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ARDL
Association of Regulatory & Disciplinary Lawyers

CONTENTS

PAGE 1 — LEGAL ASSESSORS – THE GUARDIAN OF A FAIR HEARING — MARION SIMMONS QC

PAGE 2 — DEALING WITH THE UNWELL RESPONDENT — DAVID GOMEZ

PAGE 3 — LEGAL UPDATE — KENNETH HAMER

PAGE 5 — FORTHCOMING EVENTS

LEGAL ASSESSORS – THE GUARDIAN OF A FAIR HEARING

The rules for disciplinary tribunals often provide for the appointment of legal assessors in addition to tribunal members. What is the role of the legal assessor?

The legal assessor is not a member of the Tribunal. He should therefore not be involved in the decision making process. His role is to provide administrative assistance to the tribunal, to give it advice on law and practice and where the Legal Assessor takes a full note of the evidence, to remind the tribunal of the evidence if so requested by the tribunal. He should not express his view as to the evidence or the outcome and he should be careful not to use language which may create a perception as to how he would have determined the matter if he were the decision-maker (See *Dr Mohamed Shaker Haikel v The General Medical Council* PC: decision 4th July 2002).

Transparency is all important. The parties are entitled to know the advice which the tribunal has received as to the law and as to practice and to have an opportunity to make submissions in respect of those matters. They are also entitled to hear the note of any evidence recited to the Tribunal so that they can corroborate it with their own notes or otherwise challenge the Legal Assessor's note of evidence, if it does not accord with their own notes. The Legal Assessor should have the opportunity to consider whether his advice to the Tribunal should be changed in the light of any such submissions by the parties (See *Nwabueze v The General Medical Council* [2000] 1 WLR 1760 at 1775G).

It is the practice of some tribunals to permit the Legal Assessor to retire with the tribunal during its deliberations. However careful the Legal Assessor may be not to interfere in the deliberations, the parties (and the public) cannot be satisfied that the decision was not influenced in some way by the Legal Assessor, if he is present during the tribunal's deliberations (See *Steven James Walker v The General Medical Council* PC: unreported 5th November 2002). Did the Legal Assessor frown at an appropriate moment, did he cough to indicate that the members should think again, did he ask them a question which might indicate a thought process which the members did not have themselves? Did he express an opinion on how he would decide the facts of the case or as to what in his opinion the outcome should be? If the practice of retiring with the tribunal exists it should be deprecated since it obscures the independence of the tribunal as the decision making body (Magistrates Court Clerks and Clerks to Tribunals under the auspices of the Lord Chancellor's Department absence themselves during the deliberations of the tribunal. See *Practice Directions (Justices: Clerk to Court [2000] 1 WLR 1886)*). Where there is a challenge as to the circumstances which occurred between the Tribunal members and a Legal Assessor the Court may consider evidence from the Tribunal members and from the Legal Assessor as to what took place in what otherwise would be in camera deliberations. Their recollections may however differ. In order to avoid conflicting recollections it has been recently suggested by the Privy Council that consideration should be given to

the adoption of a practice of making a record of interventions and responses by Legal Assessors in the course of in camera deliberations of a Tribunal (see *Steven James Walker v The General Medical Council* PC: unreported 5th November 2002). This suggestion illustrates the practical difficulties which arise if Legal Assessors are present during what should be and what should be preserved as confidential deliberations of the Tribunal.

Any comments which the legal assessor makes concerning the case should be made to the Tribunal in the presence of the parties and the parties should be given an opportunity to make submissions on the Legal Assessor's comments. It is for the tribunal to resolve any dispute between the Legal Assessor and the parties. Where there is such a dispute, the Tribunal may find it helpful to put questions to the Legal Assessor and the parties representatives so as to ascertain the differences between them and the reasons for those differences. In so doing the essence of the dispute should be clearly identified. It may be helpful if the Legal Assessor and the parties' representatives agree the issue or issues which arise between them and on which the Tribunal must itself come to a decision. It follows, of course, that the legal assessor should never discuss the case privately with one or more members of the tribunal.

Some disciplinary tribunal rules specify that the legal assessor should draft the decision and reasons. Other tribunals adopt a practice of the Legal Assessor or the Chairman drafting the reasons which are then signed solely by the Chairman. In other tribunals the Chairman ensures that the members of the tribunal are involved in, and agree to, the wording of the reasons.

The decision, is the decision of the tribunal members collectively and the reasons for the decision are their reasons. The tribunal members must analyse the facts and circumstances and must formulate their reasons when reaching their decision. The decision is based on that analysis and the reasons for the decision flow from that analysis. There is a logical progression from analysis to decision through to the reasons for the decision. The reasons as recorded must be the reasons of the members of the Tribunal and not of the Chairman alone or the Legal Assessor. It is therefore important that all the members of the tribunal are comfortable with the wording of the reasons. It is the responsibility of the person charged with the drafting of the reasons to ensure that they represent the reasons of all the members of the tribunal. If the Legal Assessor is given the responsibility of preparing the decision and reasons, he must be satisfied that he is recording the reasoned decision of the Tribunal.

Where one or both parties are not legally represented and the tribunal comprises all non-lawyers, the legal assessor has an important role as the guardian of a fair hearing in accordance with the law. Where the tribunal does not include a lawyer, the legal assessor may perform a useful role since the legal assessor has the expertise to focus on the issues and the relevant law and practice and to assist the tribunal to ensure that the hearing is fair between the parties. However where both parties are legally represented the legal assessor's role should be otiose.

So whether you are sitting as a Tribunal member, or acting as a legal representative of one of the parties, you should watch the legal assessor to make sure that he is performing the role he was appointed to perform – i.e: as a guardian of a fair hearing.

Marion Simmons QC

Barrister : 3/4 South Square, Gray's Inn, WC1R 5HP. Vice-Chairman of the Appeals Committee of the ICAEW. Member of the Mental Health Review Tribunal (Restricted Panel). Panel Member of the Bar Disciplinary Tribunals

Dealing with the unwell Respondent

The Respondent's ill health may impact on disciplinary proceedings in three ways:

(a) ability to attend a hearing;
(b) fitness to plead;
(c) application to transfer the case to a health committee.

The right to a fair trial in Article 6 of the European Convention on Human Rights has been construed to include the right of the accused to be present so that he may participate effectively in the conduct of his case: *Ekbatini v Sweden 13 EHRR 504*. Nevertheless, most disciplinary procedures include a discretion to proceed in the absence of the defendant. In *R v Jones (HL TLR 21/2/02)* Lord

Bingham noted that "the Court had never found a breach of the Convention where a defendant, fully informed of a forthcoming trial, had voluntarily chosen not to attend, and the trial had continued. There was nothing in the Strasbourg jurisprudence to suggest that a trial of …. defendant held in his absence was inconsistent with the Convention."

Where the absence of the Respondent in disciplinary proceedings is due to genuine illness, however, the Committee must exercise its discretion sparingly. In *Brabazon-Drenning v United Kingdom Central Council for Nursing, Midwifery and Health Visiting (CO/490/2000)* the Divisional Court stated that "save in very exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing when there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of the disciplinary process."

Applications for adjournment on the grounds of genuine ill health then, even if made late in the day, should not be dismissed out of hand. However, the Committee has always to balance competing interests. In deciding whether or not to grant an adjournment to an ill Respondent, the Committee is "bound to have regard" to the undesirability of requiring an elderly and unwell witness to attend on another occasion: *Baba v GMC (PC Appeal No 16 of 2000*).

Having attended the hearing, the Respondent's ill health may raise concerns about his fitness to stand trial. In *Baba*, the Privy Council set out a three stage test:

1. Can the Respondent apply his mind to the issues?
2. Can the Respondent appreciate the effect of the advice he is receiving?
3. Can the Respondent give instructions accordingly?

In order to avoid the risk of injustice, the Respondent must satisfy all three conditions before being judged fit to stand trial. This must be determined by the Committee as a preliminary issue before it goes on to hear the evidence.

Some rules of procedure contain a provision to transfer a case from the Disciplinary Committee to the jurisdiction of a Health Committee. Even where the Respondent satisfies all three conditions, his ill health may be such that the Committee may, on the application of the Defence or of its own motion, wish to exercise this discretion. In coming to a view on this issue, the Committee will have to weigh a number of competing factors, including the effect of the disciplinary proceedings on the Respondent's health; the public interest in holding a full and public inquiry into the allegations made; the need to protect the public and the need to maintain confidence in the profession. Where there is a complainant, the Committee must also take into account his legitimate expectation that a full inquiry will be held. Where the decision is made to transfer the case to the Health Committee, consideration needs also to be given to the stage at which that transfer should be made. This might be at the outset, before evidence is heard, or at the conclusion of the fact finding stage.

In the recent case of *Crabbie v GMC (PC Appeal No 7 of 2002)*, the Privy Council held that the question of whether a case should be transferred to the Health Committee should be considered in conjunction with the question of whether or not the case is, or may be, one which calls for erasure from the register. The question of erasure must be considered *first*. If the case is such that erasure may be the appropriate sanction, the case ought not be transferred to the Health Committee. This particular decision rested on the fact that the GMC's Health Committee does not have the power of erasure, only suspension. However the authority is of general application in considering how a disciplinary committee should exercise its discretion in the public interest.

David Gomez, Field Fisher Waterhouse

Legal Update

Kearns & Others v. General Council of the Bar [2002] 4 All ER 1075. The issue in this case was whether communications between the Bar Council and the Bar on matters of compliance with professional rules attracted qualified privilege without the need to go into the details. The head of the Bar Council's Professional Standards and Legal Services Department sent a letter to all heads of chambers and senior clerks wrongly stating that the claimants

were not Solicitors, and that it would be improper for a barrister to accept work from them unless certain specified conditions were satisfied. Eady J in striking out the action prayed in aid the principle that in the absence of malice (none was alleged) this was a classic case of qualified privilege based on an existing relationship between a regulatory body and its members, and on a common and corresponding interest in the subject matter of the letter. There is a common and corresponding interest between a regulatory or disciplinary body and the rightful recipients of such a circular which gives rise to the protection of privilege in itself. What matters is the relevance of the subject matter of the circular, and the established relationship between the recipient and the regulatory or disciplinary body sending out the letter.

Miller v. Law Society [2002] 4 All ER 312. The court was required to determine whether the claimant solicitor could bring a claim against the Law Society for breach of a private law duty of care arising from the conduct of an investigation leading to an intervention into his firm. The Deputy Judge answered "No", but on 24th June 2002 Chadwick LJ granted permission to appeal.

Based on the investigations by an accountant appointed by the Council of the Law Society, on 8th October 1997, the Office for the Supervision of Solicitors decided to intervene in Mr Miller's practice. This marked the beginning of a lengthy period during which Mr Miller was unable to work as a solicitor. On 4th February 1999, the Solicitors' Disciplinary Tribunal found that Mr Miller had not acted in a deliberately dishonest manner, but because of the state of his books of account the tribunal imposed on Mr Miller an indefinite suspension from practice as a solicitor, and ordered him to pay the costs of and incidental to the application and inquiry to include the costs of the Law Society investigating accountant. The Law Society subsequently served on Mr Miller a statutory demand for these costs which he applied to set aside on the grounds that the Law Society would not have intervened in his practice had the accountant's investigation been competently undertaken.

The Court held that Mr Miller's sole rights were confined to a statutory right of appeal to the High Court against the original intervention, and accordingly he could not bring a claim against the Law Society for breach of a private law duty of care arising from the conduct of the investigation. Accordingly the statutory demand stood. This is consistent with the decision of the Court of Appeal in ***Collins v. Office for the Supervision of Solicitors (June 21st 2002, unreported)*** refusing permission to appeal against the striking out of a private law claim brought by a former client against the Law Society alleging an assumption of responsibility and negligent investigation by the OSS into his affairs by his former Solicitor.

R (on the application of Norwich and Peterborough Building Society) v. Financial Ombudsman Service Limited [2002] The Times November, 14th 2002. Norwich and Peterborough Building Society sought judicial review of the decision of the Building Society's Ombudsman, the predecessor of the Financial Ombudsman Service Limited, in which the ombudsman had held that the society had unfairly treated a customer with two accounts by paying a lower rate of interest on one account where the terms were less onerous than the other account. The ombudsman had ordered the Society to pay the customer the difference between the two interest rates, together with £30 representing both inconvenience and further loss of interest.

The divisional court held that the ombudsman's conclusion that the Society had been unfair to its customer was not tainted by any error under the Banking Code 1998, and the ombudsman was entitled to develop criteria as to what constituted unfairness. Only if he committed such errors of reasoning as to deprive his decision of logic, could his adjudication be seen to be legally irrational. The court should be very wary of reaching such a conclusion. The decision shows that the court will only interfere with the ruling by an ombudsman where his determination and findings are legally irrational.

R (on the application of Davis & Others) v. Financial Services Authority [2002] All ER (D) 270 (Dec). In refusing the Claimants' renewed application for permission to apply for judicial review of the decision of the Financial Services Authority for the issue of a prohibition notice under Section 56 of the Financial Services and Market Act 2000, Lightman J held that Section 56 afforded both regulatory and disciplinary powers. Section 56 provides that if it appears to the FSA that an individual is not a fit and proper person to perform

functions in relation to a regulated activity carried on by an authorised person, the FSA may make a prohibition order prohibiting him from performing any one or more functions.

Lightman J observed: "It [the section] enables the FSA to make a prohibition order although there is no misconduct if otherwise it is clear that the individual is not a fit and proper person. Such exercise of power is purely regulatory. But it also enables the FSA in a case of serious misconduct to afford the necessary protection to the public which is not available under section 66." His Lordship went on to hold that, in the instant case, the seriousness of the charges were such that, if established, an exercise of jurisdiction under Section 56 would be legitimate to involve the regulatory power of a prohibition notice if the Claimants were unfit, and because of the risk which they allegedly presented to confidence in the market generally.

The case is important because it shows that in circumstances where for any reason proceedings for misconduct may not be available, the issue of an alternative remedy such as a prohibition notice may be a legitimate regulatory and disciplinary exercise to restore confidence generally.

R (on the application of Redgrave) v Commissioner of Police for the Metropolis [2003] EWCA Civ R sought judicial review of the decision of the police disciplinary board to instigate disciplinary proceedings against him. A criminal charge against R of perverting the course of justice had already been dismissed at the committal stage in the magistrates' court.

The Court of Appeal rejected R's submission that section 104 of the Police and Criminal Evidence Act 1984, which before being repealed stated that an officer who was convicted or acquitted of a criminal offence was not liable to be charged with a disciplinary offence which was in substance the same, encompassed a common law principle which continues to operate. The Court stated that no aspect of the double jeopardy rule had ever applied to tribunal proceedings under common law. Discharge of a defendant in committal proceedings before the magistrates was not equivalent to an acquittal in the context of the double jeopardy rule. However, even had there been a criminal acquittal, the double jeopardy rule had no application save to other courts of competent jurisdiction and there was therefore no bar to the bringing of disciplinary proceedings in respect of the same charge.

KENNETH HAMER, HENDERSON CHAMBERS

FORTHCOMING EVENTS

20th March 2003 – Inaugural Dinner

Time: 7pm (reception) 7.30pm (dinner)

Venue: HAC, Armoury House, City Road, London E1

Ticket Price: £55 (members) £72 (guests) 1 guest per member but limited ticket availability

Dress: Black Tie

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5th June 2003 – Seminar and Open Forum – Data Protection and Disclosure

Venue: Herbert Smith, Exchange House, Primrose Street, London, EC2A 2HS

Details to be confirmed in due course

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8th July 2003 – Summer Party at Inner Temple Garden

Further details to be confirmed

REQUEST FOR COMMENTS AND CONTRIBUTORS

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact any of the members of the editorial committee with your suggestions. The editorial committee is:

ANGELA HAYES, LAWRENCE GRAHAM
(angela.hayes@lawgram.com)

TONY WOODCOCK, STEPHENSON HARWOOD
(tony.woodcock@shlegal.com)

CALUM BURNETT, ALLEN & OVERY
(calum.burnett@allenovery.com)