

**ARDL 2023 ANNUAL CONFERENCE**

**CASE LAW UPDATE 2023**

By ***KENNETH HAMER[[1]](#footnote-1)***

**Amendment**

**1.*Bluecrest Capital Management (UK) LLP v. Financial Conduct Authority* [2023] UKUT 140 (TCC)**

*Amendment of statement of case – subject matter of reference – whether new allegation of same nature and based on same factual background*

In proceedings before the Upper Tribunal concerning references by Bluecrest Capital Management (UK) LLP against two decision notices of the Financial Conduct Authority (the Authority), the Authority applied for permission to amend its statement of case pursuant to rule 5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008. At [44]-[81] of its judgment, the Upper Tribunal (Judge Timothy Herrington and Judge Rupert Jones) considered the tribunal’s jurisdiction to amend a statement of case. Section 133 of FSMA 2000 deals with proceedings before the tribunal and s133(4) provides that the tribunal may consider any evidence relating to the *‘subject matter of the reference’.* The question of what is within the subject matter of a reference to the tribunal had been considered in a number of authorities: *Jabre v. FSA (Decision on Jurisdiction)* [2002] UKFSM FSM035 (10 July 2006); *James Parker v. FSA* (FSMT, 13 October 2004); and *Seiler, Whitestone and Raitzen v. FCA* [2023] UKUT 133 (TCC) where the tribunal referred to *Allen v. FSA* (2012) FS/2012/0019, *FCA v. Hobbs* [2013] EWCA Civ 918, and *Khan v. FCA* [2014] UKUT 186 (TCC).

The Upper Tribunal said that when it was faced with the situation where the Authority seeks to rely on allegations which were not made in the warning notice but could have been the starting point is to consider whether those allegations and the facts relied on in support of the allegations form part of the subject matter of the reference. The tribunal was satisfied that *Jabre* and the later authorities are to be read as follows. In order for new allegations to form part of the subject matter of the reference and be considered or determined by the tribunal, they must be of the same nature and based upon the same factual background as the allegations made to the Regulatory Decisions Committee and contained in the warning and decision notices, even if no findings are made upon them therein. If the tribunal was of the view that the new matters on which the Authority seeks to rely do fall within the scope of the subject matter of the reference, even though not contained in the warning notice, then the tribunal has a discretion as to whether to allow matters concerned to be pleaded, exercised through its case management powers. In those circumstances, the burden on the Authority to satisfy the tribunal that the new allegations should be pleaded was a heavy one. Section 133(4) of FSMA empowers the tribunal to make findings on a reference based upon evidence that was not available to the decision-maker at the time of the decision so long as the evidence relates to the subject matter of the reference. In the instant case, the tribunal, at [400], concluded that in relation to the Authority’s four disputed applications to amend its statement of case: the first disputed amendment was refused as a matter of discretion as it did not raise a case with a realistic prospect of success; the second disputed amendment was granted; and the third and fourth disputed amendments were refused as falling outside the subject matter of the reference and not being within the tribunal’s jurisdiction. Permission was granted for the Authority to make those amendments to the statement of case which were not disputed.

**Appeals**

**2. *Mariaddan v. Solicitors Regulation Authority Limited* [2023] EWHC 207 (Admin)**

*Striking off and costs order made by SDT against solicitor – bankruptcy of solicitor – bankrupt’s estate vesting in trustee in bankruptcy – bankruptcy not in issue in appeal – solicitor entitled to pursue appeal against personal order of striking off and costs – appeal dismissed on facts.*

See further Chapter 91 (Supplement), para 5.11B.

**3. *Stuewe v. Health and Care Professions Council* [2022] EWCA Civ 1605, [2023] 4 WLR 7**

*Late appeal – appellant resident in Gibraltar without address for service in UK – appeal notice not validly issued in time – no exceptional circumstances to extend time*

See further Chapter 91 (Supplement), para 5.25A.

**4. *Sun v. General Medical Council* [2023] EWHC 1515 (Admin)**

*Late appeal – defence union not able to support appeal and appellant given wrong advice by barrister – exceptional circumstances – extension of time granted*

Fordham J said that had he decided that there was substantive merit in the appeal he would have granted an extension of time [58]. The final day for filing the appeal and paying the fee, within the statutory 28 day time limit, was Friday 29.4.22. The appeal was filed out of time with the relevant court (the Administrative Court), with the fee paid, on Wednesday 4.5.22. The circumstances in which Dr Sun missed the deadline on 28.4.22 were as follows. The sanction of erasure had been a shock. Indeed, it was not the sanction which the GMC was inviting. Dr Sun lost her job. Her health deteriorated and she made urgent self-referral to her GP, receiving counselling. The Medical Protection Society (MPS), who had represented her before the tribunal, told her that her counsel had become unwell and was not available to advise about appealing. She was told that the MPS were seeking alternative representation for her. On 20.4.22, she was then told by the MPS that it was not going to be in a position to support an appeal and she would have to manage this herself. She was unemployed and had limited financial means. She set about drafting the appeal documents herself. She sought assistance from Citizen’s Advice and the British Medical Association. The BMA contacted a barrister who on the morning of 28.4.22 told her that she would need to lodge her appeal with the Chancery Division. In these circumstances, Dr Sun set about filing the appeal with the Chancery Division on the deadline day. She emailed the appeal documents to the three email accounts at the Chancery Division having successfully registered a CE-filing account to enable the electronic filing of the appeal. The next day was Friday 29.4.22, immediately before a Bank Holiday weekend. At 15:57 on 29.4.22 Dr Sun received an email from the Chancery Listing Office saying that the papers needed to be filed with the Administrative Court. She re-sent her appeal papers to the Administrative Court at 17:28, asking in that same email how she could pay the Administrative Court fee. It was now Bank Holiday weekend and the next working day was Tuesday 3.5.22. Dr Sun received no email response from the Administrative Court. On 4.5.22 she revised the appeal documents to include an application for an extension of time, and paid the Administrative Court fee.

Fordham J said that this was a case of ‘exceptional difficulties’ *(Adesina v. NMC* [2013] EWCA Civ 818 at [17]*)* and Dr Sun had provided ‘evidence’ with a full ‘explanation *(cf NMC v. Daniels* [2015] EWCA Civ 225 at [34iv]*).* There was nothing in Dr Sun’s conduct which could properly be criticised, up to the morning of 28.4.22. She did not ‘do nothing about appealing’ until the end of the 28 days *(cf Daniels* at [16], [34i]. Until 29.4.22 she was in the hands of others. The informal advice she received from the barrister on the morning of 28.4.22 was wrong advice (albeit not emanating from the MPTS or the GMC: cf *Rakoczy v. GMC* [2022] EWHC 890 (Admin) at [19]. On the deadline day of 28.4.22, Dr Sun received clear but erroneous assistance from a barrister on whom she was relying for help, which pointed her in the wrong direction an which lost her that important final day. These were wholly exceptional circumstances, and the restriction on access to the court – in its operation on the facts – is one that does not have a reasonable (i.e. proportionate) relationship between the means and the legitimate aim of certainty and finality. However, the appeal was dismissed on its merits; see Dishonesty below.

[Note: the appeal was arguably in time if filed on 28.4.22. Section 40(5)(c) of the Medical Act 1983 provides that ‘the relevant court’ in this instance means ‘the High Court of Justice in England and Wales’. Moreover, it is not the practice of the court to preclude a litigant from pursuing a claim who has correctly commenced proceedings in time, albeit filed in the wrong court.]

**5. *Disclosure and Barring Service v. JHB* [2023] EWCA Civ 982**

*Appeal by applicant to Upper Tribunal – no challenge to law or underlying facts – no power by Upper Tribunal to exercise appeal powers*

In 2007, JHB was convicted of sexual activity (by penetration) with a female child under the age of 16, and was sentenced to 30 months’ imprisonment and disqualified from working with children. In 2018 JHB applied to the Disclosure and Barring Service (DBS) for a review of his inclusion on the children’s barred list. The DBS, in a decision dated 22 January 2021, decided in the light of three further allegations which it found proved on the balance of probabilities not to remove JHB from the children’s list, and to add his name to the adults’ barred list. JHB appealed to the Upper Tribunal who decided that the DBS had made ‘mistakes of law and fact on which its decision was based’. The DBS was granted permission to appeal by Singh LJ, and the issue on the appeal was whether the Upper Tribunal acted beyond its powers. In allowing the appeal, the Court of Appeal (Lewison, Baker and Elisabeth Laing) concluded that the Upper Tribunal acted unlawfully. It misunderstood its powers on an appeal, and contrary to *DBS v. AB* [2021] EWCA Civ 1575, and *PF v. DBS* [2020] UKUT 256 (AAC), purported to make findings of fact when it had no power to do so. On his appeal to the Upper Tribunal JHB did not challenge the facts underlying his conviction, or the findings in relation to the three further allegations. On the reasoning in *PF,* the decision of the DBS was therefore the starting point for the Upper Tribunal’s consideration of the appeal. JHB did not claim that the DBS erred in law. The Upper Tribunal could not exercise any powers on the appeal, therefore, unless it identified an error of fact in the approach of the DBS to the findings of fact on which the decision was based. The Upper Tribunal was not free to make its own assessment of the evidence unless, and until, it found such an error. The court would remit JHB’s appeal to the Upper Tribunal to be re-heard.

**Bias**

**6. *Suleman v. General Optical Council* [2023] EWHC 2110 (Admin)**

*Committee member – involvement with complainant company – ongoing relationship – rehearing ordered*

The allegations against the appellant, a registered student dispensing optician, arose from her time when she worked in September 2019 at the Huntingdon and St Ives branches of Specsavers. It was alleged, and found proved by the committee, that she carried out restricted activities as a dispensing optician whilst unregistered, and dishonestly gave her employers a false registration number in order to conceal that she was not yet fully qualified. Her name was erased from the register. For the most part the appellant did not attend the fitness to practise hearing, lasting some ten days between and December 2022, and the committee proceeded in her absence. The committee was made up of five members, three lay and two dispensing opticians. The members of the committee included Mr P, one of the dispensing opticians. In the absence of the appellant or any representative on her behalf Mr P stated that he was ‘formally [sc. formerly] a director of a Specsavers practice, a position I held for 25 years, but I resigned from that three years ago when I retired’. Mr P confirmed that he had had no contact with anyone involved in the case. The legal adviser advised the committee that Mr P’s situation was a ‘tenuous connection’ and that he could not see ‘in any way, shape or form it would give rise to any potential conflict of interest’. In the course of the appellant’s appeal the appellant sought disclosure from Specsavers of further information about the nature and extent of Mr P’s interest. The information provided by Mr P included that he was a director and co-owner of the Hounslow Branch of Specsavers from 1994 until May 2019; and that from 2019 onwards he was a locum dispensing optician at nine Specsavers practices. In the 2019-2020 tax year, he worked 110 days, in 2020-2021 he worked 46 days and in the tax year 2021-2022 he worked 73 days, all as a locum dispensing optician for the various Specsavers branches. In an application determined on the papers prior to the hearing of the substantive appeal, Constable J observed that the fair minded and informed observer would conclude that Mr P ‘had a business relationship with a Specsavers branch and with the brand more widely which can safely be described as a substantial, long-lasting and (at the time of the panel hearing) ongoing one.’

Chamberlain J, in allowing the appeal and remitting the matter to the council for re-hearing before a differently constituted committee, said that the historic relationship between Mr P and Hounslow Specsavers was, on any view, both ‘substantial’ and ‘long-lasting’. An historic relationship confined to that single branch, which ended in 2019, might not have given rise in the mind of the fair-minded and informed observer to a real possibility of bias, though it might have aroused some concerns. But the relationship arsing from Mr P’s work as a locum was, in the court’s judgment, more significant. Although Mr P had not said whether at the date of the hearing he hoped to obtain further such work, the only proper inference from what he had said, and what he had no said, was that did entertain that hope. In this sense the relationship was ‘ongoing’. The number of days worked showed that Mr P must have been deriving (and, it is to be inferred, expecting to continue to derive) significant income from his locum work. It appeared to have been Mr P’s only source of work-derived income (other than sitting as a committee member of the council’s fitness to practise committee). Whilst Mr P had no financial interest in the Huntingdon or St Ives branches and had not worked there, the allegation against the appellant was that she had broken the trust put in her by colleagues *and Specsavers* and undermined public confidence *in Specsavers* and the profession.This suggested that neither those making the complaint nor those formulating the charges saw the branches as wholly separate businesses. Constable J referred to this as ‘the brand’, which was a perfectly sensible description. The fact that Mr P entertained the hope to obtain more centrally allocated locum work from Specsavers would lead the fair-minded and informed observer to conclude that there was a real possibly that, consciously or unconsciously, he would be disposed (a) to find that the appellant had engaged in conduct likely to injure the reputation of ‘Specsavers’ and/or (b) to resolve evidential disputes in favour of those individuals and against the appellant. Mr P should have recused himself. The committee’s decision was not saved because he was only one of its members. The committee sat for ten days and will bound to have discussed the case in detail. It was impossible to know how influential the views of the individual panel members had been. If one member is tainted by apparent bias, the committee’s decision will be vitiated.

**7. *Higgs v. Farmor’s School, The Archbishops’ Council of the Church of England intervening* [2023] EAT 45**

*Recusal of lay penal member – extra-judicial activities – appearance of bias*

The claimant was a pastoral administrator and work experience manager employed by the respondent. Following a disciplinary hearing the claimant was dismissed for gross misconduct in relation to objections made to Facebook posts in which it was said she had demonstrated homophobic and prejudiced views against the LGBT community. The claimant’s employment tribunal claim was dismissed and she appealed to the employment appeal tribunal. In relation to key issues in the appeal, Eady J had granted an application for recusal of one lay member of the appeal panel on the grounds of the appearance of bias: [2022] EAT 101. The lay member had made public statements opposing gender critical views and in support of sex and/or relationship education in schools. In granting an application by the claimant in relation to a second lay member, the former assistant general secretary of the National Education Union, Eady J said:

30. Standing in the shoes of the fair-minded and informed observer, I am aware of this background context [of knowledge and experience of lay members] when considering the issues raised by the present application. I recognise that the broader experience of lay members, which can be of such value in the EAT, may also mean that some will be involved in campaigning organisations, which may have taken a very public stance on current social and political issues in a way that would not be considered appropriate for a judge. Indeed, the broader, industrial experience of the lay members of the EAT (perhaps most obviously for those drawn from trade unions, but potentially also arising for those who have employer-side experience) will often derive from their roles within such organisations. The very experience that can provide such invaluable insight in some cases can, therefore, also mean that it would be inappropriate for such lay members to sit on an appeal that is likely to require them to reach judgements upon policies or issues on which they could be said to have already been associated with a particular ‘side’ (and see the discussion in *Hamilton v. GMB (Northern Region)* UKEAT/0184/06 at paragraphs 45-47).

31. In the present instance, none of the material relied on by the claimant was published or communicated by the lay member concerned, nor could it possibly have been understood to relate to them in their capacity as a lay member of the EAT. That said, as the *Guide to Judicial Conduct* recognises, all those who hold judicial office (a term that include lay members) must be alive to the difficulties that may arise from extra-judicial activities that might give rise to a reasonable apprehension of bias. Specifically, the question I have to consider is whether such an appearance of bias arises in the context of the public statements of the trade union in which this may member held senior office.

Notwithstanding that the lay member concerned had taken a judicial oath, and had not himself publicly expressed any views on either side of the debate, he was, however, at the relevant time, the assistant general secretary of an organisation that campaigned on precisely the areas of debate identified in the claimant’s Facebook posts and which has taken a side in that debate. The pronouncements made by the NEU were, moreover, not merely expressions of an organisational viewpoint on a matter of current interest, but of a particular association that had, on behalf of its members, a very real interest in the issues in question., and which had taken on a campaigning role in this respect. Whether or not he agreed or disagreed with all (or, indeed, any) of the pronouncements in question, by virtue of the office he held at that time, he will inevitably be associated with the views expressed, which were very clearly on the opposite side of the debate to that of the claimant. In determining whether the claimant’s posts might be considered to be homophobic or transphobic, the reasonable observer might legitimately perceive that someone who held office as assistant general secretary of the NEU at the relevant time would (even if only unconsciously) seek to maintain the position that had been very clearly adopted by that organisation.

**8. *Torre v. Scottish Legal Complaints Commission* [2023] CSIH 12**

*Case investigator – complaint against solicitor – summary of complaint prepared by case investigator – disagreement by complainant on wording of complaint – allegation of bias against case investigator rejected*

In July 2021 the appellant submitted a complaint to the respondent against his former solicitor. The complaint was assigned to one of the respondent’s case investigators, who took the view that it required to be treated as two separate complaints against the solicitor. The respondent conceded that the decision to reject the complaints was irrational and should be remitted for reconsideration by a different case investigator. In the course of email correspondence with the appellant, the case investigator made a number of amendments to the wording of the summary of the complaints. In an email to the appellant, she explained that the changes were to ensure that the summary was accurate and complete, and could be properly understood by all the parties involved, and said that the for this reason, the respondent has the final say on what is included in the summary of complaint. The appellant did not agree with the case investigator’s amendments, and took issue with the idea that the respondent had the final say on what was included in the summary of complaint. The appellant submitted that the respondent had failed to act in accordance with the rule against bias, and that the amendments made by the case investigator demonstrated bias on her part in favour of the solicitor and against the appellant. Rejecting any argument of procedural impropriety, the Inner House (Lord Justice Clerk, Lord Tyre, Lady Wise) said that the actions of the case investigator alleged by the appellant to demonstrate bias were carried out in the course of a dispute as to the wording of the summary of his complaints. The court was wholly unpersuaded that the circumstances founded upon by the appellant were indicative of actual bias on the part of the respondent or that they gave rise to any reasonable apprehension of bias. It is a very serious matter to allege that a body whose statutory function is to investigate complaints against members of the legal profession is biased in favour of those members and against the people who make complaints. The fact that the case investigator in the present case took actions which are now conceded to have been irrational provides no foundation for such an allegation.

**Case Management**

**9. *Alexander-Theodotou v. Solicitors Regulation Authority* [2023] EWHC 186 (Admin)**

*Allegations against solicitor – first set of allegations stayed – finding of dishonesty made in relation to second set of allegations – whether solicitor’s defence in first set relevant to issue of dishonesty – whether tribunal wrong to deal with second set of allegations in isolation*

The appellant, Dr Katherine Alexander-Theodotou, was a solicitor of the Supreme Court and practised as Highgate Hill Solicitors. The appellant faced two sets of allegations under the Solicitors (Disciplinary Proceedings) Rules 2019, viz: (1) allegations made in a statement under rule 12 in relation to her practice between 2015 and 2018, including that the appellant had issued unauthorised group litigation in Cyprus in the names of former clients without their knowledge and consent and had failed to comply with requests for information and decisions made by the Legal Ombudsman in relation to the litigation; and (2) allegations made in a supplemental statement under rule 14 to the effect that by failing to disclose the SRA investigations and the awards made by the Legal Ombudsman the appellant had dishonestly made false statements in insurance proposals in August 2020 and June 2021 in support of applications for professional indemnity cover for her practice. At a case management conference held on 25 April 2022, the SRA applied for the rule 14 allegations relating to insurance to be determined first because they were the most serious. The appellant opposed the application but an order was made that the rule 14 allegations would be determined as a preliminary issue. The rule 12 allegations relating to the appellant’s practice were stayed until after the preliminary issue. Following a five day hearing and judgment delivered on 7 July 2022, the SDT found the rule 14 allegations proved including dishonesty and ordered that the appellant’s name be struck from the roll of solicitors, and ordered the appellant to pay costs of £124,830. In addition the tribunal ordered that the allegations contained in the rule 12 statement be stayed with liberty to the SRA to restore.

The appellant appealed the tribunal’s July 2022 decision principally contending that the tribunal was wrong to deal with the rule 14 allegations first and in isolation from the rule 12 allegations, and by doing so it adopted a flawed approach to the issue of dishonesty. The appellant complained that the tribunal did not permit her to admit her witness statement in relation to the rule 12 allegations. The appellant submitted that only by dealing with the rule 12 allegations first could the tribunal ascertain her actual state of knowledge or belief in relation to the insurance allegations. The appellant asserted that the SRA investigations and the awards made by the Legal Ombudsman were invalid for want of jurisdiction and therefore did not need to be declared, and her conduct was not dishonest. It was her case that she was simply acting as an English agent for proceedings in Cyprus. Dismissing the appeal, Ritchie J said, firstly, that the tribunal’s judgment clearly set out the rule 12 allegations against the appellant. The judgment took into account the appellant’s defence that her Cypriot rival had maliciously instigated the SRA investigations. The tribunal noted that the appellant asserted that the SRA investigations and the Legal Ombudsman’s awards were not valid because there was no British jurisdiction to the proceedings. It was clear from the judgment that the tribunal did not doubt that the appellant subjectively believed that she had a defence to the SRA and Legal Ombudsman charges. However, the tribunal rejected the appellant’s subjective belief that investigations and awards were ‘invalid’. It was not necessary to try the rule 12 allegations either before or at the same time as the rule 14 allegations to do justice to the appellant’s defences to the rule 14 charges. The grounds of appeal blur the distinction between a genuinely held belief there was a defence to the rule 12 allegations, and a genuinely held belief that such a defence was a justification for not disclosing the matters in question to potential insurers when asked specifically to do so. The appellant was not unfairly restricted a trial from asserting her belief that the SRA/Legal Ombudsman charges/investigations/awards were flawed. Moreover, it was close to an abuse of process for the appellant to advance by this appeal a collateral challenge to the April 2022 case management decision, in circumstances where she pursued an appeal or judicial review of other rulings set out in the same order, but not against the procedural decision to take the rule 14 allegations as a preliminary issue.

**10. *Harris (by his litigation friend Adnaan Mirza) v. General Pharmaceutical Council* [2023] EWHC 551 (Admin)**

*Pharmacist – capacity – appeal against suspension – ability to participate in fitness to practise proceedings – capacity to conduct appeal proceedings*

This was a directions hearing before Fordham J in appeal proceedings by the appellant pharmacist against a six month suspension order with a review imposed by the respondent on 28 October 2022. By a subsequent decision on 3 March 2023 the appellant was removed from the register. At the directions hearing held on 14 March 2023, the court was told that the appellant intended to file a notice of appeal against the subsequent decision. The judge said that if that happened, it would be sensible for the two appeals to be linked, but there was no basis today for ordering a stay of the present proceedings. The judge said that it was important to distinguish between two different issues:

* The first issue is a set of questions about the appellant’s ability to participate in the council’s fitness to practise proceedings. That links to decisions that have been made , as to adjournments, and as to hearings in those proceedings taking place and decisions made. It links to the substance of the appeal and any linked appeal. So far as that is concerned, there are questions about what evidence was available to the relevant committees who made the relevant decisions. That is one set of questions. The court will, in due course, need to grapple with those questions.
* The second issue is distinct. It concerns capacity to conduct the present appeal proceedings (and the proposed linked appeal). The litigation friend Mr Adnaan Mirza had filed a certificate of suitability containing the reasons why he believes the appellant to be a protected party lacking capacity, and the relevant undertakings. Two recent assessments from a clinical psychologist and a consultant psychiatrist expressing the opinion that the appellant lacked capacity to conduct litigation or provide instructions were before the court.

The court would order the respondent to provide written submissions and any material, cases or commentary as to whether it is necessary to make a preliminary issue ruling on capacity in accordance with the commentary in the *White Book 2022,* paragraph 21.0.3, and giving the litigation friend an opportunity to file and serve any response.

**Civil Restraint Orders**

**11. *El Diwany v. Solicitors Regulation Authority* [2023] EWHC 1707 (Admin)**

*Solicitor – applications relating to disciplinary proceedings totally without merit – harassment of panel members and staff of Solicitors Disciplinary Tribunal – Extended Civil Restraint Order granted*

Following his convictions in Norway for harassment offences the SRA brought disciplinary proceedings against ED and on 11 December 2019, after a hearing before the SDT, he was struck off the roll of solicitors. ED’s appeal was dismissed by the court: [2021] EWHC 275 (Admin), Saini J. On 21 November 2021 the SDT refused ED’s application for restoration to the roll, and in October 2022 Murray J dismissed ED’s appeal against that determination and certified the grounds of appeal were totally without merit: [2022] EWHC 2882 (Admin). The SRA applied for an extended civil restraint order (ECRO) against ED. Making an ECRO for a period of three years, Murray J said that in *Nowak v. Nursing and Midwifery Council* [2013] EWHC 1932 (QB), Leggatt J discussed the specific requirements for the making of an ECRO and identified three questions that the court needs to ask. For present purposes, those three questions may be summarised in relation to this case as follows:

1. Has ED persistently issued claims or made applications that are totally without merit?
2. If so, has ED objectively demonstrated that he will, if unrestrained, issue further claims or make further applications which are an abuse of the court’s powers?
3. If so, what order, if any, is it just to make in order to address the risk identified?

Four applications had been made by ED, each of which related to or arose out of the disciplinary proceedings brought by the SRA and each was refused by an order that certified the application as totally without merit. They included orders made by the court refusing permission to apply for judicial review to investigate complaints made by ED against the two solicitor members of the original SDT panel and the barrister who acted for the SRA before Saini J. Additionally, ED had sent correspondence to the SRA’s solicitors Capsticks LLP which included intemperate and/or abusive language; had been the subject of a restraining order under the Protection from Harassment Act 1997 to prevent harassment of current or former members and employees of the SDT; and had been found to have breached the restraining order in relation to the chief executive of the SDT and one of the solicitor panel members that made the 2019 striking off decision.

**Conditions of Practice Orders**

**12. *Kuzmin v. General Medical Council* [2023] EWHC 60 (Admin)**

*Interim conditions made against doctor – condition requiring doctor to notify third parties – non-disclosure of condition to out-of-hours service – breach of condition – six months’ suspension upheld*

See Chapter 91 (Supplement), para 13.14A.

**Contractual and Statutory Regulation**

**13. *Colbert v. Royal United Hospitals Bath NHS Foundation Trust* [2023] EWHC 1672 (KB)**

*Trust disciplinary proceedings – allegations of misconduct against employee – attendance of witness and disclosure of documents – application for injunction*

The claimant, a consultant in oral and maxillofacial surgery, was subject to disciplinary proceedings brought by his employers, the Royal United Hospitals Bath NHS Foundation Trust (the Trust). The allegations of misconduct included that he had intimated and bullied colleagues in his department at the Trust. The claimant’s contract of employment was subject to the Department of Health guidance document *Maintaining High Professional Standards in the Modern HHS* (MHPS) and the Trust’s Managing Conduct Policy (MCP) for dealing with allegations of misconduct. Following allegations of inappropriate workplace behaviour generally in the department where the claimant worked, the Trust commissioned a report. The report (the Atkinson Report) considered the behaviour of a number of individuals, including the claimant, and recommended that the Trust formally investigate the claimant for alleged bullying/inappropriate behaviour. The investigation which followed was specifically targeted at the claimant. The Trust commissioned an external report (the Cunningham Report) and 21 witnesses, including the claimant, were interviewed as part of the Cunningham Report. The Trust concluded that the claimant had a case to answer and that the matter should proceed to a disciplinary panel. The claimant issued proceedings on 30 May 2023 seeking an interim injunction relating to the conduct by the Trust of the disciplinary process. By the time the proceedings came before the court on 19 June 2023, there were two matters in dispute, viz: (1) whether the claimant had a right to require the attendance of individuals at the disciplinary hearing, who were interviewed as part of the Cunningham Report investigation, but who the Trust was not proposing to call to give evidence; and (2) whether the claim was entitled to disclosure of an unredacted copy of the Atkinson Report and other documents connected with that report.

Dismissing both applications, the deputy judge said that the MCP did not provide, on its true construction, that the claimant could require witnesses who had been interviewed as part of the Cunningham Report to attend the disciplinary hearing, and be subject to cross-examination. It was a matter for the disciplinary panel as to the evidence they wished to hear, and the court should not ‘micromanage’ the disciplinary process. If the claimant was unsatisfied with the panel’s decision in regard to calling some or all of the witnesses he seeks, he had a right of appeal to an appeal panel, pursuant to the MCP, and the appeal panel will allow the appeal or call the witnesses itself. The claimant had no real prospect of establishing at trial a breach of contract. As to disclosure of documentation, the claimant had no real prospect of establishing at trial that the Atkinson Report constituted ‘correspondence’ within the meaning of the MHPS, or that it was relevant to the disciplinary proceedings against him; see *Burn v. Alder Hey Children’s NHS Foundation Trust* [2021] EWHC 1674 (QB), aff’d [2022] ICR 492 CA. The Atkinson Report was an investigation into workplace behaviour generally in the department in which the claimant was a member, and was not targeted at the claimant. The claimant had no unqualified right to have the unredacted report disclosed to him. It seemed likely that the Atkinson Report contained confidential information about other individuals given that it was a report on allegations of bullying and other inappropriate behaviour in relation to a range of individuals. If there was material relating to the claimant, but which raised confidentiality concerns about other individuals, the Trust would be entitled to provide the relevant information in such a way that the claimant could fairly respond to it, but without providing an entirely unredacted document.

**14. *M v. A Scottish University* [2023] CSOH 52**

*Nature of student fitness to practise proceedings – procedural fairness*

The petitioner, SM, was a final-year dental student at a Scottish university. He was subject to fitness to practise proceedings at the instance of the university. A panel concluded that the petitioner’s fitness to practise was impaired on the basis of his lack of insight into professionalism and the impact of absences on clinical care and those arranging clinical teaching, his disengagement from his course from its early years, his heavy reliance on counselling as the single solution to his issues, and the existence of a query around his understanding of probity. The panel decided that the petitioner’s studies on the university’s Bachelor of Dental Surgery course should be terminated. That decision was subsequently upheld by an appeal committee. Refusing a petition for judicial review, Lord Sandison, at [46]-[47], considered the nature of student fitness to practise proceedings and the extent they corresponded to those of the General Dental Council (GDC) in relation to registered dentists. After referring to the GDC’s document *“Student professionalism and fitness to practise. Standards for the dental team. Guidance for students’,* the judge said that the document makes clear that, at least as far as the GDC is concerned, the conduct of student fitness to practise proceedings is for the educational institution in question and not for it. Certain basic or key elements of student fitness to practise procedure are identified in the GDC’s relative publication for education providers, but the consequence of failure on the part of the educational institution to provide those elements would be a matter between the GDC and the education provider, and not give rise to any complaint on the part of the student against the provider. The judge continued:

47. The question of what proper procedures in the context of student fitness to practise proceedings may be cannot, in any event, simply be surrendered to the views of the GDC or the education provider, but is a matter over which the court must, if asked to do so, exercise its own supervision. In that context, one requires to consider whether there is any reason why the law ought to require student fitness to practise proceedings to conform or at least approximate to such proceedings in the context of registered members of a profession which the student aspires to enter. It is difficult as a matter of principle to see why that should be the case. Fitness to practise proceedings against an established member of a profession will generally tun on his or her ability or willingness to behave in a way acceptable to the requirements of the profession in question. In many though not all cases, the lack of such ability or willingness is likely to be demonstrated by misconduct of some kind. In that context it makes sense to proceed in the familiar structured way of fact-finding followed by a determination of whether misconduct has occurred before passing to the question of whether impairment has in consequence been established and the deciding sanction. In the context of student fitness to practise procedures, the question is whether the student is meeting various requirements in the course of his or her training which are deemed necessary in order to satisfy the criteria for entering into the relevant profession in the first place. The answer to that question need not, as it did not in the present case, involve any issue of misconduct at all, but rather requires an overall consideration of both matters of fact (for example, how many absences from classes or clinics actually occurred) and matters of impression or opinion (for example, the degree to which the student is engaging with the course of study or demonstrating insight into his position), all feeding together into a rather more wide-ranging and holistic determination of fitness to practise than might typically be the case in fitness to practise proceedings against an established professional.

A rigid requirement to proceed in set stages of procedure was not a legal requirement in the student context. Criticisms based simply on deviation from what would have been the GDC’s procedures or outcomes in the case of a registered dentist could not be sustained. Moreover, the fact that the university did not see its own procedures as being essentially disciplinary in nature was not a valid ground of complaint. At [48]-[53], the judge went on to hold that there was no procedural unfairness or lack of adequacy of reasons given by the panel or the appeal committee. In the present case, no suggestion was made that the petitioner’s case was conducted otherwise in accordance with the internal rules of the university. The petitioner was given a real and effective opportunity to take part in and influence the outcome of the fitness to practise proceedings, and took that opportunity. The focus of the proceedings was not on the petitioner’s health but on the consequences of his condition for the management of his professional obligations towards patients and colleagues. The essentially undisputed factual background disclosed behaviours and attitudes on the part of the petitioner which seriously called into question his suitability to continue on his course. His health difficulties which previously had provided some degree of mitigation for him had resolved without apparent improvement in the matters of concern.

**Conviction and Caution Cases**

**15. *Nazari v. Solicitors Regulation Authority* [2022] EWHC 1574 (Admin)**

*Solicitor – conviction for using disabled blue badge with intent to deceive – no basis for going behind conviction – striking-off not wrong*

The appellant solicitor appealed against the order of the SDT dated 18 October 2021 that he be struck off the roll of solicitors. On 15 February 2019, following trial at Lewes Crown Court in which he gave evidence, the appellant was found guilty by the jury of three counts (covering nine separate incidents) of using a blue badge with intent to deceive, contrary to section 115(1) of the Road Traffic Regulations Act 1984, and was fined £6,000. Between June 2018 and August 2018 the appellant had parked his car outside his office in Haywards Heath on a single yellow line during restricted hours and had repeatedly placed his son’s blue card on the dashboard of his car, intending on each occasion to deceive parking enforcement officers into thinking that someone who had the right needed to use it. Following his conviction the appellant reported himself to the SRA. The appellant submitted that in the exceptional circumstances of this case, the tribunal ought to have looked behind the conviction. The appellant relied upon the sentencing remarks of the Recorder, which made it clear that he had legitimate use of the blue badge, he did not gain any financial advantage or cause any harm, and the matter could have been dealt with by way of a strict liability offence of ‘wrongful use’ of a disabled person’s badge under section 117(1) of the RTRA 19984. Dismissing the appeal, Lang J said:

50.There are sound public policy reasons why criminal convictions are held to be conclusive proof of guilt in subsequent proceedings, *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 529, per Lord Diplock, at 541H - 542C. A departure from that approach is only justified where there is new evidence that entirely changes the nature of the case. The exceptional circumstances that might persuade a Tribunal to look behind the facts of a conviction must be more than just a submission that the Appellant was wrongly convicted. The criminal process exists for that reason.

51. The test for exceptional circumstances was considered in *El Diwany v. Solicitors Regulation Authority* [2021] EWHC 275 (Admin), per Saini J. at [35], [38], [50], [51]. In *Shepherd v. Solicitors Regulation Authority* (CO/3076/95), the Lord Chief Justice held that the principle in *Hunter* applied equally to disciplinary tribunal hearings.

Rule 32(1) of the Solicitors (Disciplinary Proceedings) Rules 2019 provides that the findings of fact upon which a conviction was based will be admissible as conclusive proof of those facts save in exceptional circumstances. In the instant case, the factors relating to the circumstances of the offence, on which the appellant relied, were mitigating factors that were taken into account by the Recorder when sentencing at the crown court. They did not amount to exceptional circumstances. The fact that the appellant could have been charged with a lesser offence does not amount to exceptional circumstances. As to the order striking the appellant from the roll, the tribunal noted that the usual sanction where misconduct included dishonesty would be a strike-off. The tribunal correctly directed itself in law, in accordance with the leading Divisional Court cases on exceptional circumstances: *Solicitors Regulation Authority v. Sharma* [2010] EWHC 2022 (Admin) and *Solicitors Regulation Authority v. James* [2018] EWHC 3058 (Admin). The tribunal also directed itself in accordance with the *‘Guidance Note on Sanctions’*. The tribunal ‘took full account’ of the Recorder’s sentencing remarks and clearly had them well in mind since they were also referenced in the context of dishonesty. On any reading of the tribunal’s judgment, the mitigating factors identified by the Recorder were considered by the tribunal. See further, Legitimate Expectation.

**16. *Fofanah v. Nursing and Midwifery Council* [2023] EWHC 1406 (Admin)**

*Nurse – conviction for fraud – nurse claiming miscarriage of justice – conviction conclusive evidence before tribunal – appeal against striking off dismissed*

On 26 September 2022, the appellant , a registered mental health nurse, was struck off the nursing register following her conviction at Nottingham Crown Court on six counts of theft, spanning the period from July 2014 until October 2015. The fraud took the form of dishonestly making false representations for gain. The prosecution case was that while employed by the Cheshire and Wirral Hospital Trust the appellant received sick pay or special leave pay whilst at the same time working and receiving payment as a bank nurse in Derby. The appellant was sentenced to nine months’ imprisonment, suspended for 18 months; together with an unpaid work requirement of 150 hours. She contended that the conviction was a miscarriage of justice and that she not guilty of fraud. By way of background her contention was that she was genuinely unfit for the Cheshire and Wirral work but that the work for Derby was of a different nature and/or therapeutic. The appellant’s attempts to appeal the criminal decision had failed albeit the matter was under consideration by the Criminal Cases Review Commission. Dismissing the appellant’s appeal against the order of striking off, Eyre J said that the appellant remained convinced that she was wrongly convicted by the jury. She was of the view that the panel should not have taken the conviction at face value. However, that approach was not open to the panel. The panel, by reason of rules 31(2) and (3) of the NMC (Fitness to Practise) Rules 2006, was compelled to regard the conviction as conclusive as to the facts and also to regard the jury’s findings of fact as proof of the facts underlying that conviction: *Nazari v. SRA* [2022] EWHC 1574 (Admin) followed. The sanction of striking-off could not be seen as disproportionate.

**Delay**

**17. *Nwosu v. Solicitors Regulation Authority Ltd* [2023} EWHC 2405 (KB)**

*Four years between complaint to SRA and application lodged with SDT – change in standard of proof during intervening period – no application made to SDT for stay for abuse of process – no investigation made by SDT for apparent delay – no evidence of prejudice to appellant*

The allegation against the appellant solicitor arose from events on 30 April 2018, when he was interviewing Person A for a paralegal position in his firm. On 25 February 2022, the SDT found proved that during the interview the appellant made inappropriate comments in questions asked during the formal interview and that his conduct was of a sexual nature and/or was sexually motivated. The SDT imposed a sanction in the form of a fine of £20,000, and ordered that he pay the costs of the SRA in the sum of £23,550. Ground 5 of the grounds of appeal was that the disciplinary hearing was unfair owing to delay, being a significant departure from the regulatory framework leading to a process that was unjust and prejudicial to the appellant. Dismissing the appeal, Jay J said that standing back from the detail of the case, there was a superficial attraction to this ground. A review of the chronology did show that there were considerable delays in the investigation of the complaint (which was made on the following day on 1 May 2018, and was not particularly complex) and in bringing the matter to the attention of the SDT. That did not happen until 26 August 2021. At first blush, that was very late. Moreover, before the coming into effect of the Solicitors (Disciplinary Proceedings) Rules 2019, an SDT applied the criminal standard of proof. For applications made on or after 25 November 2019, the civil standard of proof applied. While the civil standard of proof was correctly applied by the SDT, it could just about be maintained that an expeditious investigation would have resulted in a complaint or application by the SRA to the SDT before 25 November 2019. It was unnecessary, however, for the court to examine the merits of these superficially attractive points. The fundamental difficulty here was that it was not argued before the SDT or at any stage during the disciplinary procedure that the matter should be stayed for abuse of process. It was unnecessary to comment on whether such a submission would or might have succeeded. The fact remained that no application on that basis was ever made. Had an application be made, the SDT would have had to carry out some investigation into the reasons for the apparent delay. The SDT would have also needed to examine the issue of any prejudice to the appellant. It was maintained that the relevant interview notes had since been lost. It was quite unclear whether that had been brought about by the delay or on account of some other reason. Accordingly, ground 5 (and the appellant’s other grounds of appeal) could not succeed. The SDT’s cross-appeal on sanction was also dismissed.

**Disclosure, Confidentiality, Data Protection and Freedom of Information**

**Confidentiality**

**18. *Bar Council Helplines 2023***

The Bar Council provides a confidential Ethical Enquiries Service to assist barristers (and, where appropriate, their clerks and other staff connected with barristers’ professional practices) to identify, interpret and comply with their professional obligations under the BSB Handbook. The service does not give legal advice. The Ethical Enquiries line is 020 7611 1307. Email: [Ethics@BarCouncil.org.uk](mailto:Ethics@BarCouncil.org.uk)

**Disclosure**

**19. *Re Z (Disclosure to Social Work England: Findings of Domestic Abuse)* [2023] EWHC 447 (Fam)**

*Disclosure of judgment in family proceedings to regulator – disclosure in public interest*

See further Chapter 91 (Supplement), para 22.35B.

**Dishonesty (General Principles)**

**20. *Williams v. General Dental Council* [2023] EWCA Civ 481**

*Dental fees – NHS dental work – private top-up fees not impermissible*

The Court of Appeal (Lady Justice King, Lord Justice Coulson, Lady Justice Nicola Davies), dismissing the GDC’s appeal from the decision of Ritchie J: [2022] EWHC 1380 (Admin), held that there was no regulatory rule that private top-up fees could not be charged when NHS dental work had been carried out on the same tooth. In 2018 three patients T, U and V were seen by the respondent dentist Lucy Williams for crown treatment. In each case, the patient was offered a porcelain bonded crown on the NHS. However, the patients were advised by the respondent that a better-looking ceramic crown could be provided for an additional fee, to be paid privately. The amount of the additional fee was modest: it varied between £30 and £50. This was to cover the laboratory costs of a ceramic crown. The committee’s determination proceeded on the basis that it was impermissible to mix the payment structure of the NHS and private payments in this way. Dishonesty was firmly denied by the respondent who maintained that she did not know that top-up fees were not permitted. The NHS (General Dental Services Contracts) Regulations 2005 did not prohibit the conduct complained of. Accordingly, the committee operated throughout on an important misapprehension of the regulations themselves. In those circumstances it was impossible to see how there was a proper basis for a finding of dishonesty. Moreover, the respondent’s actual state of mind was critical to the issue before the committee as to whether her conduct was honest or dishonest. In the absence of any challenge to her evidence that she did not know of the so-called ‘fundamental tenet’ that work on a single tooth could not be split between the NHS and an agreement to pay privately, the committee had erred in law in finding dishonesty.

**21. *Sun v. General Medical Council* [2023] EWHC 1515 (Admin)**

*Mental health and dishonesty – doctor knowing that she is communicating false information – mental health condition not relevant to statutory overarching objective – relevant to mitigation of sanction*

This was a case at whose heart were questions about mental health and dishonesty. The appellant, Dr Sun, was a trainee in vascular surgery. The allegations of fact, including 13 incidents of dishonesty, were admitted as was misconduct. In 2018-2019, whilst acting as a clinical research associate, the appellant, amongst other things, dishonestly stated that she had been given permission to submit a manuscript to a medical journal, made untruthful job applications for training programmes, a self-declaration for revalidation and a work details form to the GMC, and stated to the GMC that two of her supervisors had criminal proceedings against them and had received a warning by the police for sexual harassment of a female trainee, and that a third supervisor had received a police warning for threatening behaviour. All of this was untrue and Dr Sun knew at the time that her statements to the GMC were untrue. The agreed expert medical evidence was that Dr Sun had had a mental health condition during the period in which the conduct had taken place. However, because of updated health assessments in early 2022, she was no longer suffering from any mental health condition such as to impair her fitness to practise. The GMC, pursuant to rule 17(6) of the GMC (Fitness to Practise) Rules 2006, with the approval of the tribunal, withdrew an allegation that Dr Sun’s fitness to practise was impaired by reason of adverse mental health. The GMC invited the tribunal to impose a sanction of suspension. But the tribunal decided on erasure.

Analysing the issues raised by the appeal, Fordham J said, at [32]-[45], that the tribunal was not wrong in deciding on the sanction of erasure, which was appropriate and necessary in the public interest. At [35], the judge said:

It is quite right that the role played by Dr Sun’s mental condition in relation to the Conduct was at the heart of this case. The Tribunal appreciated that. But there was a key point - in the Tribunal’s assessment – about what that role was not[Emphasis in judgment]. The tribunal rightly explored this at the hearing and emphasised it in the Determinations. The key point was that all the evidence and argument, regarding Dr Sun’s conduct being ‘affected by her mental health condition’, did not extend to any sustainable suggestion that Dr Sun’s mental health had led her to misappreciate what she was doing. Dr Sun knew what she was doing. She had the actual state of knowledge and belief which made the entirety of the Conduct ‘misconduct’. She had the actual state of knowledge ad belief which made the 13 incidents ‘dishonest’. There was no mental health distortion capable of defending, excusing or exonerating any of the Conduct. That was a central point made by the GMC. It was a central point accepted by the Tribunal. To take each of the 13 incidents, the Tribunal found that Dr Sen wrote those untruthful communications on all 13 occasions, she did so knowing and understanding that what she was saying was false. As the Tribunal recorded, Dr Sun: *knew what she was saying was false, but she said it anyway.* The key point was therefore this. Dr Sun’s mental health condition did not alter the character of the ‘misconduct’. It did not excuse or exonerate. This was carefully explored by the Tribunal, whose conclusions were clear and fully justified. As [counsel for the GMC] put it in her oral submissions, the recognition of this key point ‘fundamentally changed the exercise’ in evaluating the evidence relating to the mental health condition.

The judge went on to say, at [40], that the evidence about Dr Sun’s mental health condition could not bear the weight of making a substantial difference to the key evaluative assessment of the appropriate and necessary sanction in the public interest, by reference to the two applicable limbs (b) and (c) of the statutory overarching objective in section 1(1B) of the Medical Act 1983. At [41], the judge said that there was no substance in the criticism of the tribunal in identifying Dr Sun’s mental health as a ‘relevant mitigating factor’ while concluding that it ‘did not significantly mitigate her behaviour’. Whether a factor can be identified as a relevant mitigating factor is one question. The appropriate weight to be given to such a factor, once identified, is another. Moreover, the idea of ‘mitigation’ needed to be approached remembering that the tribunal was not exercising a punitive jurisdiction, but a prospective assessment of fitness to practise applying the public interest imperatives of the statutory overarching objective.

**Dishonesty (Sanction)**

**22. *Photay v. General Dental Council* [2023] EWHC 661 (Admin)**

*Dentist – dental treatment of patient – dishonest clinical records and scratches to radiograph – erasure upheld*

The appellant dentist challenged the PCC’s findings of fact, misconduct and impairment, and the sanction of erasure which the PCC imposed. The charges were divided into three separate referrals. Referrals 1 and 2 were allegations concerning mainly clinical practice and record keeping which the appellant admitted. Referral 3 comprised charges 40 to 42, which related to treatment of patient LT and were the most serious of the allegations of misconduct and were the main basis upon which the PCC determined that the appellant’s fitness to practise was impaired and that the sanction of erasure was necessary. The PCC, after hearing evidence and submissions, determined that in May 2019 the appellant had knowingly not completed the obturation of root can treatment, by not putting gutta percha (a plant-based dental substance) into the root canal, and had dishonestly prepared a clinical note to suggest otherwise. Thereafter, after it became apparent later in 2020 that the root can treatment had not in fact been completed, the appellant had deliberately and dishonestly scratched the radiograph to give the false impression that the root can treatment had been successfully completed. Dismissing the appeal on all grounds, Henshaw J said that the conclusions the PCC reached about how the radiograph came to be damaged were based on its assessment of the evidence as a whole, were consistent with the expert evidence, and could not be said to be wrong. The PCC was also entitled to conclude, on the evidence as a whole, that the appellant had a motive to alter the radiograph. The PCC’s sanction of erasure cannot be regarded as having been wrong.

**23. *Mian v. Bar Standards Board* [2023] EWHC 1249 (Admin)**

*Dishonesty by legal practitioner – dishonest call declaration – disbarment upheld*

The appellant was a former solicitor who transferred to become a barrister. On 4 May 2016 he submitted a Call Declaration, and on 24 November 2016 he was called to the Bar by Lincoln’s Inn. The professional misconduct related to the appellant’s failure to notify Lincoln’s Inn or the BSB that he was subject to investigation and then disciplinary charges by the SRA. On 5 September 2016, the SRA imposed conditions on his practising certificate as a solicitor. A disciplinary committee of the Council of the Inns of Court found twelve charges of professional misconduct were proved, including a finding of dishonesty in relation to three of the charges. The twelve charges of professional misconduct reflect different periods of alleged non-disclosure. By way of sanction, the tribunal disbarred the appellant. Appeal against dishonesty and sanction dismissed (Thornton J).

**Drafting of Charges**

**24. *Professional Standards Authority for Health and Social Care v. General Medical Council and Battah* [2022] EWHC 2075 (Admin)**

*Undercharging – failure by doctor to report interim conditions to employer – doctor continuing to work unsupervised contrary to interim order – omission to charge dishonest and reckless breach of conditions – serious procedural irregularity*

The tribunal found Dr Battah, a locum gynaecologist, guilty of misconduct based on a large number of clinical failures whilst working at two NHS Trusts, and his failure to report that he was subject to an interim conditions of practice order imposed by an Interim Orders Tribunal (IOT) of the GMC. The conditions included that he stop work until arrangements were in place for him to be supervised by a clinical supervisor who had been approved by his responsible officer. The substantive tribunal suspended Dr Battah’s registration for 12 months. On behalf of the PSA it was alleged that Dr Battah should have been charged with dishonestly and recklessly failing to report the interim conditions of practice order to his employer and others whom he was expressly required to notify, and in continuing to work and treat patients when he knew that this was contrary to the terms of the interim order. The tribunal found that whilst Dr Battah did not attend the IOT hearing (or the substantive hearing before the tribunal), Dr Battah knew about the IOT hearing and that he had conditions and that he continued working after he had conditions imposed on his registration and that he did not inform the relevant Trust. Allowing the PSA’s appeal and remitting the matter, Linden J said that a deliberate and knowing failure to notify, or otherwise to comply with an interim order, was a type of dishonesty. In the instant case, the way in which this aspect of the case was charged before the tribunal amounted to a serious procedural irregularity: [79]. There was evidence that Dr Battah had knowingly and deliberately breached the terms of the interim conditions, which included conditions which required to be fulfilled if he was to remain licensed. Not only had he not informed his employer; if he had worked, he had done so in circumstances which, in the view of the IOT, gave rise to a risk to patient safety, and he had done so knowing the express terms of the interim conditions. As the matter should have been charged as a breach of the interim conditions the GMC should also have supplied the tribunal with an unredacted copy of the interim order. The redacted version did not reveal any of the reasoning which led to the imposition of the interim conditions.

**25. *Professional Standards Authority for Health and Social Care v. Social work England and JS* [2023] EWHC 926 (Admin)**

*Undercharging – misconduct and health – charging allegation of health alone – serious procedural irregularity*

In about September 2016 the registrant social worker was diagnosed with bipolar affected disorder. On 15 March 2017, the registrant, together with a colleague, made a home visit in her capacity as a social worker to a client. It rapidly became to her colleague that the registrant was under the influence of alcohol and the colleague reported the matter. The registrant was referred by her employer to the HCPC, the former regulator for the social work profession. Following a social work assessment her employers also concluded that the registrant’s children had been neglected and emotionally abused, and, in response to a referral by her employers, the Disclosure and Barring Service included the registrant in its children’s barred list and its adults’ barred list. The HCPC decided that the allegations against the registrant should be dealt with as a health matter, and not as a misconduct matter on the basis that they resulted from the registrant’s bipolar health condition. On 22 September 2022, a panel of adjudicators of Social Work England decided that the registrant’s fitness to practise was impaired on the basis of a health condition, and on the basis of her inclusion in the DBS’s barred lists. The panel suspended the registrant from practising as a social worker for 2 years. Allowing an appeal by the PSA, Garnham J said, at [62]-[66], that the registrant’s attendance at the home visit on 15 March 2017 while under the influence of alcohol, and her neglect of her own children, were matters that *could* amount to misconduct. The allegation regarding the home visit dealt only with the fact of diagnosis of bipolar and did not encompass a possible allegation of misconduct in attending a home visit whilst drunk. The allegation of neglect of the registrant’s own children was not of misconduct but of impairment as a result of the barring order. The registrant’s health problems may have had some relevance, but there was no basis on the evidence for concluding that these incidents were not misconduct because they were entirely attributable to her health condition. The failure to draft the allegations correctly, to bring the real burden or substance of what had gone wrong with the registrant’s practise to the attention of the panel, amounted to undercharging and a serious procedural irregularity. The court was unable to determine whether the sanction was sufficient for the protection of the public or not.

**26. *Professional Standards Authority for Health and Social Care v. General Medical Council and Onyekpe* [2023] EWHC 2391 (Admin)**

*Undercharging – sexual relationship with patient – failure to allege that doctor knew or ought to have known patient was vulnerable or likely to be vulnerable – evidence of vulnerability*

The PSA appealed against the decision of the tribunal taken on 19 January 2023 to impose a sanction of six months’ suspension on Dr Onyekpe’s registration. It followed disciplinary proceedings in which Dr Onyekpe admitted that in June and July 2020 he had had a sexual relationship with Patient A which began after he had treated her in his capacity as a locum registrar in the Accident and Emergency department at the Whittington Hospital in London. In addition to admitting all of the charges against him, Dr Onyekpe also conceded that his fitness to practise was impaired by reason of his misconduct. Linden J allowed the PSA’s appeal on Ground 1, namely, that there should have been an allegation that Dr Onyekpe knew or ought to have known that Patient A was vulnerable or likely to be vulnerable. The lack of such an allegation meant that the full gravamen of his misconduct was not considered by the tribunal. The court remitted the matter to a freshly constituted tribunal to consider sanction. Reviewing the caselaw on ‘undercharging’, the judge said that in *Professional Standards Authority for Health and Social Care v. (1) General Chiropractic Council and (2) Briggs* [2014] EWHC 2190 (Admin) at [21], Lang J said:

On analysing these cases, the questions to be asked are:

(i) on the evidence, and applying its own rules, should the GCC have included the further allegations in the charge;

(ii) if so, did the failure to include those allegations in the charge mean that the Court is unable to determine whether the sanction was unduly lenient or not.

Linden J said that, in the instant case, there was evidence going to vulnerability in the medical notes made by Dr Onyekpe and which recorded what Patient A told him, and in the many WhatsApp exchanges between them. Before Dr Onyekpe introduced the subject of sex, Patient A had said a good deal to Dr Onyekpe to the effect that she was beset with primarily physical but also mental or at least emotional health issues, was suffering from chronic and serious pain and had been for years, was socially isolated as a result. In deciding to abandon an allegation that Patient A was vulnerable, it was tolerably clear that the GMC case examiners proceeded on the erroneous basis that the only real evidence of vulnerability was what Patient A said in a statement she had prepared for the GMC, and when it was decided that Patient A should not be called as a witness given the discrepancies in her account. There was no evidence to the effect that careful or any consideration was given to proving Patient A’s vulnerability based on the medical notes and the WhatsApp messages. Accordingly, the GMC’s approach to this issue was fundamentally flawed from the outset. In addition to what Patient A said in her witness statement, what she was recorded as saying to Dr Onyekpe in the medical notes and what she said in the WhatsApp messages was evidence of vulnerability. It was also evidence of what he perceived about her and was therefore relevant to his culpability. There was a failure to appreciate the meaning and effect of the GMC guidance in *Maintaining a professional boundary between you and your patient* and the GMC’s Sanctions Guidance at paragraphs 145-146 under the heading *Vulnerable patients*. Moreover, failure to raise the issue was contrary to the overarching objective under section 1(1A) of the Medical Act 1983. Quite apart from the question of patient safety, it was obviously important, in terms of the duties to promote and maintain public confidence in the medical profession and to promote proper standards and conduct, that the issue was at the very least raised and adjudicated. The effect of not doing so was that the case was presented on the basis that it was a perfectly healthy relationship between consenting adults with no harm done to Patient A, albeit one which Dr Onyekpe should not have entered into. The full gravity of the case was not put before the tribunal for its consideration and nor was it seen to be. So in answer to Lang J’s first question in *Briggs,* on the evidence, applying its own rules, the GMC should have included the further allegations in the charges. As to Lang J’s second question, a sanction of six months’ suspension could not properly have been the outcome had the tribunal found that Patient A was vulnerable and/or that Dr Onyekpe acted in the belief that she was. On the contrary, the outcome would likely, if not inevitably, have been erasure.

**Evidence**

**27. *Mansaray v. Nursing and Midwifery Council* [2023] EWHC 730 (Admin)**

*Hearsay evidence – contemporaneous handwritten notes made by NMC investigator*

The appellant was employed as a Band 5 clinical nurse specialist on an acute in-patient ward at Highgate Mental Health Centre. Patient A was placed in the ward under section 3 of the Mental Health Act 1983, and the appellant was assigned to him as his keyworker. The appellant faced 13 disciplinary charges including breaches of professional boundaries and engaging in sexual activity with Patient A following his discharge from the ward. On referral of allegations of misconduct by the appellant’s employer to the NMC, Ms Uzma Mahmood was appointed investigator and, as part of her investigation, on 23 August 2019 she spoke to Patient A about his relationship with the appellant. At the interview, Patient A said that he had been to the appellant’s house on a couple of occasions and they had engaged in sexual activity. Following a break in the interview when Patient A appeared uncomfortable the allegations of a sexual element to the relationship were not repeated by Patient A and he became disengaged and the interview concluded. Patient A subsequently took his own life. During the interview, Ms Mahmood had taken brief handwritten notes. Patient A had had a diagnosis of paranoid schizophrenia, mixed personality traits and substance abuse issues at the time of the events. The appellant did not dispute breach of professional boundaries and most of the allegations were admitted by him. At the heart of the dispute was whether the relationship between the appellant and Patient A was sexual or sexually motivated, as alleged by the NMC, or based on altruism, friendliness and care as suggested by the appellant. On the first day of the hearing, the NMC applied to admit as hearsay the evidence of Ms Mahmood’s contemporaneous handwritten notes and her witness statement.The application was successful. The committee went on to find the allegations proved and made an order striking the appellant’s name from the register. Dismissing the appellant’s appeal, Stacey J said:

42. The law on the admissibility of hearsay evidence is not in dispute. Both parties rely on *Thorneycroft v. NMC* [2014] EWHC 1565 (Admin) at paras. 45 and 56. The admission of the statement of an absent witness should not be regarded as a routine matter. The Fitness to Practise Rules require the panel first to consider the issue of relevance and fairness in determining the issue of admissibility of hearsay evidence. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to an objection to the admissibility of evidence.

43. The existence (or not) of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires a panel to make careful assessment, weighing up the competing factors. To do so, the panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The panel must be satisfied either that the evidence is demonstrably reliable or, alternatively, that there will be some means of testing its reliability.

44. The *Thorneycroft* judgment goes on to indicate the considerations to be taken into account by a panel when determining the issue of admitting hearsay evidence at paragraph 56.

In the present case, the judge said that the appellant’s central criticism was that the hearsay evidence was neither demonstrably reliable nor capable of being tested. However, and notwithstanding the mental health problems of Patient A, there was nothing to suggest that he was lying or giving an inaccurate account about what happened with the appellant, especially in light of the weight of the corroborating features and circumstantial evidence. He had no motive to lie. The committee concluded that although Patient A was the only direct witness, which is not unusual in sexual allegations, much of the circumstantial evidence was corroborative and supportive, such as text messages, the admitted allegations and the evidence of Patient A’s parents who had made a complaint to the Trust. Patient A made significant initial disclosures, he then became anguished and uncomfortable and, after a break, did not repeat them. Significantly however, he did not retract them. The evidence of Patient A was entirely consistent with the other evidence, apart from that of the appellant, whose evidence was implausible, inconsistent and had a number of provable inaccuracies. The appellant’s behaviour was only explained by a sexual motivation and grooming behaviour leading to sexual behaviour towards a very vulnerable, former patient to whom he had been entrusted as a keyworker.

**28. *Chowdhury v. General Medical Council* [2023] CSIH 13, 2023 SLT 404**

*Fresh evidence – practitioner diagnosed with autism spectrum disorder between impairment decision and sanction hearing – whether newly discovered information – whether material likely to have material bearing on critical issues in the proceedings*

The tribunal found that the appellant, a consultant in paediatrics and neonatology, had failed to provide proper clinical care to three children (patients A, B and C) who attended his private clinic. He had made diagnoses which were not clinically justified and as a result caused anxiety and distress to the parents of the patients. He had also recommended certain tests or investigations for which there was insufficient clinical justification. Between the impairment decision and the sanction hearing the appellant was diagnosed with autism spectrum disorder (ASD). It was not disputed that the diagnosis was a genuine one and that the appellant suffered from ASD to a ‘moderate’ extent. The appellant asserted that the diagnosis was *res noviter veniens ad notitiam* (newly discovered information), likely to have a material bearing on the tribunal’s assessment of the facts and decision on impairment. At the sanctions stage it was acknowledged that the rules of procedure did not allow the tribunal to re-open its determination on the facts, so the condition was relied on in relation to the appropriate sanction, and in particular the issue of remediation. A well-respected and senior psychiatrist, with specialist experience of ASD, produced several reports and gave evidence at the sanctions stage. However, the tribunal, while accepting the contents of the expert’s evidence, was unable to determine what impact and of what relevance the appellant’s diagnosis of ASD would have had on his treatment of the patients and imposed the sanction of erasure on the basis of the facts found proved and the appellant’s impairment. Refusing the appellant’s appeal, the Lord Justice Clerk (Lady Dorrian) giving the opinion of the court said, at [37]-[39], that the primary focus of the appeal had been on the mere diagnosis of ASD itself, rather than on the manner in which certain features of the condition effected the appellant in specific ways in relation to the subject matter, conduct and outcome of the proceedings. The diagnosis itself, and a recital of common characteristics which may be, or even are, found in the appellant did not advance the issue. To succeed with an appeal on the basis that it constitutes fresh evidence it was vital to link it closely to the conduct and outcome of the proceedings in a way which might persuade the court that it could have a material effect on the decision. The contents of the expert’s reports were for the most part stated at a level of generality in relation to the appellant and how the condition might generally manifest itself. The material must be capable of enabling the court to conclude that it was likely to have had a material bearing on or part to play in the determination of critical issues in the proceedings. The court, at [46]-[47], said that the tribunal’s decision centred of the assessment of the evidence of the parents against that of the appellant. The issue was one narrowly focussed on the credibility and reliability of the competing accounts. The tribunal was able to resolve the conflicts in the evidence for reasons which did not bear on the appellant’s demeanour or method of communication, or other general factors which might be related to the appellant’s ASD, and which was often based on extraneous evidence.

**29. *AB v. XYZ (No 2)* [2023] EWHC 1162 (KB)**

*Admissibility of evidence – university disciplinary hearing – allegation of sexual misconduct – hearsay evidence of complainant admitted – no opportunity to cross-examine*

See Breach of Natural Justice

**29A. *Roy v. General Medical Council* [2023] EWHC 2659 (Admin)**

*Fresh evidence – sexually motivated conduct – witness coming forward after hearing before tribunal – whether evidence would probably have important influence on the result of the case*

On 21 February 2023, the tribunal erased the name of the appellant from the medical register following findings of an improper emotional relationship including sexual activity between the appellant and Ms A during the period October 2001 to October 2007. Throughout the period concerned Ms A was below the age of 16 years and, because of her age, was vulnerable. The police conducted an investigation and decided not to bring any charges against the appellant. following press reports after the tribunal’s decision, on 14 March 2023 Ms B, an old school friend of Ms A, made contact with the appellant’s solicitors. Ms B made a witness statement dated 21 March 2021 in which broadly she recounted her relationship with Ms A, whom she described as her ‘best friend’ at school, and said that Ms A had a tendency to lie, embellish and tell stories. Ms B described certain behaviour of Ms A and said that she was confident that ‘if anything at all sexual’ had happened between Ms A and the appellant, she would have known about it because Ms A openly discussed her sexual relationships and her relationship with the appellant. Ms B said she believed Ms A’ complaint to the GMC was borne out of jealously. The appellant sought permission to introduce Ms B’s witness statement as new evidence.

Refusing to allow the appellant to adduce the evidence of Ms B, and dismissing the appeal, Calver J said that the law on the admission of fresh evidence under CPR 52.21(2) was well established. In *GMC v. Adeogba* [2016] EWCA Civ 162 at [26], Sir Bran Leveson P referred to the three limbs identified in *Ladd v. Marshall* [1954] 1 WLR 1489. In the present case, the GMC accepted that Ms B’s evidence could not have been obtained with reasonable diligence for use before the tribunal, and that it met the threshold of being ‘apparently credible’. The issue was whether it would ‘probably have an important influence on the result of the case, though it need not be decisive’. Applying that legal principle in the present case, the judge said that, firstly and crucially, the appellant admitted that he had behaved inappropriately with Ms A over a number of years. Secondly, the contemporaneous documents in the form of an essay, a poem and messages were damning to the appellant. They were not platonic messages; they were highly sexualised messages. He continued to lie in cross-examination that these were purely platonic, which was highly damaging to his credibility. The specific and overwhelming evidence in the contemporaneous documents belied the account given by the appellant and strongly corroborated the account of Ms A on almost all of the allegations before the tribunal. Thirdly, the appellant’s evidence was inconsistent in a number of ways, as noted by the tribunal, which undermined the credibility and reliability of his evidence generally. Turning to the witness statement of Ms B, the judge said that Ms B was not able to provide any direct evidence about the relationship between the appellant and Ms A at the relevant time. Her account was based entirely on her recollection of what she was told by Ms A (going back more than 20 years). Ms B’s statement also demonstrated that Ms A had been keeping her relationship with the appellant secret for some time. After reviewing Ms B’s statement further the judge concluded that there was nothing in the statement which called into question the tribunal’s findings of credibility and it would not ‘probably have an important influence on the result of the case.’

**Findings of Fact**

**30. *Sankaye v. General Medical Council* [2003] EWHC 1213 (Admin)**

*Tribunal finding doctor inappropriately touched breasts of patient during examination – whether finding of fact justified*

The appellant practised as a consultant musculoskeletal radiologist at a privately owned centre. The complainant was a receptionist who worked at the centre. She was experiencing back pain and had asked the appellant to carry out a diagnostic ultrasound scan as a favour. He did so on 20 July 2020, fitting it in at the end of the working day between 5.30 and 6 pm. The complainant alleged that during the procedure the appellant had touched her inappropriately touching the front of her chest and her breast. She agreed she was lying face down on the bed. The appellant maintained there was no touching of the front of the complainant’s body, and certainly not her chest or breasts. He also claimed that it would have been very difficult to reach the front of her body while she was lying on her front, requiring her or him to lift up the front of her body while she was lying down. The tribunal found proved that, on a balance of probabilities, the appellant touched the front of the complainant’s body and her breast, and that the acts were done without her consent and that his actions were sexually motivated. The tribunal made a finding of misconduct and impaired fitness to practise against the appellant, and suspended him from practice for 12 months. Dismissing the doctor’s appeal, Bourne J said, at [56],

In the present case, the central issue may not have been easy to resolve but that did not mean that it was a complex or exceptional issue. The question was, on the balance of probabilities, was the complainant right in her honest perception of the touching or was she mistaken about what happened? It was coloured by the question of how difficult the touching manoeuvre would have been, but in my judgment there was no other significant complicating factor.

The judge said that it was for the tribunal to assess the complainant’s honesty and credibility and went on, at [62], to dismiss the ‘physical difficulty of executing the alleged touching manoeuvre’ as having been only briefly touched on in cross-examination and submissions, which could explain why the tribunal’s reasons did not discuss the merits of the point, though they acknowledged its existence. The judge accepted that the tribunal’s reasons ‘would have been improved by a little more discussion on that point’, although the experts accepted that the manoeuvre was possible.

[Note: the judge’s approach may be seen as bordering on the question: Do we believe her?, which is the very thing which Warby J in *Dutta v. GMC* [2020] EWHC 1974 (Admin) at para 42, and Julian Knowles J in *Khan v. GMC* [2021] EWHC 374 at para 108, said should not be done. The question in any event, if appropriate, should have been whether the complainant was *or may have been* mistaken about what happened? The appellant’s assertion once raised in evidence and submissions, and in the appellant’s initial statement as part of the investigation, that it would have been very difficult to reach the front of the complainant’s body while she was lying on her front required to be addressed with rigour by the tribunal and the judge. The issue was not whether it was possible to do so, but whether it was more probable than not that the appellant was able to reach and touch the front of the complainant’s body, and did so.]

**31. *Shabir v. General Medical Council* [2023] EWHC 1772 (Admin)**

*Sexual misconduct – appeal against tribunal’s findings – whether event inherently improbable – complainant’s evidence consistent on core allegations*

The appellant qualified as a doctor in 2018. In September 2019, as part of his foundation year two, he was one month into a four month rotation in primary care at a medical practice with Bradford Teaching Hospitals. He faced an allegation of sexual misconduct during a consultation with Patient A. Patient A attended the practice for an appointment. She said she was prone to tonsillitis and was feeling dizzy with a sore throat. The day after the consultation, Patient A reported to the practice that the appellant touched her breasts when the same was not necessary during the course of two examinations. Specifically, she alleged that during his first examination the appellant put his hand inside her bra, touching the underside of her breasts and feeling around her breasts; and that the second examination involved him lifting her sweatshirt over her breasts and her breasts out of her bra, and pressing both breasts, her nipples and her breast area with his hand. The tribunal found all parts of the Allegation proved and erased the appellant from the medical register. On appeal the appellant submitted that the tribunal had failed to give any or any proper weight to the fact that the serious allegation of sexual assault made by Patient A was inherently improbable. The appellant was working in a supervised environment where he would meet his supervisor for a debrief after every four patients. His supervisor may have ‘popped in’ to the consultation room at any point, and there was an ‘open door’ policy. Nurses, healthcare assistants, receptionists and administrative staff were proving him with support. One nurse and one healthcare assistant did come into the room during the first part of the consultation with Patient A. There was no curtain or screen and the door to the consultation room was closed but not locked.

Dismissing the appeal, Hill J said, at [20]-[29], that the concept of inherent improbability is well-established: see, for example, *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 at [55], where Lord Hoffman said that ‘cogent evidence is generally required to satisfy a civil tribunal that a person behaved in some other reprehensible manner’; see also *Re B (Children)* [2008] UKHL 35 at [2]. In *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, Lord Nicholls summarised the concept at [73]-[74]: ‘the more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established’. In the instant case, the closing submissions made on behalf of the appellant to the tribunal had specifically addressed the issue of inherent improbability and the need for cogent evidence. Although the tribunal did not use the term ‘cogent’ or ‘cogency’, its determination of the facts included a detailed assessment of the credibility and reliability of the evidence. The tribunal was not required to make a separate, ‘standalone’ finding on inherent probability. Rejecting other grounds of appeal, the judge said she accepted that across and within Patient A’s accounts, there were several inconsistencies. However, the case was distinguishable on its facts from *Casey v. General Medical Council* [2011] NIQB 95 where the complainant had abandoned the most serious allegation against the doctor. In the present case, the inconsistencies were of a different kind, and the appellant did not abandon any of her core allegations. By contrast, here the tribunal was entitled to conclude that Patient A had been largely consistent on the key elements of the allegations, and explained its reasoning on this issue. The tribunal’s approach to the inconsistencies in Patient A’s evidence was not flawed in the sense set out in *Byrne v. General Medical Council* [2021] ] EWHC 2237 (Admin) at [15]: not sufficient to explain or justify the conclusion, out of tune with the evidence, or plainly wrong.

**32. *Metastasio v. General Medical Council* [2023] EWHC 1918 (Admin)**

*Sexual conduct with former patient – whether doctor recognised or knew she was former patient*

The allegations against Dr Metastasio arose from his contact with patient A after she had been an in-patient at Highgate Mental Health Centre (Highgate MHC). Patient A, a sex worker who appeared in pornographic films, had diagnoses of personality and bipolar disorder and was admitted to Highgate MHC in relation to risk of suicide, alcohol addiction and use of cocaine. Whilst Patient A was an in-patient at Highgate MHC, Dr Metastasio was her treating consultant psychiatrist. It was in this capacity that he first met Patient A. He had four direct interactions with her whist she was an in-patient, speaking to her during ward rounds on dates in November 2017. In April/May 2018, some five months after her discharge from Highgate MHC, Dr Metastasio began using Twitter to follow Patient A, who used a pseudonym (referred to as M), and during 2018 sent her several messages seeking to meet her. In February 2019, Dr Metastasio booked to meet M via an adult website, and later engaged in oral sex with M for which he paid her. After he sought a further meeting with her In August 2020, M complained to Camden and Islington NHS Trust, which ran Highgate MHC. The Trust referred the matter to the GMC. There was no dispute that Patient A and M were, in fact, the same person. The central issue before the tribunal was whether Dr Metastasio knew when he engaged in the conduct described that she had been his patient. The tribunal rejected his evidence that he did not recognise her or know she was a former patient. Dismissing Dr Metastasio’s appeal, and the sanction of erasure, Steyn J said that, on the issue of knowledge and credibility, the tribunal focused on the contemporaneous medical records which showed the fact that Patient A was continuing to work in the sex industry, and that Dr Metastasio had spoken directly with Patient A during his ward rounds on four occasions in November 2017. The tribunal considered that it was no coincidence that Dr Metastasio ended up following, messaging and arranging to meet a woman who happened to be a former patient. Having reviewed the evidence and the transcripts of the hearing, there was no basis on which the court could find that the conclusions the tribunal drew from the evidence were wrong.

**Fines**

**33. *Lone v. Solicitors Regulation Authority Ltd* [2023] EWHC 349 (Admin)**

*Fine of £8,000 and costs order upheld against solicitor acting improperly – handling of client’s case and client monies, and failure to register charge – no breach of trust, personal gain or loss to client.*

**Human Rights**

**34. *R (JJ) v. Spectrum Community Health CIC and The Royal College of Physicians (intervener)* [2023] EWCA Civ 885**

*Article 8 – care of prisoner by medical professional – refusal to provide certain foods to prisoner – autonomy and choice – medical professional acting lawfully*

The claimant prisoner was being cared for in the Healthcare Wing at HMP Liverpool by the staff of Spectrum Community Health, a community interest company, which provides NHS-funded healthcare services to prisoners. Spectrum is registered with the Care Quality Commission and regulated under the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. As a result of a rare genetic condition, the claimant was a quadriplegic and without teeth, and was bed-bound and wholly dependent on care staff for all his personal cares and for feeding. Spectrum declined to allow the claimant certain snacks in the form of boiled sweets, biscuits and crisps (boiled sweats) as they considered such foods posed a risk to death or serious injury to the claimant by choking or aspiration. Spectrum believed that to supply boiled sweats would risk exposing their staff to criminal or regulatory proceedings should the claimant come to harm. The claimant sought a declaration that Spectrum’s refusal to allow him to choose his diet was unlawful. His Honour Judge Sephton KC dismissed the claim: [2022] EWHC 2440 (Admin).

Dismissing the appeal, and agreeing with the judge, the Court of Appeal (King LJ with whom Lord Burnett of Maldon CJ and Lewis LJ agreed) said that the issue before the court was whether a medical professional is acting lawfully in restricting the foods which are offered to a patient because, in their medical opinion, to do so would expose the patient to a high risk of harm or death. Put the other way around, is a patient entitled to demand medical treatment which is not clinically indicated and therefore not offered to him by the doctor? The appeal was about medical treatment or care, not about prison or prisoners’ rights. The provision of food is treatment or care for the purposes of medial treatment decisions; see *Airedale NHS Trust v. Bland* [1993] AC 789 at p 858G. In the instant case, as to ground one of the appeal and the claimant’s autonomy and choice of food, King LJ said that the judge’s decision that the claimants ‘autonomy could lawfully be overridden’ by Spectrum was supported by the evidence both in relation to the risk of harm to the claimant and in relation to the risk of prosecution or regulatory action to the staff of Spectrum in the event that they fed the claimant boiled sweets. Where, as here, Spectrum had concluded, in the light of assessments and medical evidence, that the treatment sought by the claimant was not clinically indicated, then they were not legally obliged to provide it and the judge was right to find that to be the case; see *R (Burke) v. General Medical Council (Official Solicitor and others intervening)* [2005] EWCA Civ 1003, [2006] QB 273 at para 50(v). As to Article 8 ECHR, it was common ground that the claimant’s Article 8 right to respect for private life was engaged and that Spectrum’s refusal to provide him with boiled sweets was an interference with that right. The interference was ‘necessary’ (i.e. proportionate) and ‘in accordance with the law’ as required by Article 8(2). The provisions of the Care Quality Commission Regulations 2014 provide regulations dealing with the situation in which care and treatment are provided. The judge conducted a proportionality analysis and found that the course adopted by Spectrum was taken for the protection of the claimant’s health and for the protection of Spectrum and its staff. Having accepted that the circumstances of the case were such as to merit the protection of Article 8, the judge correctly concluded that the countervailing concerns of Spectrum amply justified its interference with the claimant’s right to choose.

**35. *Adil v. General Medical Council* [2023] EWHC 797 (Admin)**

*Article 10 – social media and professional conduct – Covid 19 pandemic – doctor promoting outlandish opinions on YouTube – disciplinary proceedings and 6 month’s suspension justified*

Between April 2020 and October 2020, the appellant, a locum consultant colorectal surgeon, appeared in videos on YouTube in which he made statements about the Covid 19 pandemic. What he said was to the effect that the SARS-CoV-2 virus did not exist; that the pandemic was a result of a conspiracy between the United States, the United Kingdom and the Israeli governments to impose a new order, and was being exploitered for profit by pharmaceutical companies, reputable medical organisations, and Bill Gates. He further contended that Mr Gates had infected the world with SARS-CoV-2 virus in order to sell vaccines that would be given to all, by force if necessary, that might contain microchips to further the agenda of 5G mobile technology, and would be used to control or reduce the world’s population. Dismissing the appellant’s appeal against the finding of impairment and sanction of suspension for six months, Swift J said that all this was outlandish. Taking account of *Good Medical Practice* and the GMC’s Social Media Guidance it was or should have been reasonably foreseeable to the appellant that his actions might conflict with professional standards set by the GMC. Maintaining the good-standing of the medical profession was, for the purposes of article 10(2), pursuit of a legitimate objective. It was clearly open to the tribunal to conclude that the appellant’s remarks, presented by him on the basis of his medical credentials, were likely to diminish public trust in the medical profession. The article 10 right is a qualified right. Exercise of the right to freedom of expression may be restricted when necessary in the interests of public safety, and for the protection of public health, and for the protection of others. Each of these legitimate objectives was material to the tribunal’s consideration of the appellant’s YouTube videos. The decision on sanction was entirely consistent with the Sanctions Guidance.

**Impairment of Fitness to Practise**

**36. *Professional Standards Authority for Health and Social Care v. (1) Social Work England and (2 MDR* [2023] EWHC 2125 (Admin)**

*Social worker – findings of child abuse and dishonesty – need for finding of impairment based on all three elements of statutory overarching objective – section 37(2) Children and Social Work Act 2017l*

The second respondent, MDR, was a social worker and the mother of twins, Child A (a daughter) and Child B (a son), who were born in August 2005. The second respondent faced three allegations before the panel. Under allegation 1, it was alleged that she had subjected Child A and/or Child B to emotional abuse and/or emotional distress. Under allegation 2, it was alleged that at a job interview with a local authority she failed to disclose that she was subject to an on-going fitness to practise investigation and that she had been subject to a previous fitness to practise investigation. Allegation 3 was that her failure to disclose these investigations amounted to dishonesty. The panel found all three allegations proved and that the second respondent’s fitness to practise was impaired by reason of her misconduct. The panel concluded that a finding of impaired fitness to practise was necessary to promote and maintain public confidence in the social work profession and to maintain proper professional standards under section 37(2)(b) and (c) of the Children and Social Work Act 2017, but was not necessary to protect, promote and maintain the health, safety and well-being of the public under s37(2)(a) of the 2017 Act. The panel imposed as a sanction a five-year warning. Allowing the appeal of the PSA, supported by Social Work England, that a finding of current impairment was not necessary under s37(2)(a), Farbey J said that the panel’s findings of a negligible risk of repetition of dishonesty and that the second respondent was developing insight into her misconduct into allegation 1 were wrong and irrational. Her lack of appreciation of the gravity of the allegations which she faced all pointed towards ongoing attitudinal failings giving rise to regulatory risks. The recruitment of social workers has at its centre the objective of keeping safe vulnerable adults and children. The panel could not rationally conclude that the risk to public health, safety and well-being had been remediated in circumstances where the second respondent did not recognise the risk and had shown no insight into her conduct. The case would be remitted to a panel for fresh findings on sanction.

**Insight**

**37. *Ali v. General Medical Council* [2023] EWHC 2400 (KB)**

*Conviction for dangerous driving – probation report describing risk of re-offending as low – approach by tribunal to insight – distinction between risk of reoffending and insight into behaviour*

In this case, following trial before a jury, the appellant doctor was convicted of dangerous driving and sentenced to 9 months’ imprisonment, suspended for 24 months, disqualified for driving for 18 months and required to complete a rehabilitation programme and undertake 180 hours of unpaid work. The sentencing judge in the crown court described the appellant’s behaviour as ‘a clear case of road rage’. Following an altercation with another driver, the appellant drove his vehicle deliberately at the victim and intended to hit him. The appellant’s car wing struck the victim, who was 83 or 84 years old at the time of the incident, and he fell to the ground suffering minor injuries. The appellant left the scene. On 17 December 2021 a tribunal of the MPTS determined that the appellant’s fitness to practise was impaired by reason of his conviction and suspended his registration for six months with a review. Whilst fully cooperating with the GMC throughout the course of its investigation, the appellant continued to deny the offence and made allegations against the victim and the trial judge. The tribunal found that the appellant had some insight into the seriousness of his actions, but that it was ‘limited’. It also found that although the risk of repetition was ‘low’, it had not seen sufficient evidence to conclude that the likelihood of repetition was ‘very low’. In directing a review the tribunal stated it might assist the review tribunal if the appellant provided evidence: (a) that he had continued to keep his medical knowledge and skills up to date; and (b) of the strategies that he had developed to minimise the risk of recurrence. The appellant lodged an appeal against the decision of the tribunal. The appeal was later withdrawn and the suspension came into effect on 5 July 2022. At a review hearing on 22 December 2022, the suspension was continued pending a further hearing that took place on 18 March 2023, when the tribunal imposed a further period of suspension for six months with a review. The review tribunal noted that the appellant had complied with the terms of his sentence, and had not re-offended since the time of the original incident in 2018. The evidence of the appellant before the review tribunal included proof that he had kept his medical knowledge and skills up to date by acquiring the necessary CPD points. However, on the issue of strategies to minimise the risk of recurrence, the review tribunal took the view that the appellant had not shown sufficient insight into the impact of his offending. The appellant submitted that he had sought some psychological therapy, but review tribunal had not seen any independent evidence corroborating that this had taken place, what issues had been addressed and what had been achieved by it. The review tribunal considered that an order of suspension was suspension was still required to allow the appellant time to reflect, develop and document his insight, particularly into the impact of his actions on the victim of the offence and on the medical profession.

The court (His Honour Judger Mithani KC, sitting as judge of the High Court) dismissed the appellant’s appeal against the decisions of the review committee of 22 December 2022 and 18 March 2023. The judge said, at [63]-[64], that he was not sure he understood the difference between a ‘low’ risk of repetition of the appellant’s past offending and a ‘very low ‘risk of repetition. Insight (or lack of it) applies whatever the risk of repetition. Its purpose is to allow that risk (however low) to be recognised and to be avoided. The court could understand why the appellant contended that evaluating whether the risk of reoffending had been reduced from ‘low’ to ‘very low’ or something less than ‘low’ was not a matter for the respondent. The appellant stated that the initial assessment of risk was carried out by the Probation Service and the Probation Service was best placed to decide the level of that risk. The court had not seen the probation report but it appeared to be common ground between the parties that the risk of reoffending was described in it as ‘low’. It would have been helpful to have seen the probation report to ascertain whether it contained any strategies suggested by the probation office about how the appellant’s insight into his offending could be improved. The judge continued:

65. I am clear that despite the, sometimes, inelegant words used by the Review Tribunal about the risk of ‘reoffending’, what it was alluding to was whether the Appellant had ‘insight’ into his alleged behaviour and whether he had developed strategies to avoid the type of confrontation he had with the victim. The circumstances of such a confrontation might or might not amount to the commission of a criminal offence. However, the public would be rightfully concerned to know that a doctor, who is supposed to show compassion, empathy, sympathy and understanding to, and act with professionalism towards, a patient had behaved in a manner in which the Appellant was alleged to have behaved against the victim. That is a legitimate concern which it is the duty of both the Respondent and an MPT to uphold. It may not impact directly on how a doctor discharges his professional obligations but could well be highly relevant if a similar situation arose in a professional setting. In any event, it is plainly very important for the public to know that doctors are held to the highest possible standards.

66. In my judgment, therefore, the Original and Review Tribunals were perfectly entitled to hold the Appellant to account for his criminal behaviour and to monitor his progress on insight to ensure that he had put strategies in place to avoid that type of behaviour in the future.

At [72], the judge said that the appellant could have demonstrated insight, without admitting guilt, by acknowledging how serious the findings made against him were, and even though the allegations were denied, he had put in place the necessary strategies to recognise the conduct complained of against him, how to prevent it and how to respond to it if it arose in the future in a way that was both reasonable and proportionate.

**Integrity (lack of)**

**38. *Markou v. Financial Conduct Authority* [2023] UKUT 101 (TCC)**

*No finding of recklessness or lack of integrity*

The Upper Tribunal allowed the reference by the applicant, a mortgage broker, in respect of a decision notice issued by the FCA. The tribunal was not satisfied that the authority had established its case that the applicant had acted recklessly or without integrity in failing to implement policies to combat mortgage fraud or to supervise his mortgage advisors, or had failed to take sufficient steps to prevent his company Financial Solutions (Euro) Ltd from transacting mortgage business between July – October 2017, when he knew it did not have professional indemnity insurance (PII). In broad terms the applicant contended that he implemented, maintained and enforced reasonable and effective procedures for detecting mortgage fraud, and that when the non-renewal of PII became known he instructed his mortgage advisors not to take on new business.

**39. *Seiler, Whitestone and Raitzin v. Financial Conduct Authority* [2023] UKUT 133 (TCC)**

*Correct approach to integrity in financial services. Whether applicants acted recklessly.*

On 23 June 2021 the FCA (the Authority) through its Regulatory Decisions Committee, issued decisions notices to each of the applicant employees of the Julius Baer group of companies. The applicants referred the decision notices to the Upper Tribunal. The subject matter of the references was the conduct of the applicants in respect of arrangements entered into by Bank Julius Baer & Co Ltd with an individual connected with the Yukos group of companies, pursuant to which he would receive ‘finder’s fees’ for introducing companies within the Yukos group to banks within the Julius Bear group of companies. The Authority alleged that Julius Baer’s conduct in its relationship with the Yukos group demonstrated a lack of integrity, and that it must have appreciated the clear risk that by entering into the arrangements it might be facilitating or participating in financial crime. The Authority’s case was that the applicants acted without integrity because they recklessly failed to have regard to relevant risks, being aware of those risks. The risks included that the finder’s arrangements included the individual concerned being conflicted in his advice to the Yukos group companies and to the banks, that the arrangements would facilitate the improper diversion of funds from the Yukos group companies, that the arrangements were not in the interests of those companies, and that there was no proper commercial rationale for payment of the funder’s fees by Julius Baer. Following a lengthy hearing the Upper Tribunal (Juge Timothy Herrington, chair) decided that the Authority had not made out its case that the applicants acted recklessly and consequently with a lack of integrity in relation to the subject matter of the references. The tribunal said that the correct legal approach to the concept of integrity in the financial services regulatory context was summarised in *Page and others v. FCA* [2022] UKUT 124 (TCC), at [56]-[59], adopting the summary of the relevant case law in *Tinney v. FCA* [2018] UKUT 345 (TCC), at [10]-[11] and *Forsyth v. FCA and PRA* [2021] UKUT 162 (TCC), at [40]-[44]. For the purpose of the present case, the following points were relevant:

1. There is no strict definition of what constitutes acting with integrity. It is a fact specific exercise.
2. Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.
3. Acting recklessly is another example of a lack of integrity not involving dishonesty. A person acts recklessly with respect to a result if he is aware of a risk that will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
4. To turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity.
5. There are both subjective and objective elements to the test of what constitutes a lack of integrity. The test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew.

**Interim Orders (General Principles)**

**40. *R (Philpot) v. Commissioner of Police of the Metropolis* [2023] EWCA Civ 66**

*Police disciplinary proceedings – allegation of domestic violence – interim order prohibiting contact with wife unless permitted by family court – interim order lawful under reg 6 of Police Regulations 2003*

See further Chapter 91 (Supplement), para 43.19A.

**41. *Ofori-Atta v. Ofsted* [2023] UKFTT 82 (HESC)**

*Interim order suspending registration of childminder – risk of harm to children – Childcare Act 2006*

See further Chapter 91 (Supplement), para 43.19B.

**42. *Kids Around the Clock Ltd v. Ofsted* [2023] UKFTT 105 (HESC)**

*Registration of childcare provisions suspended pending police investigation – risk of harm to children*

See further Chapter 91 (Supplement), para 43.19C.

**43. *Ramaswamy v. General Medical Council* [2023] EWHC 100 (Admin)**

*Abusive emails to GMC and staff – unmanaged health concerns – interim conditions on doctor’s registration – appeal dismissed*

See further Chapter 91 (Supplement), para 43.27A.

**Interim Orders (Extension of)**

**44. *General Medical Council v. Mwambingu* [2023] EWHC 324 (Admin)**

*Extension of interim conditions – order sought by GMC for no disclosure to third parties of documents on court file – order refused – no confidential information*

See further Chapter 91 (Supplement), para 44.14A.

**45. *Cook v. General Medical Council* [2023] EWHC 1906 (Admin)**

*Interim suspension pending criminal trial – defendant acquitted of more serious counts – interim order maintained on grounds of public confidence – tribunal wrongly assessing risk of repetition – no indication what allegations might be made by GMC*

In June 2021, following his arrest for offences relating to sexual activity with a child, which arose out of conversations he had had on the internet, an IOT imposed conditions on the appellant’s registration for a period of 18 months for the protection of the public and otherwise in the public interest. On being charged with a total of four offences the interim order was replaced on 5 August 2021 with an order of interim suspension. There was a trial in which the appellant gave evidence. The appellant was, at the time of the offences, suffering from a severe depressive illness. In September 2022, the appellant was found guilty of two counts on the indictment of publishing obscene online conversations, contrary to the Obscene Publications Act 1959, and was given a conditional discharge for one year. He was acquitted of the remaining two more serious counts under the Sexual Offences Act 2003 of arranging and facilitating a child sex offence, and conspiring to engage in sexual activity with a child.

At a hearing before the IOT on 10 March 2023, the GMC sought the continuation of the interim order on the grounds of public interest only. The defence submitted that the current interim order of suspension should be revoked, or alternatively replaced by interim conditions. Midway through the submissions on behalf of the doctor, and after the GMC had concluded its opening submissions, the IOT referred to the risk of repetition of the behaviour that would give rise to a conviction, the more serious charges of which the doctor had been acquitted. In its determination the IOT said that charges might be formulated by the GMC in relation to the sexual offences of which the appellant was acquitted, and that in view of the ‘seriousness of the charges’ and the need to maintain confidence in the profession an interim order of suspension was the only proportionate response. In allowing the doctor’s appeal, and directing that the interim order should end in one month, Lane J said, firstly, that neither side came prepared to argue whether there was a risk of repetition of the original behaviour in respect of which the doctor had been acquitted. Second, an analysis of the transcript and the determination showed that this had a significant bearing on the IOT’s conclusion that the interim order should continue, and that conditions would not be sufficient to address the public interest concerns. The IOT gave undue weight to the ‘allegation’ regarding the alleged sexual abuse of children. Moreover, there were no regulatory charges against the appellant at the time, nor any extant criminal charges. The IOT did not address the question raised by the evidence, and which the parties thought was relevant; namely, in the light of the change in circumstances whereby the appellant had been convicted on the two lesser charges and received a conditional discharge, and in part because of his mental illness at the time, did the public interest require suspension or the imposition of conditions? That important question remained unanswered because it was subsumed in the panel’s flawed reasoning.

**46. *General Medical Council v. B* [2023] CSOH 54**

*Application for second extension by court – on going criminal proceedings under Terrorism Acts – length of interim suspension not disproportionate – further extension in public interest granted*

On 24 August 2022, the Inner House granted the GMC’s application for an extension of an interim order of suspension of B’s registration until 25 April 2023: *B v. GMC* [2022] CSIH 38. B was charged with criminal offences contrary to the Terrorism Acts 2000 and 2006. The GMC sought a further extension of the interim order until 25 April 2024. The applicant was opposed by the respondent. In granting the application, Lord Ericht said that the decision to prosecute was taken in August 2021 and the committal proceedings against B and others in the magistrates’ court in Northern Ireland were ongoing. An abuse of process application by B was due to be heard in August 2023. If unsuccessful the committal proceedings may be concluded sometime in 2023 or possibly in 2024. If the abuse of process application or the committal proceedings did not bring the criminal proceedings to an end, then the case would proceed to trial in the crown court, in which case it was not possible to say at this stage when the trial would be concluded. The interim suspension was causing the respondent hardship. He was living on state benefits and due to his age may have difficulty in resuming his career after a lengthy suspension. On 26 October 2020 the interim orders tribunal granted an interim order of suspension which had been reviewed and maintained. The length of the suspension had not yet reached the stage where it makes it disproportionate for the suspension to continue. The Inner House expected that it was unlikely that the trial would take place until at least some time in 2024. The extension currently sought was only to April 2024. During the period of the extension now sought, substantial progress was expected to be made in the criminal proceedings. It was expected that he would either be discharged or committed for trial. If he is discharged, the GMC would invite the interim orders tribunal to revoke the interim order. In all the circumstances, an extension to the existing order was proportionate to the nature of the offences and the risk to public confidence in the medical profession. It was in the public interest for the suspension order to be extended as sought.

**Investigation of Complaints**

**47.** The Legal Ombudsman considers complaints about the service provided by an authorised person, including solicitors and barristers, to a complainant. Changes to the Scheme Rules took effect from 1 April 2023. Changes include:

* A reduction in the time limit to bring a complaint to the Ombudsman from 6 years from the act or omission; or 3 years from when the complainant should reasonably have known there was cause for complaint. Rule 4.5 reduces the time limit to 1 year unless the Ombudsman considers it fair and reasonable in all the circumstances to extend the time limit.
* The introduction of rule 5.7(p), which will allow the Ombudsman to consider if a case should be dismissed due to the size and complexity of the complaint.
* The introduction of rule 5.7(q), which will ensure that new issues cannot be added to an ongoing investigation if they were already known to the complainant at the time the investigation commenced.
* An amendment to rule 5.19, which will enable the Ombudsman to conclude that a final decision is not needed if no substantive issues have been raised in response to the investigator’s findings or remedy.

**Judicial Review**

**48. *Re JR249’s Application for leave to apply for judicial review* [2023] NIKB 25**

*Decision by police service that officer had case to answer of gross misconduct – officer seeking judicial review – leave granted for judicial review despite alternative remedy that matter be dealt before panel as abuse of process argument*

See further Chapter 91 (Supplement), para 49.20B.

**Jurisdiction**

**49. *Banque Haviland SA & Ors v. Financial Conduct Authority, Rowland v. Financial Conduct Authority* [2023] UKUT 00136 (TCC)**

*Procedure - Decision notice – third party reference – Final notice issued before outcome of third party reference – whether jurisdiction of tribunal circumvented*

In this case R was identified in separate decision notices issued by the FCA (the Authority) against Banque Haviland SA and three individuals, and sought a third-party reference under s393(9) of FSMA 2000. R objected to criticisms made of him in the decision notices. Banque Haviland and two of the individuals referred the decision notices to the Upper Tribunal. W, the third individual, did not refer his decision notice, and the Authority issued W with a final notice setting out the regulatory action it decided to take against him. R asked the tribunal to quash the final notice issued against W on the basis that it was a nullity, or alternatively request the Authority to rescind it. R contended that the Authority was not permitted to give the final notice to W pending the outcome of his third party reference. Dismissing this argument, Judge Timothy Herrington said, at [51]-[52], that there can be no question of the Authority having pre-determined the tribunal’s assessment of R’s third party reference and circumvented the statutory role of the tribunal and R’s statutory rights under s393 FSMA by issuing the final notice. The tribunal has jurisdiction to make findings of fact under s111(6A) FSMA as well as to make other findings as set out in that provision. R, as an identified third party, was entitled to challenge the findings in W’s decision notice as well as the findings in the other decision notices. The fact that the Authority may have ‘jumped the gun’ in issuing a final notice to W did not affect the position. He was challenging the criticisms made of him in the decision notices. The fact that a final notice has been issued to W has no impact on R’s reference. The tribunal had no jurisdiction under FSMA to in relation to matters contained in a final decision notice, or, most importantly, as to whether a final notice had been lawfully issued. The tribunal had no general judicial review function. Those were matters that would have to be addressed in the Administrative Court. However, the statutory scheme did not envisage the issue of a final notice to the subject of a decision notice until any third party reference in respect of that decision notice had been determined by the tribunal. That is the case whether or not the subject of the decision notice has referred the matter to the tribunal: [63].

**50. *Secretary of State for Justice v. Kane and The Independent Adjudicator (interested party)* [2023] EWCA Civ 842**

*Discipline of prisoner – referral by governor to independent adjudicator – jurisdiction of independent adjudicator – Prison Rules and Prison Service Instructions*

On 8 June 2020, a prison governor referred four charges against Peter Kane, a Category A prisoner at HMP Whitemoor, serving a sentence of 14 years imprisonment for supplying heroin, to an Independent Adjudicator to be dealt with under the prison discipline system. The four charges arose out of an incident on 7 June 2020, when it was alleged that Mr Kane had assaulted another prison governor, endangered the health and personal safety of others, damaged prison property and used threatening, abusive or insulting words or behaviour. On 31 July 2020, at the substantive adjudication hearing, objection was taken by Mr Kane’s solicitor that the independent adjudicator lacked jurisdiction. The basis of the objection was that the referring governor had not considered whether the charges met the applicable seriousness threshold under rule 53A of the Prison Rules 1999 to refer them to an independent adjudicator. The adjudicator rejected this argument, found the charges proved and sentenced Mr Kane to 18 additional days of detention. The determination and sentence was upheld following a review under the Prison Rules. On a claim for judicial the judge quashed the decision of the independent adjudicator on the grounds that she lacked the power to proceed with the adjudication, and should have dismissed it. Allowing the appeal of the Secretary of State, Bean LJ (with whom Thirlwall and Peter Jackson LJJ agreed) said, at [43]-[52], that there are three ways in which an offence against prison discipline can be dealt with. The first is by a governor who, if the charge is found proved, may impose some penalties but my not award additional days in custody. The second is by referral under rule 53A to an independent adjudicator, in practice District Judge (Magistrates’ Court), who may award up to 42 additional days if the charge is found proved. The third is a reference to the police, leading potentially to a prosecution in the criminal courts. Rule 53A requires the governor to refer a case to an independent adjudicator if the governor determines that the charge is ‘so serious that additional days would be awarded if the case was proved, or that it is necessary or expedient for ‘some other reason’ for the charge to be enquired into by an independent adjudicator. In the latter case the governor should set out what that reason is. But Rule 53A gives no indication of a requirement for a governor to give reasons in every case. The governor’s view of the seriousness of the charge cannot be binding on the independent adjudicator. The independent adjudicator is not under a duty under rule 53A and the Prison Service Instructions to enquire into the thought processes or reasoning of the referring governor. The independent adjudicator is under a duty to form an independent view of whether to proceed; and then, of course, if the case does proceed, to form their own view on guilt or innocence on penalty. Prison discipline is meant to provide a simple and proportionate system of justice. If the adequacy of reasons given by the referring governor can be the subject of judicial review, that raises the prospect of it becoming routine. Speed and simplicity would be impossible to achieve and the cost to public funds would be considerable.

**51. *Best’s Application for Judicial Review v. Police Service of Northern Ireland* [2023] NIKB 71**

*Police officer – retirement on grounds of ill health – pending disciplinary proceedings – applicable regulations*

On 17 September 2019 the applicant, a serving police officer with the Police Service of Northern Ireland (PSNI), applied for retirement on the grounds of permanent ill health. On 24 September 2019, the PSNI’s Professional Standards Department informed the applicant that he was under investigation arising from serious allegations made against him. He was suspended from duty. Criminal proceedings were subsequently commenced against the applicant. At trial the prosecution offered no evidence and the jury was directed to enter a verdict of not guilty. He remained subject to potential disciplinary proceedings. Following a medical assessment the Norther Ireland Policing Board (NIPB) notified the PSNI that the applicant’s application for permanent retirement on grounds of ill health was granted. The Chief Constable of the PSNI sought to exercise his discretion under regulation 14 of the Police Service of Northern Ireland Regulations 2005 (the 2005 regulations) to refuse permission for the applicant to retire on ill health grounds. Quashing the decision of the Chief Constable, Simpson J held that the applicable regulations dealing with the applicant’s particular case were the Royal Ulster Constabulary (Pensions) Regulations 1988, as amended (the 1988 regulations), and not the 2005 regulations. The 1988 regulations provide a comprehensive and exhaustive statutory framework for retirement on the grounds of ill health, including the making of representations by the Chief Constable that the member should remain in service until the conclusion of any disciplinary proceedings. Under the 1988 regulations the NIPB has the ability properly to consider issues relating to the public interest and how those issues interact with the interests of the PNSI and those of the applicant. The NIPB can properly be called the final decision-maker. In the event that either the Chief Constable or the applicant is disgruntled by the NIPB’s decision, judicial review would lie. The 2005 regulations ensure that the officer cannot give notice of an intention to retire, or retire pursuant to a notice already given, if he is suspended from duty. Either way an officer can be prevented from retiring while suspended from duty pending the outcome of misconduct proceedings. However, in the particular circumstances of the present case, the decision by the Chief Constable to rely on regulation 14 of the 2005 regulations to refuse permission to the applicant to retire was unlawful.

**Legal Advice**

**52. *Re A (Children) (Pool of Perpetrators)* [2022] EWCA Civ 1348**

*Summaries of applicable law agreed by parties – role of judge*

In the course of an appeal against orders made in care proceedings the Court of Appeal (King, Elsabeth Laing and Birss LJJ) said, at [10]-[12], that attached to the judge’s judgment was a 26-page document entitled ‘Summary of the Applicable Law’ agreed by all counsel on behalf of the parties. The court was told that it is not an uncommon practice for counsel to submit an agreed note of the relevant law in this way, the intention being that the judge then adopts its contents in its entirety. Whilst appreciating the value of such a document, King LJ said that a measure of circumspection is necessary in its use. First, a document which sets out lengthy citations from cases is unwieldy and may contain much which is unnecessary. Simply setting out any significant principle with a reference to the relevant parts of the judgment in question will ordinarily be sufficient. Secondly, the judge in his or her judgment still needs to identify and apply the principles of law relevant to the issues, before him or her. A boiler-plate incorporation of the established law in the form of an attachment to a judgment does not, without analysis in the judgment, help the reader to understand whether, and if so how, the law was applied to the facts and circumstances of the base before the judge.

**Legitimate Expectation**

**53. *Nazari v. Solicitors Regulation Authority* [2022] EWHC 1574 (Admin)**

*Solicitor – SRA investigator – recommendation of financial penalty – whether legitimate expectation*

Following the appellant’s conviction at Lewes Crown Court of three counts of using a blue badge with intent to deceive, contrary to section 115(1) of the Road Traffic Regulations Act 1984, an SRA investigation officer recommended that the appellant be ordered to pay a financial penalty of £2,000, and costs, without referral to the SDT. The investigator’s report and covering letter dated 20 May 2020 was sent to the appellant. The investigation officer, whose role was to investigate and make recommendations, was not the decision-maker. The authorised decision-maker did not accept the investigation officer’s recommendation of a fine, and referred the matter back to the investigation officer. This decision was communicated to the appellant by email dated 31 July 2020. On 5 January 2021, the authorised decision-maker made the decision, under rules 3.1 and 6.1 of the SRA Regulatory and Disciplinary Procedure Rules 2018, to refer the case to the SDT.

Lang J said, at [75] – [80], that a legitimate expectation, whether procedural or substantive, may arise from an express promise or representation made by a public body. In order to found a claim of legitimate expectation the promise or representation relied upon must be ‘clear, unambiguous and devoid of relevant qualification’: *R v. Inland Revenue Commissioners, Ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, per Bingham LJ at 1569G; see further *R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, at [60]; *Re Finucane’s Application for Judicial Review* [2019] UKSC 7, at [64]; *Paponette and Ors v. Attorney General of Trinidad and Tobago* [2010] UKPC 32, at [30]; and *R (Patel) v. General Medical Council* [2013] EWCA Civ 327, at [43]-[44]. In the instant case, the judge said, at [95], that it was clear from the terms of the investigation report and the covering letter, and the statutory context in which they were sent, that this was only a recommendation, not a decision, and that the decision was to follow. Therefore, the report and letter were not clear and unambiguous statements, devoid of relevant qualification, which were capable of giving rise to a legitimate expectation on the part of the appellant that he would not be referred to the SDT, and that he would not receive a more severe sanction than a fine. No legitimate expectation had been established by the appellant.

**Misconduct (General Principles)**

**54.** The General Medical Council’s guidance document *Good medical practice 2024* was published on 22 August 20023, and will come into effect on 30 January 2024. Page 4 states that *Good medical practice* sets out the principles, values, and standards of care and professional behaviour expected of all medical professionals registered with the GMC. It is an ethical framework, which supports medical professionals to deliver safe care to a good standard, in the interests of patients. *Good medical practice* is divided into four domains: (1) Knowledge, skills and development; (2) Patients, partnership and communication; (3) Colleagues, culture and safety; and (4) Trust and professionalism.

**Misconduct (Specific Misconduct)**

**55. *Bar Standards Board Guidance on the regulation of non-professional conduct (valid from 20 September 2023)***

The BSB has published revised guidance valid from 20 September 2023 on barristers’ conduct in non-professional life and on social media. The term ‘non-professional conduct’ is used to capture conduct that does not occur during a barrister’s professional activities as a barrister. It includes conduct that occurs in a personal/private capacity, as well as conduct that occurs in other professional capacities not as a barrister. The BSB state that such conduct may be of regulatory interest to the BSB because it can have an impact upon public confidence in the barrister or the profession.

**56. *Kwiatkowski v. Bar Standards Board* [2022] EWHC 1800 (Admin)**

*Barrister – verbal exchange with female barrister in public waiting area of court – charge of professional misconduct contrary to Core Duty 5 – article 10(2) ECHR*

Following a hearing in November 2021, a tribunal of the Bar Tribunal and Adjudication Service found proved one charge of professional misconduct against the appellant contrary to Core Duty 5 (CD 5) of the BSB Handbook, and imposed a fine of £500. CD 5 provides that ‘you must not behave in a way which is likely to dimmish the trust and confidence which the public places in you or in the profession’. The finding of professional misconduct arose out of a verbal exchange that took place on 25 November 2019 between the appellant and a female barrister, referred to a Miss E. Miss E was the appellant’s opponent in a case at Worthing County Court. The exchange took place in the public waiting area of the court and was overheard by another male barrister sitting nearby. During the verbal exchange, the appellant used sexist and discriminatory language and his conduct was ‘seriously offensive or discreditable’ within the meaning of the guidance to CD 5 in the BSB Handbook. The appellant contrasted the present situation with *Diggins v. Bar Standards Board* [2020] EWHC 467 (Admin), where the conduct involved sending a Tweet, and *Farquharson v. Bar Standards Board* [2022] EWHC 1128 (Admin), where the impugned conduct occurred in a night club, and submitted that the tribunal’s findings violated his right to freedom of expression under article 10 ECHR.

Dismissing the appellant’s appeal, Choudhury J said that it was not in dispute that the assessment whether there had been a breach of CD 5 was an objective one. In *Diggins*, Warby J said:

60. This is muddled. The question for the Panel was whether the Tweet was ‘likely’ to undermine the trust and confidence reposed by others in the appellant and the Bar. That is a question about the tendency of the Tweet ….

61. The Panel’s task was to read the Tweet, consider such evidence as there was of its context and, applying their common-sense and knowledge of the world, to make an assessment of how the Tweet would be likely to affect the attitudes of ordinary reasonable readers to the Bar or to the appellant, or both.

In the present case, precisely the same applies where a breach of CD 5 is alleged, not as a result of a Tweet or a publication, but as a result of words spoken. In that event, the requirement on the tribunal would be to assess how the hypothetical ordinary member of the public within earshot would be likely to view the conduct in question. The evidence suggested that members of the public were present. As to article 10 ECHR, the BSB submitted that the appellant’s remarks fell within the right to freedom of speech conferred by article 10(1), but the interference with that right, by reaching a finding of misconduct and imposing a sanction, was justified under article 10(2). The judge said that there can be no doubt, in view of the references to *Diggins* and *Bar Standards Board v. Khan* [2018] EWHC 2184 (Admin), that the tribunal had the correct approach to justification (i.e. necessity and proportionality) well in mind when considering liability and sanction.

**57. *Lambert-Simpson v. Health and Care Professions Council* [2023] EWHC 481 (Admin)**

*Social media and professional conduct – racially motivated post – act in question has racial purpose and shows hostility or discriminatory attitude towards racial group*

This case was about social media posts which led to the appellant, a registered psychologist being suspended by the HCPC for four months with a review. The panel found that the appellant posted three ‘inappropriate’ and/or ‘offensive comments’ and/or posts on his social media account, of which one was ‘racially motivated’, and that his fitness to practise was impaired by reason of misconduct. Dismissing the appellant’s against impairment and sanction, Fordham J said, at [21], he agreed that the present case was distinguishable from *Professional Standards Authority for Health and Social Care v. General Pharmaceutical Council and Ali* [2021] EWHC 1692 (Admin), where the registrant ‘used antisemitic words’ in a speech which called for an objective test based on the words used, and whether the words used were racist. In the present case, the allegation was framed in terms of ‘racial motivation’ which depended on the registrant’s intention, and the panel needed to consider the registrant’s state of mind.

After considering the transcripts of the panel hearing, the judge said there were key features showing that the post in question was racially motivated. The judge said, at [24 (iii)], he agreed with counsel for the HCPC that when an ‘inappropriate’ and/or ‘offensive’ comment will be ‘racially motivated’ had really two elements: (1) that the act in question (here the posting of the content) had a purpose behind it which at least in significant part was referable to race; and (2) that the act was done in a way showing hostility or a discriminatory attitude to the relevant racial group. The panel’s findings involved being satisfied as to these elements.

[Note: the four-month suspension order with a review was imposed on 28 July 2022, together with an interim (immediate) order to take effect pending any appeal. On 14 November 2022, a review panel purported to extend the suspension order by five months. The interim order was overlooked. The appeal was heard by Fordham J on 7 March 2023. If the original four months’ suspension were to take effect on dismissing the appeal, it would expire on 6 July 2023, with the possibility of an extension by a review panel. In order to secure a just and fair outcome – while protecting the public and the public interest – the judge ordered under article 38(3) of the Health Professions Order 2001 (power to substitute any decision that the panel could have made) that the interim order should take effect so as to expire on 28 March 2023 unless extended in the meantime. Whether the suspension order were to continue after 28 March 2023 would be a matter for the review panel.]

**58. *Webberley (Helen) v. General Medical Council* [2023] EWHC 734 (Admin)**

*Medical treatment of transgender child – failure to advise on risks to child’s fertility – doctor relying on consent from mother – whether failure to provide good clinical care*

The appellant, Dr Helen Webberley, was a GP with a specialist interest in sexual and transgender medicine. She operated a website called ‘GenderGP’. Her practice was investigated by the GMC and in due course charges were brought in relation to her treatment of three transgender children, patients A, B and C. Although adverse findings of fact were made against the appellant on various limbs of the allegation, the only one that led to a finding of impairment of fitness to practise was paragraph 5(d)(iii) concerning patient C. Patient C was born in 2006 and was assigned female at birth but identified as male and was diagnosed with gender dysphoria. Paragraph 5(d)(iii) alleged that following an initial consultation with patient C on 9 November 2016, the appellant failed to provide good clinical care in that she advised patient C as to the risks of GnRHa before commencing treatment without discussing the risks to patient C’s fertility. GnRHa (gonadotropin-releasing hormone agonist) is a puberty blocker. On 29 April 2017 the appellant prescribed puberty blockers for patient C. Patient C stopped taking puberty blockers in January 2018 following an apparent change of mind. The appellant accepted that the issue of fertility had not been discussed with patient C. The appellant had explained to patient C’s mother the effects that treatment may have on fertility and was reliant on patient C’s mother who had confirmed in emails in February 2017 that she had discussed fertility with patient C who was adamant he did not want children. In holding that the tribunal’s determination on misconduct was wrong, Jay J said that in his judgment the appellant owed a duty to discuss the fertility risks with patient C directly, and that patient C needed to understand that although the effects of puberty blocks were reversible, the effects of gender-affirming treatment may well not be. However, there was not a want of good clinical care in all the circumstances in the light of the email exchanges that took place between the appellant and her administrative assistant and Patient’s C’s mother in February 2017 when information and advice about fertility was given. The appellant had explained the fertility risks to patient C’s mother, and it was a reasonable conclusion that the appellant did believe that information given to this parent would be transmitted to the child. Moreover, the GMC’s expert specialist clinical psychologist was not asked to comment on whether the issue of fertility was appropriately addressed by the appellant in the various emails. Given that at least one of the appellant’s experts had commented on her clinical care in the light of the emails, any contrary view should have been explored. The appeal would be allowed and the sanction of suspension set aside. It would be disproportionate to put the appellant through further significant delays and another hearing.

**59. *Raggatt v. Bar Standards Board* [2023] EWHC 1198 (Admin)**

*Barrister – criminal proceedings – failure of prosecuting counsel to make Public Interest Immunity application in relation to surveillance material – failure to disclose surveillance material which assisted defence*

The appellant was instructed by the Crown Prosecuting Service as leading counsel in connection with the criminal prosecution of Conrad Jones in 2006 and 2007 (the Jones proceedings). In August 2007, Conrad Jones was convicted of doing acts tending to and intended to pervert the course of justice, and he was sentenced to 12 years’ imprisonment. The alleged conduct included a specific allegation that at Nottingham railway station on 1 or 2 June 2006 Conrad Jones threatened and bribed MV not to give evidence in a forthcoming murder trial. However, the effect of police surveillance material on 1 June 2006 precluded the presence of Conrad Jones in Nottingham on that day. Surveillance material was also available to the prosecution for 2 June 2006, which showed that Conrad Jones was in Coventry on that day and therefore, given it is approximately 53 miles between Coventry and Nottingham railway station, the meeting could not have taken place at the time alleged. Following his conviction in the Jones proceedings being quashed by the Court of Appeal in 2014, Conrad Jones made a complaint to the Bar Standards Board as to the appellant’s role in the non-disclosure of the surveillance material during the Jones proceedings. A tribunal of the Bar Tribunal and Adjudication Service found two charges proved against the appellant, namely: (1) that he engaged in conduct which was prejudicial to the administration of justice in not making a Public Interest Immunity (PII) application in relation to the surveillance material relating to events in the Jones proceedings and/or an admission in relation to the surveillance material; and (2) that he failed to assist the court in the administration of justice by stating to the court in the Jones proceedings that a meeting could have taken place between Conrad Jones and MV when he knew, or ought to have known, that the prosecution had in its possession surveillance material which showed the meeting could not have taken place at the time alleged. The tribunal imposed suspensions upon the appellant’s ability to practise of 12 months and 3 months respectively to run concurrently. Dismissing the appellant’s appeal, the Divisional Court (Nicola Davies LJ and Farbey J) said that the tribunal was entitled to conclude that by December 2006 the appellant was aware of the substance of the surveillance material. The court, at [81], said:

We agree with the determination of the Tribunal that the decision in December 2006 not to seek a PII hearing from which disclosure of the surveillance material would follow was wrong. The material undermined the prosecution case, it was material which assisted the defence and was also relevant to the alibi of [Conrad Jones]. The appellant’s decision was in breach of the prosecutor’s duty to disclose as soon as is reasonably practicable pursuant to the Criminal Procedure and Investigations Act 1996 and the Tribunal was correct to conclude.

The court added that the appellant made the decision in his role as leading counsel of the prosecution team. It was his decision and he must take responsibility for it. Whether or not it was supported by others in the team cannot detract from that fact. The cogency and the powerfulness of the witness MV was not a reason to withhold disclosure. There is only one test for disclosure, issues of cogency and weight are for the jury.

**60. *R (Officer W80) v. Director General of the Independent Office for Police Conduct* [2023] UKSC 24, [2023] 1 WLR 2300**

*Police officer shooting and killing suspect – honest but mistaken belief suspect armed – police disciplinary proceedings – whether criminal law test or civil law test of self-defence to be applied*

W80, an armed police officer, shot B dead in a police operation in which B was implicated in a plot with the use of firearms to snatch two individuals from police custody. W80’s account was that during the intervention, B’s hands moved quickly up to a shoulder bag on his chest. Fearing for his life and those of his colleagues, W80 fired one shot. No firearm was found in B’s bag, but an imitation forearm was in the rear of the car. The Independent Office for Police Conduct (IOPC) considered that W80’s belief that he was in imminent danger was honestly, but unreasonably, held, and that W80 had a case to answer for gross misconduct. Held by the Supreme Court (Lord Lloyd-Jones, Lord Sales, Lord Leggatt, Lord Burrows, Lord Stephens) that in disciplinary proceedings under the Police (Conduct) Regulations in relation to the use of force by a police officer in self-defence, the test to be applied is the civil law test, not the criminal law test. The civil law test is whether an honest but mistaken belief is *reasonable;* the criminal law test is whether the belief is *honestly held.* The purpose of maintaining public confidence in the police and in the disciplinary process is better served by the application of the civil law test: [99]-[100]. Accordingly, the IOPC applied the correct test when directing that disciplinary proceedings be brought against W80.

[Note: decision of Court of Appeal affirmed on different grounds; see Chapter 58, para 58.28 and Chapter 79, para 79.26]

**Natural Justice**

**61. *Cannon v. Bar Standards Board* [2023] EWCA Civ 278**

*Natural justice – mental capacity – whether barrister had mental capacity at time of hearing and on appeal – difference between capacity and fairness of proceedings*

In January 2020, the appellant was found guilty of charges of professional misconduct and was disbarred at a hearing before a Bar disciplinary tribunal. An appeal to the High Court in October 2020 was dismissed. The appellant sought permission to appeal to the Court of Appeal. The first ground of appeal was that the appellant lacked capacity (1) to participate in the hearing before the tribunal in which she was unrepresented and (2) to give instructions in relation to the conduct of the appeal to the High Court. Refusing permission to appeal, Lewis LJ (with whom Moylan and Edis LJJ agreed) said, at [21]:

The principles governing capacity can be stated shortly for present purposes. A person must be assumed to have capacity unless it is established that he or she lacks capacity. A person lacks capacity if he or she is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain. A person is unable to make a decision for himself or herself if the person is unable (a) to understand information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his or her decision. See sections 1(1), 2(1) and 3(1) of the Mental Capacity Act 1985.

The judge said that the principles governing the assessment of capacity were summarised in the judgment of Baker J in *A Local Authority v. P* [2018] EWCOP 10 at paragraph 15, and were further reviewed, and the sequence in which the relevant questions are to be answered were further considered by the Supreme Court in *A Local Authority v. JB* [2021] UKSC 51, [2022] AC 1322, at paragraphs 66 to 78. In the instant case, having received full submissions from leading counsel on behalf of the appellant and considering all the evidence, individually and cumulatively, the court was satisfied that there was no proper evidential basis for concluding that the presumption that the appellant had capacity to take the decisions necessary to enable her to participate in the disciplinary process culminating in the tribunal hearing in January 2020 was rebutted: [33]. There is a difference between questions of capacity and the fairness of proceedings. A person may well have vulnerabilities arising from underlying mental health conditions. Those may require adjustments to ensure that the proceedings are fair. In the present case, the difficulties that had been identified in relation to the appellant were ones that were relevant to the way in which the disciplinary process might need to be conducted. They did not provide a sufficient basis on which to conclude that the presumption of capacity had been rebutted. There had been no complaint about the fairness of the disciplinary process: [34]. Further, the court was satisfied that there was no proper evidential basis for concluding that the presumption that the appellant had capacity to conduct the appeal proceedings in the High Court in October 2020 was rebutted: [43].

**62. *AB v. XYZ (No 2)* [2023] EWHC 1162 (KB)**

*University disciplinary hearing – allegation of sexual misconduct – hearsay evidence of complainant admitted – no opportunity to cross-examine – breach of natural justice*

In *AB v. University of XYZ* [2020] EWHC 2978 (QB), the court held that the claimant student was entitled to legal representation at a university disciplinary hearing into an allegation that he had committed sexual misconduct against a fellow student, and in consequence a further disciplinary hearing should be held; see *Professional Conduct Casebook, 4th edition, paragraph 53.11.*

Following the decision above, there was convened a second disciplinary hearing before a panel differently constituted. At the commencement of the hearing on 3 February 2021, the claimant was informed that the complainant had said she may not attend. After numerous conversations and email exchanges it was said she felt unable to attend and relive what had happened to her again. The university had no power to compel her attendance and the hearing proceeded without her. The complainant did not provide a written signed statement. However, she did provide information to the university investigators which was contained in an email complaint, in supplementary information and in interview notes. The university had no power to compel her attendance and the hearing proceeded without her. At the outset of the hearing, counsel on behalf of the claimant made an objection to the admissibility of the hearsay evidence of the complainant. The committee’s view was that the evidence was admissible, but it was up to it to decide what weight to give the evidence of the complainant. The result of the disciplinary process was that the allegation was found proved and the claimant was expelled from the university. The claimant lodged an appeal to the disciplinary appeal committee of the university but was informed that as he had been permanently withdrawn from the university with immediate effect there was no prima facie case for the appeal. The claimant commenced a second claim in the High Court, and claimed a declaration of a breach of contract based on the Regulations of the university and an order setting aside the decisions of the second disciplinary committee and the appeal committee on the basis that the process was tainted by breaches of natural justice, in particular, in admitting hearsay evidence of the complainant and thereby admitting the evidence without an opportunity for cross-examination of the complainant.

The court considered authorities about admission of hearsay evidence/cross-examination in disciplinary proceedings, including: *R (Sim) v. Parole Board for England and Wales* [2003] EWCA Civ 1845, [2004] QB 1288; *Nursing and Midwifery Council v. Ogbonna* [2010] EWCA Civ 1216; *R (Bonhoeffer) v. General Medical Council* [2011] EWHC 1585 (Admin) and *Thorneycroft v. Nursing and Midwifery Council* [2014] EWHC 1565 (Admin). Granting the claimant relief Freedman J held, at [91]-[101], that on the basis of the earlier decision of the High Court in this case, natural justice required the claimant to have a full opportunity to defend himself including asking questions of the complainant at least through the chair. Without this, the process was unfair. The reason for the non-attendance of the complainant had not been examined with any rigour. Even if the reason given was sufficient to amount to a good reason for non-attendance, and sufficient was done in order to procure the attendance of the complainant, it was still a breach of natural justice for the hearsay evidence to be admitted:

1. The evidence against the claimant depended on the veracity of the complainant’s testimony. There was no corroboration.
2. The case was capable of being damaging to the claimant in respect of graduating and career prospects.
3. The more serious the allegation, the greater the importance of ensuring that fair and proper procedural safeguards were in place.
4. If the account of the complainant was to be admitted, it was critical that her evidence could be tested. Without the complainant being at the hearing in person or remotely, that vital safeguard was missing. There were numerous disputed issues.
5. The very matters on which the disciplinary committee relied were not capable of being decisive without appraising the disputed issues. The evidence could not be appraised without rigorous examination of the inconsistencies of the complainant’s evidence and the conflicts between the complainant’s and the claimant’s accounts.

The failure to highlight inconsistencies in the evidence of the complainant (and only highlighting inconsistencies in the evidence of the claimant) demonstrates that there was an uneven treatment in the evidence as a whole such that the process was unfair and unreasonable. In the event that the second disciplinary committee was entitled to admit the hearsay evidence and give it appropriate weight, it acted in a *Wednesbury* unreasonable manner by giving the hearsay statements weight far outside what could reasonably and fairly be given to them. Having regard to the numerous areas of contradictions and conflict between the complainant’s and the claimant’s accounts, a disciplinary committee properly directed could not fairly and reasonably find the case proven without the opportunity for questioning of the complainant.

**Negligence**

**63. *McCulloch & Ors v. Forth Valley Health Board, British Medical Association and General Medical Council intervening* [2023] UKSC 26, [2023] 3 WR 321 SC (Sc)**

*General Principles – medical practitioner – treatment of patient – not in pain at time of examination and no clear diagnosis of pericarditis– professional practice test applied – no breach of duty of care*

In this case the patient was admitted to hospital on two occasions suffering with chest pains. On each occasion the patient was seen by the same doctor, a consultant cardiologist. Her review indicated that his presentation did not fit with a standard diagnosis of pericarditis (an inflammation close to the heart. She saw no reason to prescribe non-steroidal anti-inflammatory drugs (NSAIDs), such as ibuprofen, because he was not in pain at the time she saw him and there was no clear diagnosis of pericarditis. He was prescribed antibiotics and was discharged home. He later suffered a cardiac arrest at home from which he died. His widow and other family members brought an against the hospital board. The expert evidence indicated that, while some doctors would have prescribed NSAIDs, there was also a responsible body of medical opinion that supported the consultant’s approach in this case given that the patient was not in pain when she saw him and there was no clear diagnosis of pericarditis. The Lord Ordinary rejected the claim. The Second Division of the Inner House dismissed the pursuers’ appeal. The Supreme Court unanimously dismissed the pursuers’ further appeal. The court held that the legal test to be applied to the question of what constituted a reasonable alternative treatment which a doctor was under a duty to discuss with the patient was the *Bolam* test: *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, or the ‘professional practice test’ of whether the doctor had acted in accordance with a practice accepted as proper by a responsible body of medical opinion; that, therefore, where a doctor decided in the exercise of his or clinical judgment that only some of the possible treatment options were reasonable and that decision was supported by a responsible body of medical opinion, the doctor would not be negligent by failing to inform the patient about the possible treatment options that he or she did not consider to be reasonable, even if there was a responsible body of medical opinion that regarded each of those other options as a reasonable treatment option; *Montgomery v. Lanarkshire Health Board* [2015] AC 1430, SC (Sc), and *Duce v. Worcestershire Acute Hospitals NHS Trust* [2018] PIQR P18 CA applied. The submissions of the BMA and the GMC as interveners provided strong support for the view that the determination of reasonable treatment options was a matter of medical expertise and professional skill and judgment; per Lord Hamblen and Lord Burrows JJSC at [70]. There was a need to avoid ‘bombarding’ the patient with all possible alternative treatments, which was unlikely to be in the patient’s best interest and may impair decision making: [72]-[73]. Applying the law to the facts in this case, the consultant was not negligent because her view, that prescribing NSAIDs for the patient was not a reasonable treatment option for him because he was not in pain and there was no clear diagnosis of pericarditis, was supported by a responsible body of medical opinion. She was therefore not in breach of duty of care by not informing him of that possible treatment.

**64. *Barnes v. Royal Institution of Chartered Surveyors* [2023] EWHC 1990 (Ch)**

*Claim against regulator – claim for damages for breach of contract following disciplinary proceedings – scope of contractual duty – claim struck out on facts*

The claimant was a surveyor and Fellow of the Royal Institution of Chartered Surveyors (RICS). RICS is a body incorporated by Royal Charter. Following exercising its regulatory capacity and the conclusion of disciplinary proceedings against him, the claimant commenced proceedings against RICS in the county court for damages for breach of contract and costs. A disciplinary panel of RICS’ Regulatory Tribunal found that the claimant had acted dishonestly in an application to join the RICS President’s Panel of Construction Adjudicators. The panel imposed a sanction of reprimand, a fine of £5,000 and an order preventing the claimant from making a further application for inclusion in the RICS President’s Panel for five years. An appeal by the claimant to the Appeal Panel of RICS against the findings and sanction was dismissed. RICS sought an order striking out the Particulars of Claim, pursuant to CPR 3.4, alternatively for summary judgment under CPR Part 24. It was common ground that the relationship between RICS and the its members is contractual in nature, and that contractual duties arose between the parties: [6]. It was also common ground that RICS, pursuant to its Bye-Laws, was empowered to investigate allegations that the claimant was guilty of conduct likely to bring RICS into disrepute or had failed to adhere to its Bye-Laws or to Regulations or Rules governing members’ conduct; and that, after *‘due enquiry’* under Bye-Law B5.4.2, RICS’ Regulatory Tribunal was empowered to impose one of a variety of disciplinary penalties if such conduct was found proved; and that the Regulatory Tribunal was empowered to make such order as it considered just and reasonable in relation to RICS’ costs in connection with any investigation and/or hearing: [14]. His Honour Judge Pearce (sitting as judge in the Business and Property Court and authorised to sit in the Administrative Court) said:

56. In considering the Claimant’s allegations of breach of contract in respect of the conduct of the proceedings before the Disciplinary Panel and the Appeal Panel, I accept for the purpose of this application the Claimant’s starting position that, if he could show that either the Disciplinary Panel or the Appeal Panel (or both) erred in law in dealing with the proceedings brought against the Claimant, the Defendant would not have been entitled to make disciplinary findings against him and any consequential sanction and/or costs order which it purported to impose would amount to a breach of contract. An enquiry that involved the wrong application of the law or that reached a factual conclusion outside the range of reasonable conclusions open to the Disciplinary or Appeal Panel on the material before it would not amount to *‘due enquiry’* as contemplated by the Bye-Law 5.4.2. In so far as any sanction or costs order was outside the powers of the panel on a proper construction of the terms of the contract between the parties, it would equally be inconsistent with the contractual terms.

However, for the reasons identified in the judgment, the court was satisfied that on the facts the claimant had no real prospect of succeeding on the claim, and there was no other compelling reason why the case should be disposed of at trial. Accordingly, RICS was entitled to summary judgment and there was no reasonable ground for bringing the claim.

**65. *Daly v. Independent Office for Police Conduct* [2023] EWHC 2236 (KB)**

*Claim against regulator – police officer – criminal and disciplinary proceedings – claims for malicious prosecution and misfeasance in public office*

The claimant, a serving police officer with the Metropolitan Police Service (MPS), was the subject of criminal and disciplinary proceedings arising from an incident in September 2015 he attended as a firearms officer with a number of other police officers. The defendant investigated the matter and its report was referred to the Crown Prosecution Service (CPS). The claimant was initially charged under section 20 of the Offences Against the Person Act 1861 with assaulting a member of the public. The CPS then dropped the section 20 charge and the claimant was prosecuted with assault contrary to section 47 of the 1861 Act. Following a trial he was acquitted by the jury. The defendant directed the MPS to institute gross misconduct proceedings. These proceedings commenced on 4 February 2019 and were dismissed on 6 February 2019 without the claimant being required to give evidence. Thereafter the claimant commenced proceedings against the defendant alleging malicious prosecution and misfeasance in public office in relation to the criminal and disciplinary proceedings.

The High Court struck out the claim for malicious prosecution under CPR r3.4(2)(a), and gave summary judgment in favour of the defendant in respect of the claim for misfeasance under CPR r24.2. The claimant conceded that a claim in malicious prosecution cannot be made in respect of disciplinary proceedings: *Gregory v. Portsmouth City Council* [2000] 1 AC 419. The claimant had no reasonable prospect of establishing the ingredients of the tort of malicious prosecution; see *Martin v. Watson* [1996] 1 AC 74. In the instant case, the criminal proceedings were prosecuted by the CPS, not the defendant; there was no prospect of proving that the defendant acted without reasonable and probable cause; and there was no evidence that the defendant acted maliciously. There was evidence to put before the court and reading the investigation report, the claimant had no real prospect of proving that the defendant (assuming it was the prosecutor) did not have a subjective honest belief in the charge. Any failures, if made out, on the part of the defendant may equally show incompetence or want of care rather than malice. To make out the tort of misfeasance in public office a claimant must prove that the defendant acted dishonestly or in bad faith; see *Three Rivers District Council v. Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1. In the instant case, the claimant did not institute judicial review proceedings of the defendant’s decision to direct a misconduct hearing. Even if the decision to maintain the direction for a misconduct hearing was unlawful in public law terms, that did not mean that the defendant acted dishonestly or in bad faith. Error of judgment, even serious error of judgment, is not sufficient to establish liability for misfeasance in public office.

**Oral Hearing**

**66. *McPhee v. Parole Board for Scotland* [2023] CSOH 3**

*Parole Board - prisoner requesting oral hearing – prisoner’s illiteracy cured by written representations and legal representation.*

See further Chapter 91 (Supplement), para 64.10B.

**Proportionality**

**67. *AA v. Disclosure and Barring Service* [2023] UKUT 110 (AAC)**

*Care worker – failure to provide care to two service users – whether necessary and proportionate to include appellant in adults’ barred list and children’s barred list*

The appellant appealed against the respondent’s decision that she should be included in both the adults’ barred list and the children’s barred list under Schedule 3 to the Safeguarding and Vulnerable Groups Act 2006. The appellant was employed as a home carer by a domiciliary care agency. Her work included regulatory activity relating to vulnerable adults. The DBS found proved two allegations that in April 2020 the appellant (1) during a care visit did not assist her colleague to reposition ‘service user JC’, despite JC’s daughter highlighting that her mother was struggling to breathe and asking her to do so; and (2) while providing care to ‘service user EB’, did not always take into account EB’s wishes. The Upper Tribunal allowed the appellant’s appeal. After hearing oral evidence from the appellant the tribunal said that while it found the appellant did not assist her colleague to reposition JC, despite JC’s daughter highlighting that her mother was struggling to breathe and asking her to do so, this was because the appellant did not know how to reposition JC because she had not been adequately trained. The appellant was not oblivious to JC’s discomfort but her lack of knowledge about what to do was substantially due to her not having had adequate training. The respondent had made a material mistake of fact when deciding to include the appellant in the barred lists. In relation to EB, by providing EB with tea rather than coffee the tribunal accepted that this was restricting EB’s choice and not acting on her wishes and capable of causing emotional harm. However, it was not necessary and proportionate to include the appellant in the adults’ barred list or the children’s barred list in relation to EB. The tribunal said, at [69]:

We accept that, if it is necessary and proportionate to include a person in a barred list in order to protect vulnerable adults and children, barring will be justified notwithstanding the interference with that person’s rights under the European Convention on Human Rights. Moreover, there are many cases where the relevant conduct is so serious that it is obvious that, if repeated, there would be a serious risk to a vulnerable adult or child, in which cases no detailed analysis of necessity or proportionality is required. However, this is not such a case.

**Publication and Anonymity**

**68. *A Teacher v. (1) Disclosure and Barring Service, (2) Teaching Regulation Agency* [2023] UKUT 39 (AAC)**

*Decision of Upper Tribunal ordering no publication of Disclosure and Barring Service proceedings –subsequent hearing before Teaching Regulation Authority resulting in prohibition order – Secretary of State required to publish outcome of disciplinary proceedings*

See further, Chapter 91 (Supplement), para 68.15B.

**69. *General Medical Council v. Mwambingu* [2023] EWHC 324 (Admin)**

See Interim Orders above.

**70. *AB/X v. Ministry of Justice* [2023] EWHC 1920 (KB)**

*Anonymity – removal of order for anonymity – misconduct and reporting of solicitor to Solicitors Regulation Authority – power to revisit and remove order for anonymity*

In 2014, in proceedings between the claimant and the Ministry of Justice, Jeremy Baker J made an order for anonymity of the claimant in view of the potential harm that disclosure of material in the public arena would cause to him and his family. An order for costs of the proceedings required both parties to pay some of each other’s costs. The ensuing, protracted costs and other proceedings generated the occasion for the Ministry of Justice to apply to revisit and remove the order for anonymity covering the claimant. In the course of such proceedings, the claimant, whilst appearing as a solicitor advocate, shouted and swore at counsel for the Ministry Justice and the Government Legal Service, before twice walking out and coming back into court, causing a hearing to be abandoned; failed to inform Cavanagh J that an earlier application had been dismissed by Johnson J as totally without merit; persistently accused a costs judge of bias despite such allegations being totally without merit; charged hourly rates that were excessive and purported to charge success fees upon a conditional fee agreement between himself and his own firm; and signed a bill of costs, thereby certifying to the court that the indemnity principle had not been breached, when there had been very considerable overcharging. The total costs claimed by the claimant of £936,875 were reduced by 70% for misconduct and were assessed at approximately £55,000. In ordering the removal of the claimant’s anonymity, May J said that CPR Part 3.1(7) gives the court, as part of its case management powers, the power to vary or revoke one of its own orders. One of the recognised circumstances in which it will be appropriate for the court to revisit an earlier order is where there has been a material change of circumstances; see *Tibbles v. SIG plc* [2012] EWCA Civ 518. It may also be appropriate to vary the order where subsequent events, unforeseen at the time the order was made, have removed or diminished the basis upon which it was made: *Rout v. North West Strategic Health Authority* [2010] 1 WLR 487.

In the instant case, the judge said, at [38]-[41], that when considering the balance between open justice and the public interest in reporting on one side and any Article 8 or other rights of the claimant or his family on the other, the public interest in learning of misconduct on the part of a prominent solicitor, officer of the court and hight rights advocate must weigh very heavily. The misconduct involved very serious breaches of the high standard of professional behaviour which the public is entitled to expect. Any investigation by the SRA/SDT must be at least significantly hampered by continued anonymity. The cases demonstrate that the courts will not impose, or will remove, anonymity even in circumstances where serious reputational and other harm may result from the name(s) of litigants or others being made public, including distress to family members; see *R (MNL) v. Westminster Magistrates’ Court* [2023] EWHC 587; *Scott v. Scott* [1913] AC 417, at 463; *In re British Broadcasting Corporation* [2010] 1 AC 145; *In re Guardian News and Media Ltd* [2010] 2 AC 697; and *In re S (A Child) (Identification: Restrictions on publication)* [2005] 1 AC 593. In conclusion, the court said, at [53]-[55], that it was quite satisfied that continued anonymity was not justified. This was not a case where the private interests of the claimant and/or members of his family should exceptionally outweigh the principle of open justice and the public interest in reporting cases. If AB/X was named in the cost proceedings (for instance), then his identity must be known and lifted in the substantive claim heard by Jeremy Baker J. The removal of anonymity will not of itself cause the contents of documentation before Jeremy Baker J to come to light. The parties should draw up an order lifting anonymity, but which will at the same time prevent disclosure of anything on the court file which might reveal all or part of that which the claimant successfully sought to be suppressed and destroyed as part of the claim in 2014.

**71. *Kingsbridge Capital Advisors Ltd v. Financial Conduct Authority* [2023] UKUT 103 (TCC)**

*Publication of proceedings – decision notice referred to Upper Tribunal – application to prohibit publication of reference pending hearing refused - nothing to displace presumption of open justice*

On 14 November 2022, the FCA gave the applicant, an investment adviser in the field of private equity, a decision notice cancelling its permission to carry on regulated activities. The decision notice was issued on the basis that the applicant had failed to pay fees as required by the rules of the Authority and had failed to satisfy the suitability threshold condition in relation to permitted regulated activities. On 28 December 2022, the applicant referred the Authority’s decision notice to the Upper Tribunal and made privacy applications to prohibit publication of the decision notice pursuant to Rule 14 and Schedule 3, paragraph 3, of the Tribunal Procedure (Upper Tribunal) Rules 2008. On 16 March 2023, the applicant paid the outstanding fees to the Authority. Dismissing the privacy applications the deputy judge said that the relevant principles have been considered and applied in a succession of cases, including: *Frensham v. FCA* [2021] UKUT 0083 (TCC); *Prodhan v. FCA* [2018] UKUT 0414 (TCC); *Foley v. FCA* [2020] UKUT 0169 (TCC); *PHHL Ltd v. FCA* [2016] UKUT 0129 (TCC); *Angela Burns v. FCA* [2015] 5 UKUT 0601; and *Arch Financial Products LLP and others v. FSA* [FS/2012/20]. It was clear that when deciding whether or not to allow privacy applications, the scales are heavily weighted in favour of publication, and the burden is on the applicant to produce cogent evidence of how it could suffer a disproportionate level of damage if publication were not prohibited. The applicant said that it acts as an investment adviser to only a single client at a time and that were the decision notice to be published its single potential investor would ‘walk away’. The tribunal concluded that the applicant had fallen well short of the evidential requirements necessary to demonstrate that publication of the decision notice would be significantly likely to cause it to suffer disproportionate damage. It would not be unfair to publish the decision notice and/or to include details of the reference on the register maintained by the tribunal. The starting point was open justice and there was nothing of sufficient weight on the other side of the scales to displace that presumption in this case.

**72. *Reynolds v. Financial Conduct Authority* [2023] UKUT 234 (TCC)**

*Privacy application – fear of danger to applicant and family – need for real possibility of significant physical or mental harm – Articles 2 and 3 ECHR – privacy application refused*

By a decision notice dated 2 May 2023, the Authority concluded that the applicant lacked honesty and integrity in relation to advice given to members of the British Steel Pension Scheme, and decided to make a prohibition order and impose on the applicant a penalty of £2.2 million. The applicant did not challenge the prohibition order from performing regulated activities involving investments or pensions or the findings of dishonesty and referred the decision notice to the tribunal primarily in relation to the penalty concerned. Pending the outcome of his reference the applicant sought a privacy application in relation to publication of the decision notice and particulars of the reference. The basis of the privacy application was that publication would pose ‘danger to my family and myself’. Refusing the application, the tribunal (Deputy Upper Tribunal Judge Mark Baldwin) said that in order to establish that publication of the decision notice would pose a danger to himself and his family which engaged his Articles 2 and 3 ECHR rights, the applicant must show that publication would create a real possibility of serious physical harm and possible death, a continuing danger of serious physical and psychological harm or extremely serious risk of physical harm (using the phrases in *RXG v. Ministry of Justice* [2019] EWHC 2026 (QB), at [35] per Dam Victoria Sharp P. To succeed Mr Reynolds must ‘demonstrate convincingly the seriousness of the risk’ and that there is a real possibility of significant harm that cannot sensibly be ignored. In the instant case, there had been a level of unpleasant commentary on social media about the applicant, but one incident apart, there had never been any serious threat of physical harm made to him, and that single threat did not lead to anything. Turning to the issue of mental health, the applicant had produced no medical evidence in support of his account of his or his son’s mental state. Mental health issues would only be relevant if it could be shown that there was a real risk that publishing the decision notice would have an adverse impact on their health. There was nothing before the tribunal that publishing the decision notice would harm their health. Moreover, the applicant had not demonstrated a real need for privacy, that it would be unfair to him to publish the decision notice and include his case in the Tribunal’s register. His business had already closed down and there was no suggestion that publication would cause severe damage to his livelihood. Publication would have no economic impact on the applicant.

**Reasons**

**73. *Professional Standards Authority for Health and Social Care v. General Medical Council and Lingam* [2023] EWHC 967 (Admin)**

*Sanction – need for careful analysis of seriousness of doctor’s actions – relevant to public protection and achieving statutory objective*

In this case, the tribunal imposed a conditions of practice order for 24 months with a review. It was imposed in respect of inappropriate prescribing practice by transcribing, signing and issuing almost 300 private prescriptions between January 2013 and March 2014, purportedly for use outside the UK where insufficient or no relevant information was before the doctor. The prescriptions were completed by the second respondent Professor Lingam at the request of a company called Kool Pharma Ltd. It was admitted there was a failure adequately to assess the patients, and that there were multiple and comprehensive breaches of *Good Medical Practice*  and the GMC’s guidance on prescribing medication. None of the allegations, including as to misconduct and impairment, was contested by Professor Lingam. Dishonesty was not alleged. Professor Lingam’s case was that he was prescribing as part of a humanitarian enterprise, for those who had no local access to required medication. He admitted in his evidence that he had been reckless although it had not been alleged in terms that his disregard of the guidance on prescribing was reckless. Allowing the PSA’s appeal and remitting sanction to be reconsidered by the tribunal on the basis of unclear reasoning as to sanction, Foster J highlighted, amongst other things, *seriousness* of the offence and said:

73. There is a significant risk that the Panel may have misapprehended the seriousness of the actions of Professor Lingam. …. Importantly, it is impossible to know certainly whether the Panel in fact accepted Professor Lingam’s explanation about humanitarian assistance, which was central. They did not say as much in the decision. They said they ‘considered’ the ‘submission’. …. It may be that the Panel accepted everything that was said – since the imposition of a conditions sanction may be thought consistent with acceptance of the genuineness of that answer. …. The context here suggests the Professor may have exhibited significant blindness to obvious risk, or, alternatively, have possessed awareness of risks yet taken a decision to run those risks in any event. It is not clear what analysis the Panel engaged in upon these matters because they did not set out their reasoning in any detail on the important factual context – which would have assisted them in determining seriousness. In the context particularly of a man of the intelligence and learning of the Professor, the Panel ought in my judgement have asked itself whet the facts told them about the admitted recklessness, and thus the seriousness of the matters found proved. Careful analysis of what happened and what its significance and seriousness are goes directly to public protection and is the best means of achieving that statutory objective. The same obtains for the duty of upholding the good name of the profession; a clear articulation of the impact of the behaviour upon reputation is called for in order properly to apply the sanctions criteria. In order to do that, a careful decision on the character and seriousness of the actions in question is required.

**Recklessness**

**74. *Markou v. Financial Conduct Authority* [2023] UKUT 101 (TCC)**

*No finding of recklessness or lack of integrity*

See Integrity (Lack of)

**75. *Seiler, Whitestone and Raitzin v. Financial Conduct Authority* [2023] UKUT 133 (TCC)**

*Whether applicants acted recklessly and consequently with lack of integrity.*

See Integrity (Lack of)

**Registration**

**76. *Sengupta v. General Medical Council* [2023] EWHC 1302 (Admin)**

*Appeal against indefinite suspension order – relevance of findings by previous panel – distinction between refusal of restoration and test for indefinite suspension*

On 21 January 2022, the tribunal made two decisions in relation to Dr Sengupta, whose speciality was in obstetrics and gynaecology. First, it refused her third application for restoration to the medical register made under section 41(1) of the Medical Act 1983 (the restoration decision). Second, it directed, pursuant to section 41(9) of the 1983 Act, that her ability to make further applications for restoration be suspended indefinitely (the suspension decision). In March 2010, Dr Sengupta had been erased from the medical register following findings of misconduct including findings of dishonesty in relation to professional and clinical matters, and by reason of deficient medical performance. She made applications for her name to be restored in 2015 and 2018, both of which were unsuccessful. Her application in 2021, which was rejected in January 2022, was therefore her third unsuccessful application. Her notice of appeal against the indefinite suspension order filed in time indicated that she also wished to proceed ‘towards a judicial review’ of the restoration decision. Dr Sengupta was in person and Linden J, as an abundance of caution, treated the notice of appeal as an appeal against the suspension decision and an application for permission to claim judicial review of the restoration decision, and to consider both on their merits.

Between the application for restoration in 2015 and the application in 2018, Dr Sengupta sent an email to Dr Gee, a retired consultant obstetrician and former Head of the Postgraduate School of Obstetrics and Gynaecology in the West Midlands, in which she complained about her ‘poor’ training in the West Midlands. The 2018 tribunal described the email as ‘intemperate’ and ‘unacceptable’, and said that Dr Sengupta’s follow-up email to Dr Gee appeared to suggest that she blamed him for drawing the correspondence to the attention of the GMC. The 2018 tribunal did not find that Dr Sengupta acted dishonestly in this regard. It found that she acted intemperately and emotionally. In its restoration decision, the 2021 tribunal, whilst saying that no formal finding of dishonesty was made in 2018 regarding these mails, referred to Dr Sengupta knowing that what she wrote was untrue and her ‘persistent and repeated’ dishonesty. In its suspension decision the tribunal said it had taken those matters into account in deciding it was not in the public interest to allow Dr Sengupta to make another application with so little prospect of success. In quashing the suspension decision and remitting it for reconsideration, Linden J said that the basis on which the 2021 tribunal could make a finding of dishonesty which was not made by the 2018 tribunal was unclear. Moreover the GMC did not allege dishonesty against Dr Sengupta in this regard. However, the restoration decision should stand. There was no prospect that she would be restored to the register even without the finding of dishonesty in relation to the emails to Dr Gee. The question for the tribunal on the application to restore was whether Dr Sengupta was ‘now fit to practise?’ having regard to the overarching objective; see *GMC v. Chandra* [2018] EWCA Civ 1898. The question on the application for a suspension order was different: should she be prevented indefinitely from making future applications (subject to a review after three years under sections 41(11)). The two questions engaged were different, albeit connected, considerations. The first concerned the current state of play; the second considered the likely future position. The tribunal’s findings that Dr Sengupta remained unfit to practise by reason of issues with her competence were more than sufficient to support the tribunal’s conclusion that she should not be restored to the register. It remained the case that the tribunal was concerned about the issue of her conduct which led to the original erasure. Her conduct since then in relation to the Dr Gee emails, though not dishonest, was concerning, and it was relevant to her fitness to practise.

**Review Hearings**

**77. *Ali v. General Medical Council* [2023] EWHC 2400 (KB)**

*Conviction for dangerous driving – probation report indicating low risk of reoffending – approach by tribunal to insight – review hearing*

See Insight above.

**Sanction (General Principles)**

**78. *Professional Standards Authority for Health and Social Care v. Nursing and Midwifery Council and Namusisi* [2023] EWHC 1230 (Admin)**

*Nurse – serious findings of misconduct apposite to striking off – failure of panel to carry through misconduct into assessment of sanction*

The allegations against the second respondent nurse related to her conduct whilst working on a night shift for Chelsea and Westminster Hospitals NHS Foundation Trust on 8/9 June 2019. She was tasked with caring for Patient A who suffered from Parkinson’s Disease and had additional medical needs due to hospital-acquired pneumonia. He was considered to be highly vulnerable and had been placed in a side room with two nurses allocated to care for him. At around 3 am on 9 June 2019, he was found to be unresponsive at a 45 degree angle on the bed so that his head was below his feet. He was described as being ‘hypoxic and blue’ with secretions covering his face. It took around two hours to stabilise him, clean him and make him comfortable. The nurse was charged with failing, amongst other things, to keep and maintain Patient A’s safety; falling asleep during her shift; and exposing Patient A to the risk of aspiration. In evidence the nurse stated that she had maintained constant observation of Patient A, that she did not fall asleep at any point during the shift, that Patient A was not at risk of aspiration, and that the secretions on his face were because Patient A had been coughing. The panel found all the charges to be proved. The findings of the panel in relation to the nurse’s misconduct and impairment to practise were described as ‘deplorable’. She was found to have ‘selfishly placed your own interests over the needs of a highly vulnerable patient’. Her actions were considered to be ‘deliberate and planned’, and there was said to be ‘very limited insight with little responsibility taken or the seriousness of risk acknowledged’. The panel identified a significant risk of repetition, and concluded that an informed member of the public, aware of the charges found proved would be ‘horrified’ at the misconduct. The panel suspended the nurse’s registration for a period of 12 months. Allowing the PSA’s appeal, supported by the Council, and substituting an order for strike-off, Thornton J, said:

41. It is apparent that the findings of the Panel in relation to impairment are apposite to the [Council’s] Guidance on striking off. What was relevant to impairment was equally relevant to sanction. Yet all the Panel said in relation to striking the nurse from the nursing register was that it would be disproportionate to do so on the basis that she had been working without regulatory concerns for three years since the incident in question. …

…

43. More broadly, the Panel’s findings in relation to impairment did not carry through into the assessment of sanction, with the result that the panel failed to grapple with the seriousness of the incident itself, beyond listing the several aggravating features without adequately engaging with them. Despite referring to the guidance on seriousness of misconduct, the Panel did not engage with the proposition that the misconduct in play in the present case may be less easy to put right when considering suspension/strike-off. The outcome was that disproportionate weight was afforded by the Panel to the fact that the misconduct took place in a single incident and there had been no regulatory concerns since.

**Sanction (Specific Cases)**

**79. *Wilson v. Charity Commission for England and Wales* [2023] UKFTT 562 (GRC)**

*Accountant – finance director and trustee of charity – mismanagement in administration of charity – disqualified as trustee of any charity for four years**– not disqualified from employment by a charity*

The appellant was a qualified accountant and the finance director of the Professional Footballers’ Association (the Union), and pursuant to holding that position he was an *ex officio* trustee of the Professional Football Association Charity (the Charity). Both appointments were terminated and the respondent opened a statutory inquiry into the Charity under the Charities Act 2011. The respondent concluded there had been mismanagement – but not misconduct – in the administration of the charity and made an order, pursuant to section 181A of the Act of 2011, disqualifying the appellant from being a trustee for any charity or holding office or employment, paid or unpaid, in any charity that involved the exercise of senior management functions for a period of four years.

Allowing the appellant’s appeal in part, the Upper Tribunal said the terms ‘misconduct’ and ‘mismanagement’ are not defined in the Act. However, in guidance issued by the respondent, ‘misconduct’ is taken to include any act or failure to act in the administration of a charity which the appellant knew or ought to have known was criminal, unlawful or improper. ‘Mismanagement’ is taken to include any act or failure to act in the administration of a charity that may result in significant resources being misused or the people who benefit from the charity being put at risk. Nevertheless, disqualification is a discretionary power and should only be used if, in addition, it is appropriate and proportionate having regard to the public interest. The tribunal said that the appellant, on the evidence, treated the Union and the Charity as, in essence, one entity, albeit with a separation of accounting exercise taking place at the end of a financial year. There was a distinct lack of appreciation shown by the appellant that he was dealing with a multi-million pound charity or the issues raised for the proper management of the Charity. The tribunal concluded that the appellant showed a lack of understanding of the proper management of charities and that by his conduct he had placed the Charity in significant financial and reputational risk. He was unfit to discharge the duties of a trustee of any charity and had damaged public trust and confidence in charities generally. The tribunal was satisfied that the statutory criteria for making a disqualification order were satisfied and that it was proportionate to make an order for four years. However, the tribunal removed the disqualification of the appellant holding office or employment in any charity. There was no dishonesty on the part of the appellant, and even when an interim suspension order was made the respondent permitted the appellant to, in effect, continue to operate the charity and keep it running. There was no conflict of interest in the appellant acting as an employee, even in a senior management position and, in any event, he could be supervised in such a role.

**80. *R (Chief Constable of the British Transport Police) v. Police Misconduct Panel and Police Constable Aftab (Interested Party)* [2023] EWHC 589 (Admin)**

*Off-duty officer in car approaching lone female pedestrian – officer showing his warrant card – engaging in inappropriate sexual conversation and later messaging her – sexual harassment – dismissal*

See further Chapter 91 (Supplement), para 77.32D.

**81. *R (Victor) v. Chief Constable of West Mercia Police* [2023] EWHC 2119 (Admin)**

*Student probationary police constable – misconduct proceedings resulting in final written warning – removal of claimant’s vetting clearance and dismissal from force – whether decision of vetting appeal panel irrational*

On 29 May 2021 at about 2.00am while off-duty the claimant, a student probationary officer with West Midlands Police, was involved in an incident in a public house in Worcester. The claimant had been drinking since about 6.00pm the preceding evening and the incident occurred when she confronted a man whom she believed had been sleeping with her twin sister’s boyfriend. There was an altercation in which the claimant shouted abuse at that man. The claimant left the public house at the instigation of the door supervisor but then continued shouting abuse in the street. The incident led to misconduct proceedings under the Police (Conduct) Regulations 2020 (the Conduct Regulations). Those proceedings resulted in a finding of misconduct and in the claimant receiving a final written warning. The claimant’s vetting clearance under the Vetting Code of Practice was then reviewed and withdrawn because her behaviour on 29 May 2021 had shown she was not fit to hold vetting clearance. The Vetting Code of Practice issued by the College of Policing under section 39A of the Police Act 1996 provides that vetting is an integral part of a police force’s framework of ethics and professional standards. It assists with identifying individual’s who are unsuitable to work within the police service. Everyone working in a police environment is vetted to the requisite level. The guidance document Authorised Professional Practice on Vetting provides that vetting is conducted in the police service to help identify and manage risk relating to areas including, public confidence. On 8 December 2021, West Mercia force’s Vetting Appeal Panel refused the claimant’s appeal, stating that for the claimant to retain vetting clearance despite such behaviour ‘would have a derogatory effect on [the public’s] trust and confidence in West Mercia Police’. On 16 March 2022, the chief constable discharged the claimant from the force under regulation 13 of the Police Regulations 2003 in consequence of the removal of her vetting clearance. Permission to bring judicial review proceedings was granted on grounds of irrationality. The central issue was whether it was lawful for the claimant’s vetting clearance to be removed and for her discharge to follow as a consequence in circumstances where the conduct on which the vetting decision was based had been addressed in misconduct proceedings and where it had resulted there in a final written waring rather than dismissal.

Dismissing the claim, Eyre J said that the core decision was that of the vetting appeal panel to withdraw the claimant’s vetting clearance rather than the subsequent discharge decision. This was because the discharge decision was dependent on the vetting decision. In the context of the interrelation between the Conduct Regulations and the discharge of a constable under other procedures it was necessary to consider the decisions in *R v. Chief Constable of British Transport Police ex parte Farmer* [1999] COD 518, 1999 WL 1142693, CA; *R (Monger) v. Chief Constable of Cumbria* [2013] EWHC 455 (Admin); and *C v. Chief Constable, Strathclyde Police* [2013] CSOH 65, [2013] SLT 699. After reviewing the cases the judge said:

62. My understanding of the effect of the general principles set out above and of those decisions concerning constables is that where there is an issue as to whether particular conduct took place the protections provided by the Conduct Regulations should not be circumvented. In such cases the procedures laid down by those regulations should normally be followed. A failure to do so is likely to mean that a dismissal based on the misconduct is unlaw as in *Monger.* However, where the conduct (or at least the relevant acts0 amounting to misconduct is admitted or otherwise not in dispute then it is not necessarily the position that the use of other procedures instead of in addition to those in the Conduct Regulations is precluded. It is clear from *Farmer* and the *Strathclyde Police* case that it can be lawful to dispense with a probationer’s services other than through the misconduct route even when the basis for taking that course is behaviour which could amount to misconduct. The critical question in such a case will be whether the effect of the course adopted is (a) to undermine or subvert the protections provided for a constable accused of misconduct or (b) amounts instead to the legitimate use of a different power for its intended purpose. The lawfulness of the action will depend on both the particular circumstances and the particular procedures which are being used. In relation to the former the presence or absence of a factual dispute will be of great significance and is normally determinate. As to the latter there will need to be close analysis of the nature and purpose of the powers being used.

At [63]-[66], the judge said that, in the instant case, the vetting clearance was used to subvert or sidestep the protections given to the claimant by the Conduct Regulations. There was no material dispute as to the facts. The minor points of difference in respect of the actual terms of abuse spoken by the claimant and whether she was required to leave the public house did not go the substance of her conduct, namely, that in public and when in drink she had shouted abuse at another and had continued to do so in the street. The chief constable was right to say that public confidence in the police service would be diminished if those who are immature or who have shown an ability to lose their self-control when affected by drink. Part of the purpose of the vetting regime is to ensure that those lacking the necessary maturity and self-control do not receive clearance even if they are persons whose integrity is not in question: [74]. After analysing the structure and purpose of the different provisions the judge, at [92], said that the ultimate outcome of the misconduct, vetting and regulation 13 processes was that the claimant was discharged in circumstances where her conduct had not resulted in dismissal under the Conduct Regulations. That, however, was not because the vetting or regulation 13 processes unlawfully subverted the outcome of the misconduct proceedings but instead because those processes were applied properly and by reference to the criteria applicable and relevant to them in the particular circumstances. It followed that the vetting decision was not unlawful or irrational even though it led to the discharge of the claimant.

**81A. *Chief Constable of Thames Valley Police v. A Police Misconduct Panel and Javeed* [2023] EWHC 2693 (KB)**

*Officer touching female colleague at work – finding of inappropriate but not sexually motivated conduct – errors in panel’s reasons on sanction – case remitted – Sexual Offences Act 2003, section 78*

A police misconduct panel found that, on 11 August 2020 in the staff room in the custody suite at Maidenhead Police Station, PC Javeed approached Miss A as she was at her desk and without her invitation or consent proceeded to touch her in an unsolicited and unwelcome way. The panel found that PC Javeed’s conduct amounted to gross misconduct but was not sexually motivated and imposed a written warning for 5 years. The claimant brought judicial review proceedings on two grounds, namely that, firstly, the panel should have found the officer’s conduct was sexually motivated and, secondly, material errors in the panel’s decision on sanction. Jay J dismissed the first ground. Reviewing the evidence and the panel’s findings the panel was entitled to decide that PC Javeed’s actions were not sexual. The judge, at [67], agreed with counsel for the officer that section 78 of the Sexual Offences Act 2003 applied by analogy. Some actions are inherently or by their very nature sexual; see section 78(a); others *may* be sexual, depending on all the circumstances, including the inferences to be drawn from any explanation, or the lack of it, given by the individual in question; see section 78(b). The panel found that PC Javeed had no malign intentions; he was intending to be friendly but he went too far in his tactile behaviour towards Miss A in a professional setting. However, on ground 2, the court had concerns about the panel’s reasons for imposing the sanction it did [82]. There was a tension between passages in the panel’s decision. A panel properly directing itself could reach the same conclusion as did this panel, namely a final written warning for 5 years, or it could decide to dismiss PC Javeed. The outcome remained uncertain, and accordingly the court would allow the application for judicial review and remit the sanction for further consideration but on the basis that the panel’s finding of fact stood and ground 1 had failed.

[Note: Section 78 of the Sexual Offences Act 2003 provides: “*For the purposes of this Part (except sections 15A and 71), penetration, touching or any other activity is sexual if a reasonable person would consider that – (a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.”*]

**Striking Off**

**82. *Farquharson v. Bar Standards Board* [2022] EWHC 1128 (Admin)**

*Barrister – conviction for sexual assault – two years suspension substituted for disbarment*

Following a hearing before a tribunal of the Bar Tribunal and Adjudication Service, the appellant was found guilty of three offences of professional misconduct, and was disbarred. Charge 1 arose from his plea of guilty in the magistrates’ court to sexually assaulting a female colleague contrary to section 3 of the Sexual Offences Act 2003 for which he was sentenced to six months imprisonment, suspended for 18 months. In a night club the appellant had repeatedly assaulted the complainant. Charges 2 and 3 related to text arose of text messages he sent to the complainant and another asking them to respond to a scripted message from him with an untruthful account of the events. It was accepted that the appellant’s aim in sending the text messages was to construct a false narrative to pacify his then partner, rather than to mislead a police investigation. Heather Williams J dismissed the appeal on misconduct but in allowing the appeal as to sanction said that there were mitigating factors to depart from the starting point of disbarment in the case of a serious sexual assault. The mitigating factors included the appellant’s admission and guilty plea; his previous good character and clean disciplinary record; his co-operation with the police, his chambers and his self-referral to the BSB; this was a single incident (albeit a serious one); and his genuine remorse. The appellant had also taken very substantial steps to voluntarily address his conduct, and undergone extensive steps to address his medical conditions. There had already been considerable impact on him. He had not practised as a barrister for 19 months, had suffered a consequential loss of income and his relationship with his long-term partner and the mother of his children had broken down. As to charges 2 and 3, the behaviour had occurred in the appellant’s personal life under article 8 ECHR and had been out of character. There was no reference to article 8 in the tribunal’s written reasons. A two-year suspension was substituted for charge 1, to run concurrently with a suspension period of four months and two months for charges 2 and 3.

**83. *Golden v. Nursing and Midwifery Council* [2023] EWHC 619 (Admin)**

*Midwife practising in France – unregistered and no insurance – erasure upheld*

The appellant was an independent midwife who was contacted by a pregnant woman to be her private midwife for her planned birth in France. She did not wish to use local French hospitals or State midwifery services or the private French midwifery services but instead wished to have a home birth in her house in France with an English registered midwife. This was her first child. She entered into a contract with the appellant, which was drafted by him, for him to provide midwifery services, and paid him £3,00 plus travel expenses. They eventually fell out. She went to a French hospital where she gave birth to a live, healthy baby. The charges which the NMC laid against the appellant, and which the committee found proved, included practising midwifery in France without requesting leave to provide midwifery services from the French Order of Midwifes (charge 8), and practising midwifery in France without having in place appropriate insurance (charge 9). The committee struck the appellant off the register after a disciplinary hearing. Dismissing the appellant’s appeal, Ritchie J said, at [110], that the sanction of erasure from the register was appropriate and inevitable, in particular because the appellant’s uninsured, unregistered, black-market midwifery, carried out under a poorly drafted contract was a danger to the mother and her child. Fortunately, no personal injury was suffered because the mother paid for a private scan and the birth was then induced t a French hospital.

**84. *Re JR168 and Another’s Application (Suspension of police constables)* [2023] NIKB 83**

*Decision to suspend first applicant and to re-position second applicant – decisions unlawful – Police (Conduct) Regulations (Northern Ireland) 2016, reg 10(4)*

The applicants were two probationary constables in the Police Service of Northern Ireland (the respondent). The issues at the heart of the proceedings arose from an incident to commemorate the 29th anniversary of a notorious shooting attack which occurred in Belfast during the time of ‘the Troubles’. Police officers including the applicants went to the commemorative gathering and the first applicant, accompanied by the second applicant, made an arrest of a male person who was later released without charge. A decision was made by the deputy chief constable to suspend the first applicant and to re-position the duties of the second applicant. Both decisions were later lifted. Although the practical effect of the decisions had dissipated, given that both decisions had been lifted upon review, Scoffield J allowed the applicants’ claim for judicial review and an order to quash the decisions and the removal of those decisions from their records. At [74] the judge said that at the core of the case lay the conclusion of the respondent that the public interest required that the first applicant should be suspended under regulation 10(4)(b)(ii) of the Police (Conduct) Regulations (Northern Ireland) 2016. Regulation 10(4) provides that the ‘appropriate authority’ shall not suspend a member unless redeployment is not appropriate (reg 10(4)(a)); *and* either the effective investigation of the case may be prejudiced unless the member concerned is so suspended (reg 10(4)(a)(i)), or ‘having regard to the nature of the allegations and any other considerations, the public interest requires that he should be so suspended’ (reg 10(4)(b)(ii)). Based on the consideration in the case, the court was persuaded that the respondent imposed suspension in the first applicant’s case because of the threat (whether real or perceived) that, if it did not do so, republican support for policing would be withdrawn:[89]. The re-positioning decision in relation to the second applicant should be quashed on a similar basis. The respondent was materially influenced by the threat (real or perceived) that one party would leave the Policing Board unless the duty status of both officers who attended at the commemorative event was charged (with at least one instance of suspension required:[94].

**Voluntary Erasure**

**85. *Re Danielle O’Neill and Michael McHugh and a decision of the Medical Practitioners Tribunal Service of 1 October 2021* [2023] NIKB 46**

*Fitness to practise allegation referred by GMC to MPTS – voluntary erasure application by doctor – application heard by tribunal as preliminary issue before hearing commenced – lack of jurisdiction – GMC (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations 2004, reg 3(8)*

On 6 February 2019, case examiners at the GMC decided to refer allegations of deficient professional performance against Dr Michael Watt, a consultant neurologist with the Belfast Health and Social Care Trust’s Neurology Service, to the MPTS pursuant to rule 8(2)(d) of the GMC (Fitness to Practise) Rules 2004. Numerous serious concerns came to light about a number of aspects of Dr Watt’s clinical practice including the performance of epidural blood patch procedures for chronic headache in a large number of both NHS and private patients and this led to a recall of patients. Following the referral Dr Watt sought to apply for voluntary erasure from the medical register under the GMC (Voluntary Erasure and Restoration following Voluntary Erasure) Regulations 2004 (the VE Regulations). The hearing dates for Dr Watt’s fitness to practise hearing were scheduled to take place over three sessions. Session 1 would run from 27 September until 1 October 2021 and would sit for the purposes of dealing with Dr Watt’s voluntary erasure application only. On 1 October 2021, following a hearing in private, the tribunal granted Dr Watt’s application for voluntary erasure pursuant to the VE Regulations. The applicants, who were former patients of Dr Watt, commenced judicial review proceedings to quash the decision of the decision of the GMC to refer the voluntary erasure application to the tribunal and the tribunal’s decision to grant voluntary erasure. The High Court, granting the application, said that the core provision relating to processing of such applications was regulation 3 of the VE Regulations. The general theme of the regulations is that applications once received are determined by the registrar of the GMC, case examiners, an investigation committee or a tribunal arranged by the MPTS. The particular body that in fact determines the voluntary erasure application is largely dictated by the question of whether there are outstanding fitness to practise investigations or proceedings involving the medical practitioner involved. Rule 3(8) of the VE Regulations states that where a fitness to practise hearing before the MPTS *‘has commenced’* the registrar shall refer it to the MPTS for them to arrange for it to be determined, and the application shall be determined by the tribunal accordingly. In the instant case, the substantive fitness to practise hearing had not begun or *‘commenced’* under the GMC (Fitness to Practise) Rules 2004 at the time the tribunal determined Dr Watt’s application for voluntary arrangement. The hearing had been listed to determine Dr Watt’s voluntary erasure application as a preliminary issue and before the actual substantive hearing commenced. Accordingly, the tribunal had lacked jurisdiction to determine the application on 1 October 2021.

**Waiver of Privilege**

**86. *Mond v. Insolvency Practitioners Association* [2023] EWHC 477 (Ch)**

*Privileged material disclosed for determination of preliminary issue – whether disclosure waived for purposes of substantive hearing*

The claimant was an insolvency practitioner licensed by the defendant to accept appointments as supervisor of individual voluntary arrangements (IVAs). Following a hearing before the defendant’s disciplinary committee in May 2018, at which he was represented by counsel, three allegations of a complaint were found proved concerning the claimant’s role in various IVAs in creating a scheme designed to avoid the requirement to obtain creditor approval for certain payments out of IVA estates. The disciplinary committee imposed a severe reprimand, a fine of £500,000 and a costs order of £208,369.51. The claimant appealed to the appeal committee of the defendant. Having changed counsel he sought permission to amend his grounds of appeal to allege that his former counsel had a serious conflict of interest and was able to act in the claimant’s his best interests because his former counsel had been heavily involved in advising on the setting up of the arrangements to which the complaint related. The claimant stated expressly that he was only waiving privilege for the purposes of the appeal and not beyond. On this basis the claimant disclosed over 200 documents comprising communications and notes between himself and his former counsel. The appeal committee allowed the appeal and set aside the sanction and costs and remitted the complaint back to the disciplinary committee to be heard by a differently constituted panel. The parties were in dispute about how the privileged material before the appeal committee should be dealt with on the referral back of the complaint to the disciplinary committee.

The claimant issued proceedings for a declaration that he had not waived privilege as to the disclosed material. The defendant put in a defence, and applied for summary judgment on the basis that privilege had been waived. It was common ground that the subjective intention of the person disclosing privileged material was not of itself determinative in ascertaining the proper limits of any waiver. In deciding whether the claimant had a reasonable prospect of success in showing that privilege had been maintained, the court considered *B v. Auckland District Law Society* [2003] 2 AC 736, *Scottish Lion Insurance Co Ltd v. Goodrich Corporation* [2011] SC 534, *R (Belhaj and anor) v. Director of Public Prosecutions (no 2)* [2018] 1 WLR 3602, *British Coal Corp v. Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113, *Berezovsky v. Abramovich* [2011] EWHC 1143 (Comm), *Property Alliance Group v. Royal Bank of Scotland plc* [2015] EWHC 3272 (Ch), *Pickett v. Balkind* [2022] 4 WLR 88 and *Kyla Shipping Co Ltd v. Freight Trading Ltd* [2022] EWHC 376 (Comm). Holding that the test for summary judgment was not met, the court said that (1) in this case, the limits of the waiver were clearly and expressly stated, and the claimant’s statement that it was limited to the appeal was not contested at the time or indeed at any stage of the appeal committee process; (2) the claimant disclosed the privileged material to vindicate his article 6 rights because he had not received a fair trial; it was not to obtain a litigation advantage; and (3) the further disciplinary committee hearing was capable of taking place without the privileged material. The claimant had a reasonable prospect of showing at trial that the declarations he seeks have practical utility if his submissions on limited waiver were right.

**Witnesses**

**87. *Freeman v. General Medical Council* [2023] EWHC 45 (Admin)**

*Witness called by GMC walking out during cross-examination – witness not a complainant but called to rebut doctor’s case – tribunal deciding not to exclude witness’s evidence – decision not wrong or unjust to appellant*

See further Chapter 91 (Supplement), para 89.17A.

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