandoned other than that for breach of contract. Mr Alwitry maintained his claim for both pecuniary damages and also for punitive or exemplary damages. 9. The trial was held between 19 September and 2 October 2018. Pursuant to directions given on 20 July 2018, the trial dealt only with (a) the issue of liability and (b) "whether as a matter of Jersey law, damages are limited to the contractual notice period plus any 'Gunton' extension". The second element raised two subsidiary issues. The first was the availability of exemplary or punitive damages. The second was the applicability on the facts of the 'Gunton extension'. This was a reference to certain English case-law which establishes the principle that damages for wrongful dismissal are capped by reference to the remuneration that would have been payable during any notice period to which the employee would have been entitled had the contract been terminated lawfully (sometimes referred to as the 'Edwards cap' after the decision in *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*

[2012] 2 All ER 278) together with the remuneration that would have been earned during any disciplinary process, if the grounds of dismissal would, properly implemented, have triggered such a process (sometimes known as the 'Gunton extension' after *Gunton v Richmond-upon-Thames LBC*

[1981] Ch 441). It was common ground between the parties in the court below and in this court that these principles of English common law have been recognised as part of the customary law of this jurisdiction in *McDonald v Parish of St Helier*

[2005] JRC 074 ,

[2005] JLR 212 , and *Jeanne v Jersey Telecom Ltd*

[2009] JCA 138 . In particular, as this court said in *Jeanne* at §30, a wrongfully dismissed employee " must normally accept the repudiation and sue the employer for damages" and even if the employee is able to refuse to accept the repudiation, " the right to sue for continuing wages lasts only for the period it would have taken for the employer to dismiss lawfully ". In other words (still quoting from *Jeanne*) the employee " cannot ... sue for future loss on the basis of the chance that he might have retained the job if the proper procedure had been used." The question at the trial of this action was how those legal principles applied (if at all) to the facts of this case. 10. The Royal Court heard oral evidence from nine factual witnesses, namely Mr Alwitry, Mr McLaughlin (the Interim Managing Director of the General Hospital), Mr Downes, Mr McNeela (another Consultant Ophthalmologist), Dr Luksza (a senior physician and joint Medical Director), Mr Siodlak

(an ENT Surgeon and joint Medical Director), Mrs Body (the Director of Operations), Mr Riley (the HR Director), and Senator Gorst. Expert evidence was also adduced in relation to the question of patient safety from Mr T. D. Matthews, a Consultant Neuro-Ophthalmologist called on behalf of Mr Alwitary, and Mr J. L. Brookes, a Consultant Ophthalmic Surgeon called on behalf on behalf of the SEB, but they were not required to give oral evidence because they agreed on the key issues. The Royal Court naturally also considered the documents carefully, and had the advantage of hearing legal argument on behalf of the parties. 11. The first issue to be addressed in the Royal Court's Judgment (§267 - 287) was the legal question whether the Contract allowed the SEB to give three months' notice of termination without cause, notwithstanding the absence of any express provision to that effect in the Contract. Applying standard principles of law on implied terms (§276, citing *Grove and Briscoe v Baker*

[2005] JLR 348), and in spite of Jersey customary law (§280, citing *McDonald v Parish of St Helier* (supra), at §15) the Royal Court's conclusion (§280 - 283 & §287 of its Judgment) was that the Contract laid down an exhaustive code for termination, and as such it could only lawfully be terminated pursuant to the terms set out in Schedule 18 of the T&C. That conclusion was reinforced by the entire agreement clause in the Contract (clause 30). There is no appeal against the Royal Court's Judgment in this regard. 12. The second issue to be addressed in the Royal Court's Judgment (§288 - 319) was whether Mr Alwitary nevertheless repudiated the Contract, thereby allowing the SEB to treat it as terminated. The test applied by the Royal Court was whether Mr Alwitary committed a breach which went " to the root of the contract " or involved " a breach of a fundamental condition " or was " sufficiently serious to justify the termination of the contract " (§288 - 289, citing *Grove and Briscoe v Baker* (supra), at §14, and *Chitty on Contract* (33rd ed.), at 24-018). In particular, the Royal Court held that the employee's conduct had to be judged objectively (§291). This involved the Royal Court analysing whether " Mr Alwitary had conducted himself in such a way as to so undermine the trust and confidence which is inherent in his contract of employment with the SEB, that the SEB was entitled to terminate his contract of employment " (§293). Applying that test, and after a careful review of the evidence, the Royal Court reached the following key conclusions: (i) Mr Alwitary's conduct was " difficult and at times exasperating to hospital management " (§314) and it led individual members of the hospital management to the point where they wished to terminate his Contract (§306). Mr Alwitary must have been aware that there were difficulties before the Contract was terminated (§317). (ii) Nevertheless, prior to 12 November 2012 (the date on which the BMA contacted Mr Jones), no collective management decision had been taken to terminate the Contract (§296 - 306). As such, " the relationship between Mr Alwitary and the hospital management remained viable " up to that point (§307). In other words, the Royal Court concluded that, up until 12 November 2012, Mr Alwitary's conduct had eroded, but not destroyed, the relationship of mutual trust and confidence. (iii) The BMA's contact with Mr Jones on 12 November " was causative of the decision that was taken very hurriedly the next day " by hospital management to terminate the Contract (§308). (iv)

That decision was taken on the basis of an erroneous assumption by management that Mr Alwitary had made a formal complaint to the BMA against Mr Downes (§308 - 309). Furthermore, the SEB's decision to support the HSSB's decision was similarly prompted by the mistaken belief that Mr Alwitary had made a formal complaint about Mr Downes (§311). (v) In fact (unbeknownst to the hospital management and the SEB), all that Mr Alwitary had done was to contact the BMA about his PAs. That contact could not properly have been regarded by hospital management or by the SEB as contributing to the destruction of the relationship of mutual trust and confidence (§311). Since the relevant test was objective, it could not therefore be said that Mr Alwitary's conduct had caused the final breakdown (§312), nor could it be said that he had manifested any intention of renouncing his contractual obligations (§318). (vi) As a matter of procedure, it was "grossly unjust" to Mr Alwitary for him not to be told of "the charges against him and how precarious his employment was" before the Contract was terminated (§316). (vii) The decision to terminate the Contract was taken in the knowledge that the SEB would be held in breach of contract, but in the belief that that was a preferable outcome to continuing with Mr Alwitary's employment (§315). (viii) The decision was taken "in good faith and motivated by the best long-term interests of the General Hospital", and the concerns over Mr Alwitary's conduct "were genuinely held" (§319). 13. For these reasons, the Royal Court held that Mr Alwitary had not repudiated the Contract and the SEB was not entitled to terminate the Contract without notice. That is the first issue on which the SEB appeals. 14. The next issue to be addressed in the Royal Court's Judgment (§320 - 329) was whether the Contract was terminated because Mr Alwitary had raised issues of patient safety. Schedule 12.7.1 of the T&C entitled him to speak out in the public interest if he had genuine concerns regarding patient safety, and to suffer no detriment for doing so. On this issue, the relevant features of the Royal Court's Judgment may be summarised as follows: (i) The expert witnesses were agreed that (a) the patient safety concerns raised by Mr Alwitary were, on their face, reasonable (§321), but that (b) it is the consultant who decides which patients he will operate on, and who is responsible for ensuring their post-operative care (§321), and (c) operating lists should be organised by the operating surgeon to take account of (among other things) the need for early review, and organising patients on a list when the operating surgeon is available for post-operative review (§322). There was never any question of Mr Alwitary being required by the hospital management to undertake any operation on any patient: rather, the operating lists would be his, and it would be his responsibility to ensure that there were robust arrangements for their post-operative care being in place; if they were not in place, it was his responsibility not to operate; there was never any question of a patient being operated on without such post-operative care being in place, so the issue of the safety of any actual patient was entirely hypothetical (§323). (ii) In purporting to raise concerns over patient safety, the Royal Court held that Mr Alwitary was "in reality, negotiating for a timetable that would enable him to return home at the weekends, while his family was still in England" and although there was nothing wrong in seeking to achieve that outcome "in our judgment it was quite inappropriate to use patient safety concerns for this purpose. There was never any

question of any patient's safety being put at risk" (§326). (iii) As a result, " this was not a case, pursuant to Schedule 12.7.1, of Mr Alwitary wishing to speak out in the public interest, because of a genuine concern about a patient safety issue; indeed he did not think that the States of Jersey whistleblowing policy, which he had not read, applied to him" (§326). (iv) Finally, " Mr Alwitary's contract was terminated by the SEB not because he had raised patient safety issues, but because of the way he had conducted himself with the hospital management over the start date and Job Planning issues" (§328). 15. This is the issue to which the Respondent's Notice is addressed. 16. The next question to be addressed in the Royal Court's Judgment (§330 - 342) was whether, on the facts, the SEB was contractually entitled to terminate the Contract for cause on the basis of " some other substantial reason to do so " within §18.2.1 of the T&C, namely a fundamental breakdown in working relationships between the parties. In this context, the Royal Court made the following observations and findings: (i) First, it observed that " It might be thought to be stretching it somewhat to talk in terms of Mr Alwitary's working relationships when his contract was terminated before he had started work at the General Hospital at all and before his contract had become effective " (§340), but the Royal Court did not in terms make a positive finding that the working relations could not (as a matter of principle) be fundamentally destroyed prior to commencement. (ii) Second, the Royal Court emphasised that the focus of the inquiry under this heading was the question whether there was in fact a breakdown in the working relations, rather than the question of Mr Alwitary's responsibility for any such breakdown (§339), which had been the issue in relation to the second issue (see §12 above). Nevertheless, it then held that " The email from the BMA stands to be treated in the same way as when we were dealing with repudiation, namely something which could not contribute to any asserted breakdown in Mr Alwitary's working relationships with his co-employees " (§341). (iii) Third, since it had " already found that as at the 22nd November, 2012 [being the date on which notice of termination was sent to Mr Alwitary], the employment relationship between the co-employees concerned in the hospital management and Mr Alwitary had not been irreparably damaged by his conduct ... it must follow that his working relationships with them had not fundamentally broken down " (§341). (iv) Finally, the Royal Court observed that Mr McNeela had always been happy to work with Mr Alwitary and " there is no evidence that working relationships with other members of staff employed at the General Hospital had fundamentally broken down " (§341). (v) As a result, the Royal Court held that " there had not been a fundamental breakdown in the working relationships between the parties " and accordingly that the SEB did not have " some other substantial reason " for terminating Mr Alwitary's Contract (§342). 17. This is the second main issue in the appeal. 18. In summary, therefore, the Royal Court's conclusion on liability was that the termination of the Contract was invalid (§344). Turning to the extent of that liability, the Royal Court noted that it was common ground between the parties that guidance should properly be derived from English law, not from Norman or French law (§344). After referring extensively to the English case-law (§345 - 361), the Royal Court concluded that " there is no basis that we can see upon which we can properly restrict damages to the

notice period required for a valid dismissal for cause " (§364). That too is subject to appeal. 19. Dealing finally with punitive and exemplary damages, the Royal Court made the following key findings: (i) Mr Alwitary had been treated " most unfairly " as a matter of procedure (§367). (ii) Nevertheless, damages for breach of contract in Jersey are compensatory (§372). (iii) Exemplary or punitive damages were accordingly refused (§372). (iv) Even if, as a matter of principle, exemplary or punitive damages had been available, the Royal Court would not have awarded any because the hospital management had acted in good faith (§373). 20. The Respondent's Notice does not seek to challenge these findings. THE GROUNDS OF APPEAL 21. The SEB now seeks to appeal against the Royal Court's Judgment on two grounds - (i) first, although the Royal Court's findings of primary fact should not be disturbed, nevertheless it ought to have concluded, on the basis of those findings, that Mr Alwitary repudiated his Contract; (ii) alternatively, on the basis of its findings of primary fact, the Royal Court ought to have concluded that the SEB was entitled to terminate the Contract on three months' notice for 'some other substantial reason'. 22. As part of its argument on the second ground, the SEB also submits that the Royal Court (a) failed to determine its alternative claim that the Contract could properly be terminated for 'conduct' within §18.2.1 of the T&C and thereby (b) failed to resolve the issue of whether the SEB's disciplinary procedures were engaged, and (if so) what effect they would have had on Mr Alwitary's claimable loss (i.e. whether the 'Gunton extension' applied). GROUND 1: TERMINATION WITHOUT NOTICE The applicable legal principles 23. The first question is whether the Royal Court was correct in rejecting the SEB's argument that Mr Alwitary's conduct amounted to repudiation. There was no significant difference between the parties as to the applicable legal test for resolving that issue: they both accepted that the Royal Court adopted the right approach (see §12 above). In other words, the question was whether Mr Alwitary committed a breach which went " to the root of the contract " or involved " a breach of a fundamental condition " or was " sufficiently serious to justify the termination of the contract ", or whether he " had conducted himself in such a way as to so undermine the trust and confidence which is inherent in his contract of employment with the SEB, that the SEB was entitled to terminate his contract of employment ". There was also a significant measure of agreement between the parties (by reference to *Neary v Dean of Westminster*

[1999] IRLR 288, and *Briscoe v Lubrizol Limited*

[2002] IRLR 607) that, in answering that question, the court must take into account the character of the employer, the role played by the employee, and the degree of trust required in the circumstances when assessing the extent of the duty of trust and confidence, and the gravity of any breach. 24. The SEB also submitted (by reference to *McDonald v St Helier* (supra), at §28, citing *Malik v BCCI*

[1988] AC 20, at 34G - 35C) that it is an implied term of any contract of employment that the employee should not, without reason and proper cause, conduct himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between him

and his employer, and that the test for assessing whether an employee has acted in breach of that duty is an objective one. We do not consider it to be either necessary or desirable to express a view on the existence or scope of any such implied term in this jurisdiction, because in the present case there is an express term (see §4 above), and as a result there is no room (because there is no need) to imply any such term. Nevertheless, we consider it appropriate to note and to adopt, in relation to any assessment whether there has been a breach of the express term, the approach taken in *Malik v BCCI* to the same question in relation to the implied term - namely, that it is an objective test. 25. The objective nature of the test is significant. It means that, when the court is seeking to ascertain whether an employee's conduct goes "to the root of the contract" or involved "a breach of a fundamental condition" or was "sufficiently serious to justify the termination of the contract" the question is not answered by reference to the employer's actual reaction at the time: subjectively, the employer might or might not have considered the conduct to be repudiatory, but that is not the test. [ii] Nor is the question answered by reference to any inquiry as to the employee's motives or intentions: the employee might well have intended to repudiate his contract, or he might have been blind to the likely consequences of his actions, but in either event his subjective state of mind is generally irrelevant. 26. In order properly to apply an objective test, the court must ensure that it does not slide into a factual inquiry as to what each side actually thought at the time. The question is not whether one side intended, or the other side accepted, a repudiation. Rather, the question is whether the conduct, viewed objectively, went "to the root of the contract" or involved "a breach of a fundamental condition" or was "sufficiently serious to justify the termination of the contract". That question is answered by reference to a test of reasonable foreseeability: in other words, the question is whether it was reasonably foreseeable to an employee performing that particular function that that particular conduct would be regarded by that particular employer as repudiatory. That is what Lord Nicholls meant in *Malik v BCCI* (supra) when he referred to the obligation "not to engage in conduct likely to undermine the trust and confidence required" (ibid, at 35A, emphasis added), a point he repeated shortly afterwards, saying: "The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (ibid, at 35C, emphasis added). It is also reflected in Lord Steyn's speech where he referred to conduct "likely to destroy or seriously damage the relationship of confidence and trust" (ibid, at 45F - G, emphasis added), a point he again repeated later in his speech (at 47F - G). It is reflected again in Lord Millett's speech in *Johnson v Unisys Ltd*

[2003] 1 AC 518, where he referred to "the obligation not to do anything which would damage or destroy the relationship of trust and confidence" (ibid, at §78, emphasis added), and also in *Dyson LJ's* judgment in *Omilaju v Waltham Forest LBC*

- [2005] ICR 481 , at §14. 27. Having asserted that the court should follow English law, the SEB also points out in this context that Pothier says that: " La bonne foi qui doit régner dans le contrat de louage, de même que sans les autres contrats, oblige le conducteur a n'user d'aucun mesonage ni d'aucun autre artifice pour faire paroître l'ouvrage qu'on lui donne a faire " (Ouvres Complètes de Pothier, vol 6, Septième Partie, Chapitre II, Art. II, pp. 291 - 292). For the avoidance of doubt, contracts for services were included in Pothier's *Traité de Louage*. This submission is closely related to the SEB's separate point (by reference to *Rawlinson v Brightside Group Ltd*
- [2018] ICR 621 , at §18) that, under English law, it has been held that the relationship of trust and confidence under an employment contract imports an obligation not to mislead. Whether an obligation of good faith arises in every contract is not a matter for this judgment, but we accept that there is a mutual obligation of good faith in a contract of employment. 28. The SEB also submitted (by reference to *Boston Deep Sea Fishing & Ice Co v Ansell*
- (1888) 39 ChD 399) that, in responding to a claim for wrongful dismissal, it is open to an employer to rely upon conduct by the employee irrespective of whether it was in fact the reason for the dismissal. As a matter of general principle, Mr Alwitary did not challenge this proposition, and we accept it - not least because it reflects the objective nature of the issue whether there was a repudiatory breach. Nevertheless, on the facts of this case we do not consider that the principle is in play because there was no relevant conduct of which the SEB was unaware. 29. To the extent that the SEB relies on the cumulative effect on the hospital management of Mr Alwitary's conduct between early August and mid-November 2012, it also seeks to rely on English case-law (in particular, *Omilaju v Waltham Forest LBC* (supra) and *Kaur v Leeds Teaching Hospitals NHS Trust*
- [2019] ICR 1) dealing with the concept of a 'last straw' - i.e. an event which is not itself repudiatory of a contract, and may not itself constitute a breach of contract or even unreasonable or blameworthy conduct, but which is (taken in the context of other conduct and events) contributory towards a repudiatory breach. Whilst not in any way doubting the soundness of the reasoning in *Omilaju* , we are not persuaded that it provides any great assistance to this court in this case. The principle developed in *Omilaju* may be of more relevance where there might otherwise be an argument that the innocent party has somehow affirmed the contract or waived any breach, and then subsequently seeks to rely on a later trivial act to claim that the contract has been repudiated by the party in breach. That is not really this case. The question for the Royal Court in this case was whether the employee's course of conduct, viewed objectively as a continuing whole, was likely to destroy or seriously damage the relationship of trust and confidence with his employer. The real dispute between the parties in relation to the putative 'last straw' (namely, the contact with the BMA) is whether the court was entitled to take it into account at all, or whether it was (in the words of *Omilaju* at §22) " an entirely innocuous act " which cannot properly be taken into account as conduct contributing towards repudiation even if the SEB " genuinely, but mistakenly, interprets [it] as hurtful and destructive of [its] trust and

confidence" in Mr Alwitry. 30. Finally under this heading, we need to address the applicable test for this ground of appeal. The SEB rightly accepts that it cannot overturn the findings of primary fact made by the Royal Court, unless there was simply no evidence on which the court could have reached its conclusion, or if its decision was so contrary to the weight of evidence as to be perverse. In this context, Mr Alwitry relies on *Tullett Prebon Plc v BGC Brokers LP*

[2011] IRLR 420 , at §19, as authority for the proposition that the question whether there has been a repudiatory breach is " a question of fact for the tribunal of fact ". Whilst accepting that proposition as stated, it is important to recognise the nature of the factual question in this context. Any finding by a trial court that there has been a repudiation is not a finding of primary fact: it is not a question of determining, on the basis of conflicting evidence, what factually happened. Rather, it is an evaluation of the significance of the factual evidence, and in that sense it involves an application of the law to the facts as found. As both Advocates appeared to accept in the course of oral argument, any determination by the trial court whether there has been a repudiation will certainly be a fact-sensitive question, but in reality it involves an evaluation of the evidence, and in truth requires an application of the law to the facts. As such, this court is not required to be as deferential to the trial court as it is in relation to questions of primary fact, such as witness credibility. Alleged errors of law

- (i) The applicable legal test: 31. The SEB's first and main argument under this heading is that the Royal Court articulated what the SEB submits is the correct legal test (namely, whether Mr Alwitry's conduct " objectively assessed, was such as to "seriously damage " the employment relationship , " [iii] emphasis added) but that it then applied a much higher threshold test in practice (asking whether " the employment relationship of trust and confidence had been irreparably damaged by Mr Alwitry's conduct " [iv] , emphasis in the original). The SEB also submits that this involved the Royal Court ignoring the express terms of clause 3 of the Contract, which does not (says the SEB) require proof of any 'irreparable' or even 'serious' damage to the relationship in order to establish a breach. 32. It will be seen that the thrust of the SEB's argument under this heading is that the Royal Court ostensibly applied too high a threshold test ('irreparable' damage, rather than 'serious' damage). Before dealing with that argument, however, there is one preliminary issue that needs to be addressed first. It will be apparent from §25 - 26 above that the true issue in relation to repudiation is not whether Mr Alwitry's conduct did in fact damage the relationship (whether seriously or irreparably) - although the answer to that factual question might inferentially assist in answering the true question, which is whether, viewed objectively, his conduct was likely to destroy or seriously damage the relationship of trust and confidence between him and his employer. 33. Although it is not, on its face, the real thrust of the SEB's complaint under this heading, its argument would (if correct) lead to the conclusion that the Royal Court applied entirely the wrong test in this regard - i.e. not merely that it applied too high a threshold. According to the SEB's paraphrase of the Royal Court's Judgment in §3.19 of its Contentions in this court, the question it posed was whether " the employment

relationship of trust and confidence had been irreparably damaged by Mr Alwitry's conduct " (emphasis added). In other words, the SEB's argument is predicated on the Royal Court having conducted a factual inquiry as to whether the relationship was in reality irreparably damaged, rather than asking (as it should have done) whether, viewed objectively, Mr Alwitry's conduct was likely to have that result. 34. In fairness, there are indeed occasional passages in the Royal Court's Judgment which might be taken to suggest either (a) that it was engaged upon a purely factual inquiry as to whether Mr Alwitry's conduct caused the breakdown in relations (see in particular §306 - 308) or (b) that it was engaged upon an analysis of the parties' subjective intentions and motivations (see for example §318

- 319). Nevertheless, viewing the Judgment as a whole, it is clear that the Royal Court expressly recognised that the test was objective (see §291), that that is indeed the test it applied (see §293), and that was ultimately how it expressed its conclusion (at §314), where it said this: " we are not persuaded that looked at objectively , [Mr Alwitry's] conduct ... was of sufficient gravity to justify summary dismissal " (emphasis added). Having correctly recorded that the test is objective, we are satisfied that that is the test the Royal Court applied. 35. Turning then to the SEB's actual ground of appeal (see §31 above) we would reject it for three separate reasons: (i) First, it is apparent from §319 of the Royal Court's Judgment that it was applying a test which was at least as generous to the SEB as it now seeks to espouse. In particular, the Royal Court concluded that Mr Alwitry " had not conducted himself in such a way as to so undermine the trust and confidence which is inherent in his contract of employment with the SEB, that the SEB was entitled to terminate his contract of employment summarily ": in putting its conclusion in this way, it is apparent that the Royal Court was not adopting any rigid test to which the SEB now takes objection, namely requiring " irreparable damage ". (ii) Second, the relevant English case-law was not, in our judgment, seeking to draw any meaningful distinction between 'serious' damage and 'irreparable' damage, and nor was the Royal Court. The question that is repeatedly posed in the judgments is whether the conduct was likely to 'destroy or seriously damage' the relationship of trust and confidence. That is the test the Royal Court rightly applied. (iii) Finally, if (contrary to our preferred view) there were any relevant distinction between 'serious' and 'irreparable' damage, the SEB's argument would risk conflating two separate questions. The first is whether Mr Alwitry had done anything which could be considered as a breach of the express terms of his Contract. If that were the issue, it might have been sufficient for the SEB merely to prove that Mr Alwitry had 'seriously' damaged his relationship of trust and confidence with the HSSB. The second and separate question is whether the SEB was entitled to treat the Contract as having been repudiated: and that was the issue before the Royal Court. In that context, the SEB had to prove that Mr Alwitry's conduct had so undermined the trust and confidence that is inherent in this particular Contract that the SEB was longer required to retain him in its employment. That test could not be satisfied merely by demonstrating that there had been some element of breach: rather, Mr Alwitry's conduct would have had to be likely to destroy the relationship, i.e. to have caused irreparable damage. 36. For these reasons, we reject the SEB's first argument

under this heading. (ii) Ignoring the 'last straw': 37. The SEB's second argument of law is that the Royal Court erroneously discounted Mr Alwitary's approach to the BMA entirely because "as a matter of policy [it did] not think that an employer receiving a request from an employee's trade union for contact could ever contribute to a breach by the employee of the implied term of trust and confidence" and as a result the email from the BMA "was not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence" (§320, emphasis added in each case). 38. In our judgment, it might be putting the matter too high to say that the receipt by an employer of a request for contact from a trades union is, as a matter of inflexible legal principle, incapable in any circumstances of ever contributing to a breakdown in the relationship of mutual trust and confidence. Nevertheless, we consider it highly unlikely that it would ever contribute in practice, not least because of the protection afforded to trades union membership under Article 11 of the European Convention on Human Rights, and the case-law recognising the importance of guaranteeing the effectiveness of that right, such as *Wilson v UK*

(2002) 35 EHRR 20, and *Şişman v Turkey* (App. No. 1305/05, 27 September 2011). In the circumstances, although it might be thought that the Royal Court somewhat overstated the point, we do not consider that it erred in substance. 39. Nevertheless, in case we are wrong on that point, we will consider separately below the question whether, even if the contact with the BMA could in principle be taken into account, it was (in the wording of *Omilaju*) 'innocuous'. (iii) Objective test 40. The SEB's third argument under this heading is that, having (rightly) accepted by reference to *Malik v. BCCI* that the test is an objective one (§291), the Royal Court then (wrongly) based its decision at least in part on a subjective assessment of Mr Alwitary's intentions and motivation, noting that he showed every sign of wanting and intending to take up his appointment (§318). 41. There is, in our judgment, some superficial attraction in this argument. As noted above, there are certain passages in the Royal Court's Judgment which might be read in isolation as indicating that it was taking into account either or both of Mr Alwitary's intentions and the SEB's good faith (see §318 - 319). However, it is neither appropriate nor desirable to subject individual paragraphs in the Royal Court's lengthy and detailed Judgment to separate scrutiny. Instead, the Judgment needs to be read and understood as a whole, and taking that approach, as we have already indicated, the Royal Court correctly applied an objective test. For these reasons we reject the SEB's third argument under this heading. 42. Part of Mr Alwitary's answer to the SEB's argument under this heading was also the submission that, even applying an objective test, the court is entitled to take into account the subjective intentions of the alleged contract-breaker. Reliance was placed in this regard on *Tullett Prebon* (supra), at §27. We are not persuaded that that case assists the analysis in the present context. In another case, a question might arise whether a party has manifested an intention not to be bound by a contract. If that were the issue before the court, then it would (as Mr Alwitary submits) make sense for the court to conduct an objective assessment of the subjective intentions of the alleged contract-breaker. But that is not the issue in this case, as the Royal Court itself recognised in §318 of its Judgment.

Here, as the Royal Court said, the SEB's case "is not that [Mr Alwitary] expressly refused to perform his side of the contract, but that by his conduct over the start date and the Job Plan he had so undermined the trust and confidence which is inherent in his contract of employment with the SEB that the SEB were entitled to summarily terminate his contract of employment". In this context, an assessment of Mr Alwitary's subjective intentions would have had no role to play. (iv) Fair process 43. The SEB's final argument under this heading is an allegation that the Royal Court wrongly imported considerations of fair process into its assessment of whether Mr Alwitary's conduct was repudiatory, noting in §316 of its Judgment that "we also question whether an employer can properly say that the relationship has been irreparably damaged by a course of conduct by an employee over which it has never made any substantive complaint; the absence of any complaint would suggest an intention "to soldier on"". 44. In our judgment, there is nothing in this complaint, essentially for two reasons. (i) Even applying a rigorously objective approach, the fact that an employer has given no indication to an employee that a course of conduct is jeopardising his continued employment is capable of being a relevant factor in assessing whether, viewed objectively, it was reasonably foreseeable that a continuation of that conduct would be likely to destroy or seriously damage the relationship of trust and confidence. This is particularly so in the present case, where clause 17 of the Contract specifically required matters relating to conduct to be resolved where possible without recourse to formal procedures. (ii) Second, the way in which the Royal Court expressed itself on this issue (in particular, the provisional sense conveyed by the words "we also question") makes clear that it was not founding its Judgment on any supposed legal principle that an employer can never claim that its relationship with an employee has been irreparably damaged by a course of conduct in respect of which it has never made any substantive complaint. For the avoidance of doubt, if that is what the Royal Court had been saying, it would have been wrong; but in our judgment that is not what it meant. Rather, the comment quoted above was being made in the context of the Royal Court's analysis of the facts leading up to the events on 12 and 13 November 2012. 45. For these reasons, we reject the SEB's fourth and final argument based on alleged errors of law by the Royal Court. [v] The next question is whether the Royal Court correctly applied the law to the facts. Applying the law to the facts 46. Under this heading, the SEB contends that the Royal Court's findings of fact, whether viewed singly or cumulatively, "showed an overwhelming case of repudiatory breach" (§3.18 of its Contentions in this court). In particular, the SEB relies on the following thirteen findings: [vi] (i) an important part of the relevant context is the Verita Report of January 2010, which was critical of a long-standing culture of individual autonomy, rather than team-work at the General Hospital (§18); (ii) the Contract in this case was one for a senior consultant at the General Hospital, and the contractual duty not to undermine trust and confidence was not only implied by law but also expressly stated in clause 3 of the Contract, where it was said to be "essential", given the nature of the employee's role and responsibilities, that the parties worked "in a spirit of mutual trust and confidence", and that aspects of that duty included a requirement to "co-operate with each other" and to "maintain goodwill" (§256); (iii) Mr

Alwitry had been " somewhat disingenuous " in claiming in his job application that he had a six months' notice period with Derby Hospital, in circumstances where his notice period was three months (§297); (iv) against the background of real urgency in the appointment of a third consultant, and having received a deadline for acceptance, Mr Alwitry undermined Mr McLaughlin's position as Managing Director by seeking to " build a case for a later start date " (§298); (v) Mr Alwitry displayed " similar conduct " in relation to the Job Plan (§299). Mr Downes had been " astounded " by Mr Alwitry's approach of emailing others within the General Hospital without informing him, and of rewriting the timetable he had been given (§173); (vi) in Mr Downes' absence, Mr Alwitry " sought to build support for his preferred job plan with Ms Gindill [the theatre sister] and Ms Hockenhull [the Eye Clinic sister], to whom he made critical comments about Mr Downes' position over Friday operating, which were undermining of Mr Downes (the reference to Mr Alwitry's father 'digging out' correspondence relating to Mr Downes' own appointment as a consultant) " (§300); (vii) notwithstanding Mr Downes' email of 9 October 2012, Mr Alwitry had " not given up on the job planning issue " (§300 & 301). Even after Mr Downes' direction and warning of 9 October 2012, requiring him to address any further timetabling questions to himself, Mr McLaughlin or Mrs Body, Mr Alwitry sought, during his visit to the island on 22 and 23 October 2012 when he failed to meet with Mr Downes or anyone else in hospital management, to engage on the same issue with Ms Gindill (§79) and Mr Siodlak (§210). This had made Mrs Body (the Director of Operations) " more nervous " as it was " not normal for new consultants to have conversations with theatre sisters before starting about changing their Job Plan " (§233); (viii) Mr Alwitry's conduct was regarded by Mr McLaughlin and other members of hospital management as " unprecedented " in a newly appointed consultant yet to take up his post (§302); (ix) Mr Alwitry's by-passing of management and his direct contact with non-management hospital staff in relation to his Job Plan " might well justify disciplinary action " (§314); (x) Mr Siodlak considered that Mr Alwitry's appointment would be " a disaster " and make the circumstances leading to the Verita Report seem like " a walk in the park " (§210). He considered that Mr Alwitry's conduct had been " consistently adversarial ... inappropriate, uncooperative and frankly unacceptable " (§221); (xi) Dr Luksza, another participant in the decision to dismiss, considered the patient safety issues raised by Mr Alwitry as a " red herring ". He " had been a medical director for many years and Mr Alwitry's behaviour was 'abhorrent' compared to the norm ... To make such a meal of it beforehand was unique in his view " (§204); (xii) overall, hospital management concluded that Mr Alwitry " would be difficult, if not very difficult, to manage and would not fit in with the new culture they were endeavouring to foster following the Verita report " (§315), and these concerns were genuinely held in good faith, and were motivated by the best long-term interests of the General Hospital (§319); (xiii) finally, Mr Alwitry, in raising purported patient safety concerns, " was in reality negotiating for a timetable that would enable him to return home at the weekends "; it was " quite unacceptable " to use patient safety concerns for this purpose; there was never any question of any patient's safety being put at risk (§326).

47. It is apparent from the foregoing summary that, in deciding whether Mr Alwitry had

repudiated the Contract, the Royal Court took fully into account the relevant context and (with one or possibly two exceptions, discussed in §51 - 57 below) the relevant conduct. In truth, the main thrust of the SEB's argument in this regard is that the Royal Court gave insufficient weight to the significance and gravity of Mr Alwitry's conduct. We reject its argument in this regard for the following reasons. 48. As noted above, the question whether an employee's conduct is sufficiently serious to constitute repudiation is a matter of evaluation. In this case, as in any other, the position is simply that different views could reasonably be formed, a point which can be graphically illustrated by reference to the evidence given in this case. In §197 of its Judgment, the Royal Court records Mr McNeela's view that " the hospital's approach was entirely wrong. He completely dissociated himself from the decision, and felt that Mr Alwitry had been treated "in an appallingly shabby manner"" . By contrast, in §204 the Royal Court recorded the fact that Dr Luksza considered that " Mr Alwitry's behaviour was "abhorrent" compared to the norm ". Faced with these competing expressions of opinion, and in light of all the evidence at trial, the Royal Court was entitled and required to reach its own conclusion objectively on the likely effect of Mr Alwitry's conduct. 49. In doing so, it needed to balance numerous conflicting considerations: (i) On the one hand, there were matters that might arguably be taken into account in building a case for repudiatory conduct: in particular, Mr Alwitry repeatedly tried reopening issues which hospital management were treating as closed; he approached members of the hospital staff who were not involved in management; he did so to some extent behind the backs of management; his behaviour could be regarded as attempting to 'divide and rule' by trying to solicit support for his position from some individuals at the General Hospital for use against others; and he made numerous comments which could fairly be regarded as criticisms of management (in particular, Mr McLaughlin) and of the Clinical Director (Mr Downes). (ii) On the other hand, the Royal Court plainly had clear evidential grounds for reaching the conclusion that it did. There were, in particular, two main issues - the start date for Mr Alwitry's employment, and his Job Plan. So far as the start date was concerned, the debate was at least partly the fault of hospital management in light of the ambiguity in the advertisement (with its imprecise reference to a commencement date in "Winter 2012") and the fact that hospital management did not pick up on the reference to a six months' notice period in Mr Alwitry's application form. In the event, a compromise was reached. So far as the Job Plan was concerned, Schedule 3 in the T&C required job planning to be " based on a partnership approach ", but Schedule 4 made express provision for an appeals procedure in circumstances where " it has not been possible to agree a Job Plan ": in the circumstances, it is extremely difficult to regard as repudiatory conduct which led to a state of affairs which is expressly contemplated in the terms of the Contract itself. Furthermore, the expert witnesses considered Mr Alwitry's concern over patient safety to be reasonable (§321), and even if his expressions of concern were prompted by a desire to achieve a timetable that suited his family circumstances, that was not something he hid from hospital management. Moreover, the experts observed (in §35 of their joint statement of 24 September 2018) that Mr Downes " did not address [Mr Alwitry's]

concerns, or looked [sic] at the options [Mr Alwitary] put forward " and that " it was unhelpful at this stage [for Mr Downes] to imply that 'his demands don't bode well for future relationships within the organisation" . More generally: Mr Alwitary's communications were polite (§102); he showed a willingness to compromise (§76 & §137) and he did compromise; the duty to co-operate was mutual (clause 3 of the Contract) - in other words, the hospital management was as much obliged to co-operate with Mr Alwitary as vice versa; Mr Downes could have been more helpful to Mr Alwitary (§188) and Mr Riley was " somewhat hard-nosed " (§234); Mr Alwitary's contact with non-management hospital staff was less culpable bearing in mind the fact that (a) he might understandably wish to build relations with future colleagues with whom he expected to be working for years to come, and (b) Mr Downes himself copied to non-management staff his own emails of 24 September and 9 October 2012 (the latter being set out in full in §74 of the Royal Court's Judgment) discussing Mr Alwitary's proposed Job Plan, and the fact that at least one member of non-management staff (the Eye Clinic sister) responded to Mr Downes expressing her own concerns at the proposed Job Plan (§68 of the Royal Court's Judgment). 50. In the circumstance, we see no basis on which we can properly interfere with the Royal Court's conclusion - subject, as we say, to the one or two issues that appear to have been overlooked in its Judgment, to which we now turn. 51. The first is the question of contact with the BMA. As noted in §38 above, we consider that the Royal Court was entitled to discount that contact. But if we were wrong on that, we do not consider that it could or should have affected the Royal Court's assessment of whether there had been any repudiatory conduct. The terms in which Mr Alwitary wrote to the BMA were not particularly complimentary towards Mr Downes, but neither were they in any sense inappropriate. If he was entitled to raise his concerns with the BMA (as he was) he obviously had to explain frankly what those concerns were. In the email, he first discussed his reluctance to work 11.5 PAs in circumstances where his Contract only required him to work 10 PAs, and he then added this: "I daren't ask Downes about it again as I fear he'll take offence. We're going to be working closely together for the next 4 or 5 years so want to keep him sweet and want a happy working environment. Strangely Mr Downes telephoned one of my consultant colleagues in Derby last night asking if I was still coming. He assured him that I was looking forward to it. He thinks he's made life as hard as possible for me from the beginning to try and put me off coming over. I think that's a tad harsh and he and I have a good relationship so he would have no motive for that. He's a well acknowledged control freak but that's just his management style and I only have to live with it for a few more years." 52. The SEB suggests that this email formed part of a chain of communication in which Mr Alwitary had previously made derogatory remarks to the BMA about Mr Downes, and that the email also needs to be read in the context of all the correspondence passing between Mr Alwitary and various members of hospital management and staff as well. But, even taking all that into account, we do not consider that the email from Mr Alwitary to the BMA can have been regarded as contributing to repudiatory conduct: rather, he was expressing his concerns to his trades union, as he was entitled to do. 53. The SEB also seeks to rely on the terms of the email of

12 November 2012 from the BMA to Mr Jones, referring to " a delicate issue surrounding Mr Alwitary " and the fact that he had " run into a few problems with the consultant lead " (i.e. Mr Downes). Again, we do not consider that this email could contribute towards any repudiatory conduct by Mr Alwitary, for multiple reasons:

- (a) it was written by the BMA, not by Mr Alwitary nor at his dictation; (b) it merely sought contact; (c) the SEB did nothing to explore what the BMA wanted to talk about before jumping to its decision to terminate. 54. For this accumulation of reasons, even if it were appropriate to take into account the contact with the BMA, it should not and would not have altered the outcome in the court below. 55. The other matter which the Royal Court did not (or at least did not obviously) take into account in assessing whether Mr Alwitary had acted in repudiatory breach is the issue in §44(xiii) above: it would appear from §288 - 319 of the Royal Court's Judgment (where they addressed the arguments on repudiation) that no account was taken of the likely impact on hospital management of the fact that Mr Alwitary was seeking to challenge the proposed Job Plan on a false basis. His purported concerns over patient safety were addressed separately in §320 - 329 of the Judgment (in other words, after the Royal Court said, in §319, that " for the reasons set out above , we conclude [emphasis added] that ... Mr Alwitary had not conducted himself in such a way as to so undermine the trust and confidence which is inherent in his contract of employment with the SEB, that the SEB was entitled to terminate his contract of employment summarily"). As a result, the fact that Mr Alwitary's purported concerns over patient safety were (as found by the Royal Court) raised in a manner that was " quite inappropriate " (§326) for the purpose of winning a Job Plan that better suited his personal convenience appears not to have been taken into account by the Royal Court when assessing whether he had repudiated his Contract. 56. Assuming this omission was made, it was, in our judgment, a significant one in assessing objectively whether Mr Alwitary's conduct was sufficiently grave to amount to a repudiation, for four related

reasons:

- (i) first, because the debate over the Job Plan was the substance of many, if not most, of the numerous exchanges that took place between the parties between early August and mid-November 2012; (ii) second, because it was in this context that hospital management were so concerned (for example) about Mr Alwitary not only
 - (a) refusing to accept the Job Plan which had been presented to him but also
 - (b) directly approaching the theatre sister and the Eye Clinic sister, who had no role in management, and (c) at the same time failing to arrange a meeting with any of the hospital management team when he visited Jersey in late October 2012, and also (d) making a number of comments to various members of staff which carried at least implied if not express criticisms of Mr Downes (which are quoted in §66, §68 & §72 of the Royal Court's Judgment); (iii) third, because hospital management were themselves specifically aware that Mr Alwitary was seeking to use purported concerns over patient safety as a pretext for

achieving an outcome which suited his personal preferences (see §43, §49, §51, §66, §70, §134, §170, §193, §245, §325 of the Royal Court's Judgment), and that is exactly the kind of behaviour that would be calculated to undermine the relationship of trust and confidence between a senior consultant and hospital management; (iv) finally, because these specific concerns were felt all the more keenly at the General Hospital because they threw into sharp focus the very issues that were addressed in the Verita Report. 57. For these reasons, it would appear that the Royal Court's Judgment failed to take into account a significant evidential factor in assessing whether, viewed objectively, Mr Alwitry's conduct was such that he should be treated as having repudiated his contract. The question then arises whether this court should make that assessment itself, or remit the matter to the Royal Court for clarification or further consideration. There are obviously competing considerations in play, but on balance we consider that the better course is to make the assessment ourselves, partly because the material findings of fact have already been made by the Royal Court and partly because this litigation has already been on foot for a considerable length of time and it would inflict unnecessary further expense and delay on the parties to remit the matter to the court below. 58. Overall, we conclude that, even taking into account the Royal Court's finding of fact as to Mr Alwitry's true motives in raising concerns over patient safety, viewed objectively his conduct as a whole could not be regarded as having been likely to destroy or seriously damage the relationship of trust and confidence between the parties. We reach that conclusion for a combination of reasons: (i) First, applying the approach outlined above with regard to an appellate court's role in reviewing evaluations made by the court below, we consider there would need to be a really significant new factor before reaching a different judgment from the trial court. (ii) Second, as the Royal Court rightly recognised (§321) the expert witnesses considered that the patient safety concerns raised by Mr Alwitry were reasonable. This was not a case where he was raising a bogus concern. (iii) Third, the hospital management was aware of Mr Alwitry's desire to return to England at the weekends until his family was able to join him full time because he told them so himself. This was not a case where he was dissimulating or hiding anything. (iv) Fourth, as already noted above, Mr Alwitry's concerns were expressed politely, and he conveyed a willingness to compromise, and did compromise. (v) Fifth, since the relationship was one of mutual co-operation, and since issues over conduct were required to be identified and resolved without recourse to formal procedures by virtue of clause 17 of the Contract, the fact that Mr Alwitry was given no warning that his conduct was progressively undermining the HSSD's willingness to honour his employment contract is a material factor in assessing objectively whether his course of conduct was likely to destroy or seriously damage the relationship. (vi) Finally, as the Royal Court specifically record (§66), Mr Alwitry himself made a number of practical suggestions in order to mitigate the concerns he had expressed, some of which involved inconvenience to himself. 59. For these reasons, and also taking fully into account the other matters listed in §49(ii) above, we do not consider that, viewed objectively, Mr Alwitry's conduct as a whole was likely to destroy or seriously damage the relationship of trust and confidence, even taking into account the Royal Court's findings in relation to his true motives for raising patient safety. For that

reason, we dismiss the first ground of appeal. GROUND 2: TERMINATION ON THREE MONTHS' NOTICE

Introduction

60. In the alternative to its first ground of appeal, the SEB's second ground is that the Royal Court ought to have concluded that the SEB was entitled to terminate the Contract on three months' notice for 'some other substantial reason' (its preferred outcome), or on the basis of Mr Alwitry's 'conduct' (its fall-back argument), within the meaning of Schedule 18 of the T&C. Although the SEB in fact purported to terminate summarily, the parties are agreed that employment law proceeds on the assumed basis that an employer would have terminated a contract as promptly and economically as legally permissible. The question therefore arises in this case as to whether the SEB would have been able to terminate either for 'conduct' or for 'some other substantial reason'. 61. It is important to distinguish between these two different bases of dismissal, both in terms of substance and in terms of outcomes. In this context, it was common ground between the parties that assistance can properly be derived from English case-law, not least because the Contract in this case is closely based on the standard English NHS model. 62. On that basis, the difference of substance between dismissal for 'conduct' and dismissal for 'some other substantial reason' is that, in the former case, the employer's reason for dismissal is the employee's conduct, whereas the latter is a residual category where the employer's reason is not founded on conduct (or capability), but might for example involve a breakdown in working relations based on a clash of personalities (see *Lauffer v Barking, Havering & Redbridge University Hospitals NHS Trust* [2010] Med LR 68, at §39). 63. In terms of outcomes, the difference between the two bases of dismissal relates to quantum: if Mr Alwitry was dismissed for 'some other substantial reason' then he would have been entitled to damages reflecting the remuneration he would have received in respect of the three months' notice period (i.e. the 'Edwards cap'); by contrast, if he had been dismissed for 'conduct', then he would have been entitled to invoke the disciplinary procedures under the Contract, and as a result his damages would have reflected the remuneration due not only in respect of the three months' notice period but also in respect of an extended notional period of time that would have been required for the disciplinary process to run its course (i.e. the 'Gunton extension'). 64. This distinction, and the financial impact of the 'Gunton extension', has spawned a considerable amount of case-law in England which establishes the principle that an employer who is in fact concerned about an employee's conduct (or capability) cannot side-step the disciplinary procedures that would otherwise be available in relation to a dismissal on those grounds by relying instead on a contractual right to dismiss for 'some other substantial reason' by alleging a breakdown in mutual trust, thereby avoiding the financial consequences of the 'Gunton extension' (see the Royal Court's Judgment §332 - 338). 65. Although (no doubt for sound reasons of financial self-interest) the SEB's preferred outcome was to argue that the termination of the Contract should be treated as having been based on 'some other substantial reason', it is logical to start by considering

first (if it is open to us to do so - as to which, see §67 - 73 below) whether the termination could lawfully have been founded on Mr Alwitary's 'conduct': if so, the question whether the termination should logically have fallen into the residual category of 'some other substantial reason' would not arise. 66. In either case the burden is on the SEB. That was the Royal Court's ruling in §339 of its Judgment, and there is no appeal against that ruling. In any event, we consider that it represents the correct approach, because the question whether the SEB could have lawfully terminated either for 'conduct' or for 'some other substantial reason' is an issue in respect of which the SEB asserts the affirmative: see Phipson on Evidence (19th ed.), §6-06. For that reason, we reject the SEB's submission that this is merely an evidential burden: in our judgment, it is a persuasive burden.

Termination for 'conduct' 67. The Royal Court's Judgment states at §339 that the SEB did not rely at trial on any entitlement to have been able to terminate for 'conduct'. It is common ground that that is incorrect, and that in fact both parties invited the Royal Court to rule on the question whether the SEB could lawfully have terminated for 'conduct'. The question therefore again arises whether this court should rule on that issue itself, or remit the matter to the Royal Court for further consideration. 68. Before doing so, there is one point of legal principle which this court can and should resolve, not least because it impacts on the decision whether this court should rule on the availability of 'conduct' as a ground for dismissal in this case. The SEB contends that, where an employer seeks to rely on 'conduct' (or on any other contractually permissible ground) as the reason for dismissal, the question for the court is one of fact, not of sufficiency: in other words, the inquiry is whether the employer did in fact dismiss for 'conduct', not whether the material available to the employer was sufficient to justify a reasonable and fair conclusion that the employee's conduct justified his dismissal on that ground. 69. In response, Mr Alwitary submits that this argument is unsustainable in the present case, essentially for four main

reasons:

- (i) First, because it derives from a line of case-law dealing with unfair dismissal where there is a factual inquiry as to the actual reason for a person's dismissal: by contrast, Mr Alwitary submits, the present case is one of wrongful dismissal, and there is no factual inquiry to be made as to whether the SEB did or did not dismiss for 'conduct' because they purported to terminate summarily on the grounds of repudiation. The question whether they could lawfully have terminated for 'conduct' is not a factual inquiry as to their actual grounds of dismissal, and hence the court is not bound to accept the SEB's (in this case non-existent) election to rely on 'conduct'. (ii) Second, the question of classification that arises in relation to unfair dismissal is in any event only the first step in a two-stage analysis, the second stage being an inquiry into the fairness of the dismissal. By contrast, the SEB's attempt to read across that first step of the analysis to a wrongful dismissal case such as this without resort to the second stage in the analysis (unfairness) would involve a false and unprincipled outcome, because it would shield an employer in a wrongful dismissal case from any scrutiny as to the reasonableness of his actions. (iii) Third, Mr Alwitary submits that, as a

matter of interpretation, this Contract does not allow the SEB to dismiss Mr Alwitry for 'conduct' if it did not in fact have reasonable grounds for doing so. Any such interpretation of the Contract would be inconsistent with the Royal Court's ruling (which is not being challenged on appeal) that the SEB could not lawfully terminate without cause, and would also be inconsistent with the plain intention expressed in the structure, headings and content of Schedule 18 (outlined in §4 above) - in particular, the wording of the final category under §18.2.1, " some other substantial reason ", which clearly indicates that the preceding reasons must themselves also be matters of substance , not merely matters of subjective, let alone unreasonable, opinion. (iv) Fourth, Mr Alwitry seeks to draw an analogy with the approach taken in a number of other cases, namely *Skidmore v Dartford & Gravesham NHS Trust*

[2003] ICR 721 , *Mattu v The University Hospitals of Coventry & Warwickshire NHS Trust*

[2013] ICR 270 , *North v Television Corp Ltd*

[1976] 11 ALR 599, and *McClelland v Northern Ireland Health Services Board*

[1957] 1 WLR 594. 70. Whilst we do not derive any particular assistance from these supposed analogies, on this point we accept Mr Alwitry's submissions for the first three reasons he advances, and also because this approach properly reflects the jurisdiction on *résolution* which entitles the court to rule on whether a contract can be lawfully terminated. In our judgment, the SEB could not claim to have been entitled lawfully to dismiss Mr Alwitry on the grounds of 'conduct' if it did not have reasonable grounds for doing so. 71. The next question is accordingly whether this court should rule on that question, or remit the matter to the Royal Court for further consideration. In order to choose between those two alternatives, it is important first to identify the nature of the exercise on which the court would be engaged in this regard. So far as that is concerned, the question is again an objective one. In other words, the court would need to decide for itself whether there were reasonable grounds on which an employer in the SEB's position could reach the conclusion that Mr Alwitry's Contract could be terminated for 'conduct'. This approach is reflected in the relevant case-law, which says that " the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence: it depends on whether the facts emerging at the trial prove the breach " (*Ridge v Baldwin*

[1964] AC 40 , at 65, quoted in *Mattu* (supra) at §69, emphasis added); and " in considering a claim of wrongful dismissal, the employment tribunal was not confined to a reviewing role, and it was not only appropriate but necessary for the tribunal to make its own findings of fact as to whether [the employee] had breached her contract in such a way as to justify summary dismissal " (see *Voisins Department Store Ltd v Soares*

[2014] JRC 004, at §78, quoting *Boardman v Nugent Care Society*

- [2013] ICR 927). In other words, the court is not required to assess what would be likely to have happened if a disciplinary process had been duly initiated: the court is not assessing the likelihood of the employee having been able to persuade the employer to change his mind. Rather, the court is making up its own mind as to whether it considers there were reasonable grounds for treating the employee as having acted in sufficiently serious breach of contract to justify his dismissal on notice. 72. In our judgment, this approach also chimes with the approach taken to the quantification of damages for wrongful dismissal. So far as that is concerned, the case-law on the 'Edwards cap' and the 'Gunton extension' make clear that the court is not called on to quantify the loss of the employee's chance to persuade his employer to change his mind: see *Janciuk v Winerite Ltd*
- [1998] IRLR 63, at §8. The logic of the approach on both issues (i.e. the question whether the employer could lawfully have terminated for cause, and the question of quantification) both proceed on the basis that the court's function is to form its own view on whether there were reasonable, substantive grounds for a lawful termination
- not whether, if a fair disciplinary process had been duly followed, the employer might have retained the employee. It is the essence of the 'Edwards cap' that an employee's entitlement to compensation for being deprived of the opportunity of enjoying a fair disciplinary process has been fixed by legislation, and as such it would be contrary to principle for Jersey customary law to include, as part of any award of damages for wrongful dismissal, an element reflecting the lost opportunity to have a disciplinary process. The logic of that approach also suggests (as we have found) that the court's function in determining the substantive question whether there has indeed been wrongful dismissal is to make an objective assessment of whether reasonable grounds for dismissal based on 'conduct' existed, not whether, if a fair disciplinary process had been followed, Mr Alwitry would have been able to 'clear his name' and persuade the HSSD to continue his employment. 73. Given the nature of the exercise on which the court would need to embark, and given also the detailed review of the evidence in the Royal Court's Judgment, and the desirability in the interests of both parties of bringing as much certainty as possible to this dispute at as early a stage as possible, we accordingly conclude that the better course is for this court to resolve whether the SEB could lawfully have terminated for 'conduct'. 74. In making that assessment, it is important first to recognise that it is a different question from that raised under Ground 1 of the appeal. The question under Ground 1 was whether Mr Alwitry's conduct was repudiatory, such as to justify summary dismissal. By contrast, the question under this heading is whether he had sufficiently misconducted himself to justify dismissal on notice, following a suitable disciplinary process. That obviously connotes a less egregious breach of contract. As we have found, it involves assessing whether the SEB had reasonable grounds for dismissing Mr Alwitry on the basis of his 'conduct'. That is always going to be a fact-sensitive assessment. 75. The principal factors that can be invoked on either side have been outlined in §49 above. Putting the case for the SEB at its highest, the Royal Court held in §314 of its Judgment that Mr Alwitry's conduct was such that " we can see might well justify disciplinary action ", and we agree. Nevertheless, disciplinary action is one thing, and

dismissal is another. Having regard to the accumulation of reasons summarised in §49 and §58, we consider that the SEB has fallen well short of discharging the burden of proving that it had reasonable grounds for terminating Mr Alwitary's Contract on the basis of 'conduct'. As the Royal Court said in §315 of its Judgment, the hospital management feared that Mr Alwitary would be difficult, if not very difficult, to manage; but, rather than rise to that management challenge, either informally or by means of the formal disciplinary procedures provided for in the Contract, they issued a "pre-emptive strike" which, on the evidence of Mr Riley, was part of a strategy to avoid those very procedures. Having in mind in particular the factors we have referred to in §49(ii) above, we do not consider that there were reasonable grounds for taking this decision in all the circumstances.. Termination for 'some other substantial reason' 76. In case we are wrong on the SEB's hypothetical entitlement to terminate for 'conduct' we will also address its other argument (in fact, its preferred outcome), namely that the SEB could have terminated the Contract on three months' notice for 'some other substantial reason'. 77. The critical passages in the Royal Court's Judgment have been quoted in §16(ii) & (iii) above. In our judgment, they display a logical flaw. The Royal Court said that, having already found that the relationship between the hospital management and Mr Alwitary "had not been irreparably damaged by his conduct ... it must follow that his working relationships with them had not fundamentally broken down" (§341, emphasis added). That is a non sequitur. The question of responsibility for the breakdown is entirely separate from the question of fact whether there had indeed been a breakdown. 78. The unavoidable conclusion is that, rightly or wrongly, the relationship between Mr Alwitary and hospital management had irretrievably broken down by 13 November 2012, and the decision to terminate the Contract is proof of that breakdown, as is (for example) Mr Downes's threat to resign. Under this heading, it is important to repeat that responsibility and culpability for the breakdown are irrelevant: the question is simply whether the relationship had gone, and the truth is that it had. 79. This conclusion is not altered by the fact that the Royal Court commented (§341) that "Mr McNeela had always been happy to work with him and there is no evidence that working relationships with other members of staff employed at the General Hospital had fundamentally broken down". The relevant question under this heading is not whether Mr Alwitary's working relationship with each of his co-employee colleagues had irreparably broken down: rather, the question is whether there is a substantial reason for the employment relationship to be terminated, and if the relationship between employer and employee has broken down then there is likely to be such a substantial reason, irrespective of whether all the other employees share the same view as the employer, and irrespective also of who is responsible for the breakdown. 80. Reaching this stage of the analysis brings us to the issue addressed in §332 - 338 of the Royal Court's

Judgment.

In circumstances where the true reason for an employee's dismissal is (alleged) misconduct, can the employer 'side-step' the consequences of classifying it as such by relying instead on 'some other substantial reason'? The decisions in *Lauffer* (supra) and *Kerslake v North West London Hospital NHS Trust*

[2012] EWHC 1999 (QB) suggest that the answer is "no". In *Kerslake* the court said, at §182, that an employer "is not permitted to dismiss under the guise of 'some other substantial reason' if the real reason for the dismissal is capability or conduct". We agree. Indeed, any other outcome would risk violating the principle of contractual interpretation that a party cannot profit from his own wrong-doing: if an employer's true reason for dismissal is his concern over the employee's conduct but, on analysis, the employer does not have objectively good reasons for dismissal based on misconduct, and thus a purported dismissal on that basis would be unlawful, it would be perverse to interpret the contract as nevertheless enabling the employer to dismiss for 'some other substantial reason'. Given that dismissal for misconduct would have triggered a disciplinary process, if the employer fails to prove misconduct justifying dismissal under that heading, it would be repugnant nevertheless to allow the employer to dismiss for 'some other substantial reason' and thereby avoid any disciplinary process. 81. Our conclusion in this regard is reinforced by the circumstances of this case. The Royal Court held (see §12(i) - (iv) above) that the relationship had not broken down irretrievably by 12 November 2012. The decisive cause of the final breakdown was the receipt of the email from the BMA: but the reason that email had the effect it did was a combination of (a) the misunderstanding of the HSSB as to the nature of the contact between Mr Alwitry and the BMA and (b) the fact that hospital management chose to take the decision to terminate without first clarifying matters with the BMA. That being the position, it would require a perverse interpretation of the Contract to allow the SEB to terminate on notice for 'some other substantial reason' when the circumstances ostensibly giving rise to that 'substantial reason' were the product of its own "grossly unjust" process (§316). 82. Another way of looking at the same point is to recognise that the 'reasons' for dismissal listed in Schedule 18 of the T&C in this case operate as a constraint on the SEB's freedom to dismiss Mr Alwitry, and they must be interpreted and given effect with that function in mind. As such, the category 'some other substantial reason' should not be interpreted in such an open-ended way as to enable the employer to terminate effectively without a good reason. In context, the words 'other' and 'substantial' must each be given real value, and it would deprive both words of any value if the contract were interpreted as permitting the SEB to terminate the contract in reality on the basis of conduct but in circumstances where there was on analysis no legitimate basis for terminating for misconduct. Any such interpretation would emasculate this category as a form of constraint on the SEB's freedom to dismiss Mr Alwitry, and would also be inconsistent with the mutual obligation of good faith which underpins the will or *volonté* of the parties to make the employment contract. 83. In summary, we would accordingly accept in relation to the Contract in this case the approach suggested in *Lauffer*, at §39,

namely that 'some other substantial reason' " is a residual category for cases where there is no misconduct or no capability issue" (emphasis added). As such, the SEB could not have lawfully terminated the Contract in this case under this heading if its true reason for termination was in fact Mr Alwitry's conduct. 84. In our judgment, it is beyond argument that the SEB's true reason for dismissing Mr Alwitry was indeed founded on its perception of his conduct - indeed, that is how it was described in the minutes of the meeting on 13 November 2012 at which the decision to terminate was taken (referring to " Mr Alwitry's communication, attitude and behaviour "), and it is the very first issue identified in the letter of termination dated 22 November 2012 (referring to " The attitude and behaviour displayed in relation to multiple aspects of the role"). It was also the reason for dismissal advanced in argument before us by the Solicitor-General on behalf of the SEB (albeit for the purpose of another aspect of his legal argument). Finally, it is also repeatedly reflected in the Royal Court's Judgment, notably at §308 and §328. 85. For these reasons, we would accordingly hold that the SEB was not entitled to terminate on notice for 'some other substantial reason'. CONSEQUENTIAL ISSUES IN THE APPEAL 86. It is common ground that, if Mr Alwitry had repudiated his contract, then he would not have been entitled to damages. It is also common ground that, if the Contract fell to be treated as having been terminable for 'some other substantial reason', Mr Alwitry would not have been entitled to invoke any disciplinary process, because the ground of termination would not have been disciplinary. As such, his damages would have been limited by the 'Edwards cap'. 87. Only if the court had held that termination would have been justifiable on grounds of 'conduct' would Mr Alwitry's pecuniary damages have included the 'Gunton extension': damages would then have been assessed on the assumed basis that the employee would have been dismissed pursuant to the shortest contractually permissible notice period, plus a reasonable time for completion of any disciplinary process. 88. If the 'Gunton extension' had applied, it would have been necessary to determine what it delivers. The first part of the question would have involved an issue of principle, namely whether the contractual disciplinary process was available in circumstances where Mr Alwitry had not commenced work. Because of its findings on the other issues, the Royal Court made no ruling on that question. In case the matter goes further, we will express our conclusion briefly. There is in our judgment no doubt about the answer: the Contract was unconditional and binding, and accordingly Mr Alwitry was fully entitled to invoke the disciplinary process, irrespective of whether he had started work. 89. The second question would have been one of fact, namely how long a duly conducted disciplinary process would have taken. Once again, the Royal Court made no formal finding, but it recorded in §249 of its Judgment the evidence of Mr Riley that a disciplinary process would, in his experience, have taken three months, including any appeal. The SEB informs us that it invited the Royal Court to rule on the length of any likely disciplinary process, and in the absence of any ruling from the Royal Court it invites us to accept the evidence of Mr Riley and rule that the 'Gunton extension' should be held to be three months. Mr Alwitry objects, saying that the length of any 'Gunton extension' does not fall within the scope of the trial, as laid down in the Act of Court dated 20 July 2018 (the relevant part of which is quoted in

§9 above). 90. We do not propose to rule on this factual question, for a combination of reasons: first, because on our view of the law the issue does not arise since the 'Gunton extension' does not apply; second, because the directions for trial limited the issues to (a) the question of liability, and (b) the question of principle "whether ... damages are limited to the contractual notice period plus any 'Gunton' extension" (emphasis added). In other words, the consequential question that might arise as to the length of any 'Gunton extension', if it were held to apply as a matter of principle, was not an issue for determination in the Royal Court. That is, no doubt, why there was no ruling on it. That being the position, it is not for this court to rule on it either. 91. For the reasons outlined above, our overall conclusion is that the appeal should be dismissed. THE RESPONDENT'S NOTICE

Introduction

92. The Respondent's Notice seeks to uphold the overall outcome in the Royal Court, but at the same time to overturn five findings, three of primary fact and two of inference. In considering whether this court should interfere with the Royal Court's findings of primary fact, we propose to adopt the approach indicated in *CSS Limited v Nautech Services Ltd*

[2015] JCA 021 , at §17 - 18, in particular: (i) we must not only be convinced that the relevant findings were wrong, but also clear that there was no evidence which could have supported them; (ii) where the finding is one based on inference from primary facts, we must accord a high degree of respect to the Royal Court. 93. With that approach in mind, we will deal with each of the factual issues raised in the Respondent's Notice in turn. In doing so, we would merely observe that we were not invited by the SEB to dismiss the Respondent's Notice by reference to any argument that, as a matter of principle under r. 5(1) of the Court of Appeal (Civil) Rules 1964 , a Respondent is only entitled to apply either (a) for the order made by the court below to be varied or (b) for the order to be upheld on grounds other than those relied on by that court. There may be an argument that, in circumstances such as these where a party has won in the court below, he is not entitled to ask this court (whether by Respondent's Notice or by Notice of Appeal for that matter) to revisit any incidentally adverse factual findings, if he is not seeking thereby to alter the order made by the court below or to add to the substantive grounds for reaching the conclusion that it did. In dealing with the complaints raised in the Respondent's Notice in this case, we should accordingly not be taken as impliedly upholding the right of a winning party in the court below to invite this court to alter any factual findings which were made in the judgment below.

(i) The finding in §297 94. First, Mr Alwitry invites this court to overturn the Royal Court's finding in §297 of its Judgment that " it was somewhat disingenuous of Mr Alwitry to have answered "six months" to a question that was clearly directed to the period of notice he had to give the Derby Hospital". In our Judgment, applying the approach indicated above, this ground of cross-appeal is not made out: there was at least some material on which the Royal

Court could properly reach the conclusion it did, namely the uncontested fact that Mr Alwitary's notice period was three months, not six months, and the fact that Mr Alwitary could have explained the true position either in a covering letter (it is common ground that he included an 18-page CV with his application) or orally to Mr Downes, whom he already knew. Furthermore, the Royal Court had the advantage of hearing Mr Alwitary's evidence under cross-examination on this issue. Mr Alwitary points out that the General Hospital was, in asking the question it did, trying to establish how much time the applicant would need before starting his employment, and that is no doubt true: but it is equally apparent that the Royal Court was fully alive to that factor. No doubt other tribunals of fact might not have found Mr Alwitary's answer to be even 'somewhat' disingenuous, and left to ourselves (on the basis of the evidence as we understand it, albeit without the advantage of hearing cross-examination) we would not have been minded to do so, but that is not the applicable test on appeal. (ii) The finding in §323 95. Second, Mr Alwitary invites this court to overturn the Royal Court's finding in §323 of its Judgment that the issue of patient safety was "entirely hypothetical". This issue needs to be considered carefully in context, and in light of the exact wording in the Judgment. The Royal Court recognised in §321 that the expert witnesses considered Mr Alwitary's concerns over patient safety to be "reasonable on the face of it". It also recorded that the experts agreed that it is the consultant who decides which patients he will operate on, and when (§322). It was in that context that the Royal Court said this: "the issue of the safety of any actual patient was entirely hypothetical" (§323). In our judgment, that comment is unimpeachable. The simple truth is that Mr Alwitary was not drawing attention to some actual risk that had crystallised in relation to any specific patient: rather, he was raising a concern as to the potential for future risk whose solution would, in practice, lie largely in his hands. For these reasons, we reject Mr Alwitary's argument under this heading: there plainly was evidential material on which the Royal Court could properly come to the conclusion it expressed, for the reasons it gave in §320 - 329 of its Judgment. (iii) The finding in §325 96. Third, Mr Alwitary invites us to overturn the finding in §325 of the Royal Court's Judgment that "One can see that the options put forward by him would not be attractive to the hospital management and we note they omit the option of his providing cover for his own patients following that one Friday". On the point of detail as to whether Mr Alwitary offered to provide cover himself, the Royal Court was wrong. To that extent, we accept the argument in the Respondent's Notice. That aside, the Royal Court's inference was entirely logical and compelling. (iv) The main finding in §326 97. Fourth, Mr Alwitary invites this court to overturn the finding in §326 of the Royal Court's Judgment that "In purporting to raise these issues, and setting out his proposed solutions to them, we find that Mr Alwitary was, in reality, negotiating for a timetable that would enable him to return home at the weekends, while his family was still in England. We see nothing improper in his seeking to negotiate such an outcome, but in our judgment it was quite inappropriate to use patient safety concerns for this purpose. There was never any question of any patient's safety being put at risk". We reject his argument: this is a paradigm example of a finding of fact based on a careful review of the factual and expert evidence and an assessment of the factual witnesses, in particular Mr Alwitary, whom the Royal Court

found to be " somewhat argumentative under cross-examination, and given to a degree of flippancy, verbosity and conceit about his capabilities " (§103).

- (v) The further finding in §326 98. Finally, Mr Alwitary invites us to overturn the Royal Court's finding, again in §326 of its Judgment, that his patient safety concerns were not a factor in the hospital management's decision to terminate his Contract. This again is a hopeless argument: the Royal Court had plenty of evidence on which to base its finding, and there is no ground on which we can properly interfere. 99. For these reasons, we dismiss the Respondent's Notice. *Authorities Alwitary v States Employment Board*

[2019] JRC 014 . *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*

[2012] 2 All ER 278 . *Gunton v Richmond-upon-Thames LBC*

[1981] Ch 441. *McDonald v Parish of St Helier*

[2005] JRC 074 *McDonald v Parish of St Helier*

[2005] JLR 212 . *Jeanne v Jersey Telecom Ltd*

[2009] JCA 138 . *Grove and Briscoe v Baker*

[2005] JLR 348 . *Chitty on Contract* (33rd ed.) *Neary v Dean of Westminster* [1999] IRLR 288. *Briscoe v Lubrizol Limited*

[2002] IRLR 607 . *Malik v BCCI* [1988] AC 20. *Johnson v Unisys Ltd*

[2003] 1 AC 518 . *Omilaju v Waltham Forest LBC*

[2005] ICR 481 . *Ouvres Complètes de Pothier*, vol 6, Septième Partie. *Rawlinson v Brightside Group Ltd*

[2018] ICR 621 . *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 ChD 399. *Kaur v Leeds Teaching Hospitals NHS Trust*

[2019] ICR 1 . *Tullett Prebon Plc v BGC Brokers LP*

[2011] IRLR 420 . *European Convention on Human Rights. Wilson v UK*

(2002) 35 EHRR 20 . *Şişman v Turkey* (App. No. 1305/05, 27 September 2011). *Lauffer v Barking, Havering & Redbridge University Hospitals NHS Trust*

[2010] Med LR 68 . *Phipson on Evidence* (19th ed.). *Skidmore v Dartford & Gravesham NHS Trust*

[2003] ICR 721 . *Mattu v The University Hospitals of Coventry & Warwickshire NHS Trust*

[2013] ICR 270 . *North v Television Corp Ltd* [1976] 11 ALR 599. *McClelland v Northern Ireland Health Services Board* [1957] 1 WLR 594. *Ridge v Baldwin*

[1964] AC 40 . *Voisins Department Store Ltd v Soares*

[2014] JRC 004. *Boardman v Nugent Care Society*

[2013] ICR 927 . Janciuk v Winerite Ltd [1998] IRLR 63. Kerslake v North West London Hospital NHS Trust [2012] EWHC 1999 (QB). CSS Limited v Nautech Services Ltd

[2015] JCA 021 . Court of Appeal (Civil) Rules 1964 [i] The only qualification is that we assume that the reference to " Mr Downes " in §106 of the Royal Court's Judgment is a typographical error, and that it was intended to refer to Mr Alwitry. [ii] In practice, it is likely that the employer will have treated the contract as having been repudiated because otherwise a dispute is unlikely to arise for determination by the court. But the legal question is not whether, as a matter of fact, the employee's conduct had the subjective impact on the employer of destroying his trust and confidence in the employee. [iii] This is quoted from §3.19 of the SEB's Contentions in this court. [iv] Ibid [v] We should record the fact that, in addressing the issues raised on appeal, we have rearranged the SEB's arguments to some extent because some were listed in its Contentions as arguments of law when on analysis they properly represented challenges to the Royal Court's application of the law to the facts. [vi] These are drawn variously from the submissions set out in §3.18 - 3.32 of the SEB's Contentions in this court. Page Last Updated: 17 Jul 2019 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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