Judicial Review

1 October 2021

Fenella Morris QC

Judicial Review of Disciplinary Proceedings

Unusual but not extinct

Early challenges

Changes to policy or process

R (BMA) v GMC

Early challenges

The decision to bring proceedings

Baker Tilly UK Audit LLP v FRC

- Appeal remains an option
- Public interest in hearings
- Evidence in full at hearing
- Panel could stay for abuse
- (In this case) panel could award costs

Early challenges

Decision to prosecute after a decision not to do so

- Legal error in application of rules
- Legitimate expectation

Early challenges

Challenges by complainants or other interested parties

Part way challenges

R (Husband) v GMC

- No inflexible rule against such challenges
- Appropriate where no disruption to process
- And where may shorten hearing

Challenges to final decisions

Fundamental flaws

R (Ngole) v University of Sheffield

University's position was untenable from the start – blanket ban not proportionate

Challenges to final decisions

Deference

R (Young) v GMC

Not where

- rule provides important protection to individual
- aimed at finality
- apparently aberrant decision
- public interest considerations not dependent upon professional expertise

End

Social Work England

Registrant Engagement

Holly Bontoft
Head of Legal (Senior Lawyer)

Before and During Registration

Burden on applicant during registration process
Rule 22, Registration Rules: *"An applicant must provide…"*

Engagement may be required by standards
Social Work England Professional Standards 6.6: *"Declare to the appropriate authority and Social Work England anything that might affect my ability to do my job competently or may affect my fitness to practise, or if I am subject to criminal proceedings or a regulatory finding is made against me, anywhere in the world."*

SRA Code of Conduct 7.3: *"You cooperate with the SRA, other regulators, ombudsmen, and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services."*

Before and During Registration

Adeogba v GMC [2016] EWCA Civ 162

"It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed."

“There is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

Enforcement powers

Most regulators will have their own enforcement powers

Social Workers Regulations 16(4): *"Where a registered social worker has failed to provide information or evidence… the regulator may appoint… adjudicators to determine whether it is necessary, for the protection of the public or in the best interests of the registered social worker, to suspend or remove their entry from the register."*

Section 35A(1A) Medical Act 1983: *"The Registrar may by notice in writing require a practitioner, within such period as is specified in the notice, to supply such information or produce such documents as the Registrar considers necessary…"*

Practicalities

The disciplinary process

R (Kuzmin) v General Medical Council [2019] EWHC 2129 Admin

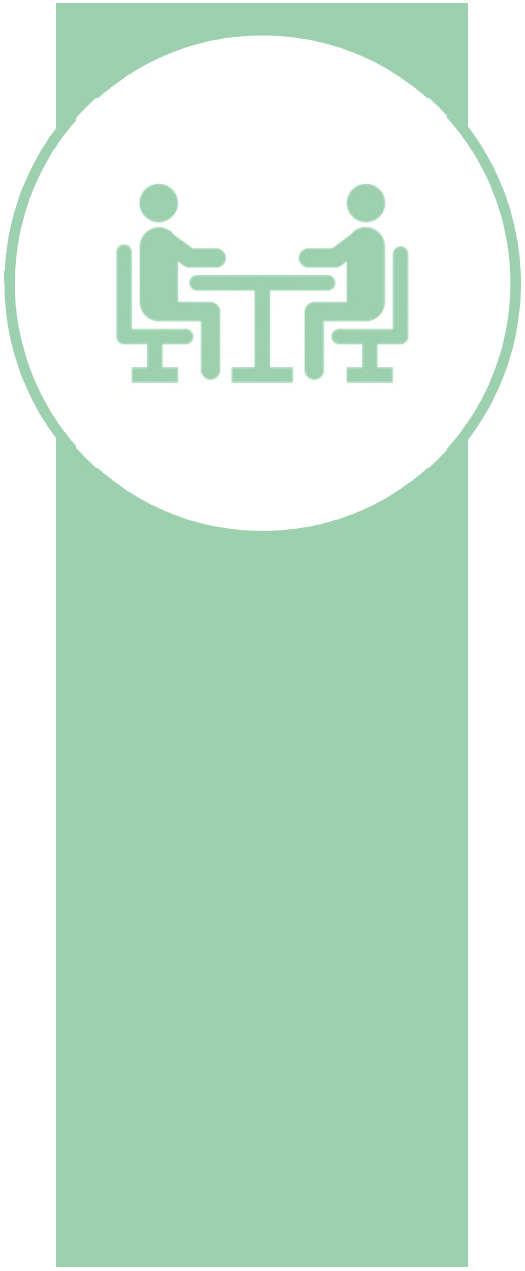
"… whilst emphasising that whether an adverse inference is drawn will be highly dependent upon the facts of the particular case, it seems to me that, generally, no inference will be drawn unless:

1. *a prima facie case to answer has been established;*
2. *the individual has been given appropriate notice and an appropriate warning that, if he does not give evidence, then such an inference may be drawn; and an opportunity to explain why it would not be reasonable for him to give evidence and, if it is found that he has no reasonable explanation, an opportunity to give evidence;*
3. *there is no reasonable explanation for his not giving evidence; and*
4. *there are no other circumstances in the particular case which would make it unfair to draw such an inference."*

The disciplinary process

General Medical Council v Udoye [2021] EWHC 1511 (Admin)

"It is clear that there is no proper legal basis for making the decision on whether to draw an adverse inference turn on an assessment of all the evidence apart from that inference. The satisfaction of the requirements of procedural fairness in Kuzmin to determine whether it is appropriate to draw an adverse inference should not be confused with the substantive evaluation of all the evidence, including how much weight to give to that inference in any particular case. Accordingly, the decision on whether an adverse inference should be drawn in any particular case, and if so how much weight to give to that factor, should not be made after all the evidence on the allegation has been evaluated and findings made."



The practicalities

- Differences between professions and level of support
- Effect of remote hearings
  - Ability to attend
  - Willingness
- New routes to engagement

Any questions?

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Regulation and the Twittersphere

James Stuart
Barrister
Lamb Chambers

Introduction

- 3 REGULATORS' SOCIAL MEDIA GUIDANCE
    - SRA
    - BSB
    - GMC
- 3 CASE STUDIES
    - SOLICITOR D
    - BARRISTER H
    - DOCTOR S
- 3 COMMON TWITTERSPHERE ISSUES
    - THE USE OF LANGUAGE
    - "LINKING BACK"
    - FREEDOM OF SPEECH

Social Media Guidance - SRA

2019 Use of Social Media and Offensive Communications

- Emails, texts and social media networks
- “Offensive, derogatory or inappropriate”
- Sent in a work context or if sender is identifiable as SRA regulated
- Even if acting in a personal capacity
- Tend to damage public confidence
- Dishonesty, discrimination, harassment or
- Lack of Integrity or independence or undermine rule of law
- The nature of the communication – no need for proof of viewers
- Not the SRA’s role to sanction fair comment or opinions
- Re-tweeting (without making clear disagreement)
- Presumption of account holder authorship
- Mitigating and Aggravating Factors

Bar Standards Board

BSB Handbook Social Media Guidance 2019

- Anything you publish online
- Posting material, sharing content, promotion or networking
- Twitter, YouTube, Facebook, LinkedIn & internet forums
- In a professional or personal capacity
- Could be linked back to your status as a barrister
- Comments designed to demean or insult
- Honesty & integrity (CD 3) – Unlawful discrimination (CD 8)
- Confidentiality of client's affairs – inadvertent revealing

General Medical Council

Doctors' use of social media – GMC 2013

- Treat colleagues fairly and with respect (36)
- Public trust (65) Patient confidentiality (69)
- Blogs, internet forums, content communities, social networks
- Privacy
- Positive benefits of social media
- Maintain social boundaries
- Maintain confidentiality – do not discuss individual patients
- Respect colleagues – bully, harass or comment
- Anonymity – identify yourself by name
- Conflicts of interest

Solicitor D – 2018 – Suspended for 18 Months

Twitter

Partner – 32 yrs solicitor- aged 71 – firm's compliance officer

Caused reputational damage to profession – lacked integrity
14 month period

Offensive words & hostility to Islam, Judaism & Catholicism

"women should carry pepper spray….to rid the world of Islam"
"Muslims should be put in a work camp …. educate or get rid"
Sexual crimes committed by members of Catholic church
Jewish Global conspiracy to rule the world

Admitted guilt – removed herself from social media – "heat of the moment" –
Genuine remorse and a degree of insight

Solicitor H – 2019 – Suspended for 2 Years

Twitter and Internet Blog

34 years call – respected family law specialist

Undermining public trust and confidence

Series of tweets and a blog 2017-2019
“Twitter spat” with another barrister over sexual predators

Seriously offensive, abusive and publicly disparaging towards the other barrister
Obscene and seriously offensive language

Disparaging of the BSB’s regulatory process – and its then director general

Admitted 2 charges - remorse and insight and health issues
[Later Appeal on health grounds [2021]EWHC 28 (Admin)]

Doctor S – 2016 – 2 Month Suspension

Twitter

Aged 37 – Hospital Consultant

188 expletive-filled Twitter rants venting frustration at people with trivial problems “ambulatory neurotics crippling the NHS”

Described by the Daily Mail as “UK’s most un-PC doctor”

“reasonable and well-informed member of the public would not expect a doctor to air such views in a public forum”

Apologised

The Use of Language

"Twitter is a casual medium" – *Stocker [2019] UKSC 17*

Tweets are supposed to be read quickly and analysed in a superficial way – *BSB-v-Diggins [2020]EWHC 467*

Changing public opinion of certain words over time

Acceptability of expletives in context

The "fine line" is not an appropriate or fair approach to disciplinary rules

Linking Back

Diggins –v- BSB [2020] EWHC 467 (Admin)

Status as a professional

Public methods of identifying individuals

Retrospective linking – the improper tweets and the identification

Anonymity

Deliberate Disguise

Authorship of social media accounts

Freedom of Expression

ECHR Art 10 (and Arts 8 and 9)

- Political Expression – Robust political discourse
- Religious expression – *R(Ngole) –v- Univ of Sheffield and CPC [2017] EWHC 2669*
- Personal Expression – Spats between professionals
- Legitimate Expression - *Diggins, Khan –v- BSB [2018] EWHC 2184*
- "Mere gossip"
- Standards apply legitimately outside the workplace – *R (Pitt & Tyas) –v- Gen. Pharmaceutical Council [2017] EWHC 809*
- Lack of Integrity? Wingate & Evans –v- SRA [2018] EWCA Civ 366
- How far should the Regulators go in policing "the Wild West" of Twitter

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What keeps regulators awake at night?

Juliet Oliver
Solicitors Regulation Authority
1 October 2021

Recent Headlines

- **Firms plead for Brexit deal as coronavirus leaves industry reeling** (Observer, 27 September 2020)
- **Rule of law under attack, says Law Society** (LSG, 15 September 2020)
- **Would you let a robot lawyer defend you?** (BBC news, 15 August 2021)
- **Should City Firms cut ties with fossil fuel giants?** (LSG, 27 August 2021)
- **Sexism, metoo and the legal profession** (the Times magazine, January 2020)
- **SRA begins money laundering clampdown with six firms fined** (LSG, 23 June 2021)

Impacts of the pandemic and wellbeing

- SRA resources: *Your Health, Your Career*
- Case cohort for reports of bullying, harassment and discrimination
- Thematic review into firm culture
- Working with others
- New guidance
  - Regulatory guidance and case studies
  - Best practice hints and tips
- Continuing work to promote EDI in profession and within the SRA's regulatory approach

Technology

- The effects of the pandemic on tech use are here to stay
  - 55% increased their use of technology; 35% adopted new tech
  - 90% said the changes will be permanent
- Risks and opportunities for regulatory objectives:
  - Lawtech skills not widespread, and these, and adoption, are not evenly distributed.
  - AI and machine learning; our work in AML
  - Regulators Pioneer Fund
  - Sandboxes and pilots
  - Collaboration and research

Anti money laundering

- 6516 firms supervised for AML purposes
- Dedicated team covering investigation, proactive supervision and policy specialists
- 85 firm visits, 168 desk-based reviews, 39 suspicious activity reports, 273 reports and 29 enforcement outcomes during the past year.
- Firm risk assessment exercise
- Thematic review of MLRO/MLCOs
- Government consultations:
  - Amendments to the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 Statutory Instrument 2022 - GOV.UK (www.gov.uk)
  - Call for Evidence: Review of the UK's AML/CTF regulatory and supervisory regime - GOV.UK (www.gov.uk)

MENTAL HEALTH AND THE IMPACT OF REGULATORY INVESTIGATIONS

Katie Costello,
Partner,
BLM

CARING FOR DOCTORS, CARING FOR PATIENTS: PROFESSOR MICHAEL WEST AND DAME DENISE COIA

- *"There is now much evidence for the beneficial effects of compassion on patient outcomes and on the wellbeing of those who provide care. Neglect, incivility, blaming and harassment have quite the opposite effects."*

- *"Our call to action is for all NHS leaders to lead with compassion. That is not only our challenge, it is our imperative."*

THE IMPACT OF COMPLAINTS PROCEDURES ON THE WELFARE HEALTH AND CLINICAL PRACTICE OF 7296 DOCTORS IN THE UK: BOURNE, WYNANTS ET AL, BMJ OPEN 2015

- *"Doctors with recent or current complaints have significant risks of moderate or severe depression, anxiety and suicidal ideation. Morbidity is greatest in cases involving the GMC."*

- *"This study suggests that the regulatory system we have in the UK has unintended consequences that are not just seriously damaging for doctors, but are also likely to lead to bad outcomes for patients. Our data suggests the impact of complaints of all kinds on doctors is often disproportionate to the issue being investigated."*

"Doctors should not have to sacrifice their lives for their profession. If they are to give their all to patients and make patients their first concern, then the quid pro quo is that the system (the NHS) cares for them and does everything morally, ethically and practically that it can to remove or, at the very least, reduce the causes of their distress."

PROFESSOR LOUIS APPLEBY – REDUCING STRESS FOR DOCTORS UNDERGOING AN INVESTIGATION, 2016

"Suicide is not confined to those who are known to be mentally ill – it can be those who are thought to be coping that are most at risk – so reducing risk is a task for the system as a whole."

CHANGES TO BETTER SUPPORT DOCTORS UNDER INVESTIGATION: GMC, DECEMBER 2020

1. Reducing impact on doctors
2. Increasing support for doctors
3. Be more sensitive

"We have received positive support from doctors who have been investigated since we made the changes, and plan to continue to seek that feedback".

ANONYMOUS GP, SPEAKING TO THE BMJ 2021

"It affected every grain of me in terms of what I did in the workplace. I ask myself, would I have had the resilience to persevere knowing how long this process would take?"

GMC V DR X [2019] EWHC 493 (ADMIN)

"On the very particular facts of this case, this risk [suicide] overwhelms the public interest which informs the duties of the GMC, and that accordingly, publication in the proposed form would constitute a breach of Dr X's Right to Life under Article 2" – Mr Justice Soole.

ADAM KAY – THIS IS GOING TO HURT

"Even though they've got a stethoscope round their neck and a decent line in gallows humor, they're still just that teenager who arbitrarily put a tick next to "medicine" on their UCAS form. Just a human, as fragile as anyone."


CLEAR ▸ CONCISE ▸ CONNECTED

REGULATION

ARDL

Theresa Thorp
Head of Regulatory Enforcement

Regulation in Numbers

874
Reported Concerns
Of which 376 Complaint investigations

389
Regulatory Reviews
Excl. SCSI and ARMA audits

129
Panel hearings

1660
Sanctions

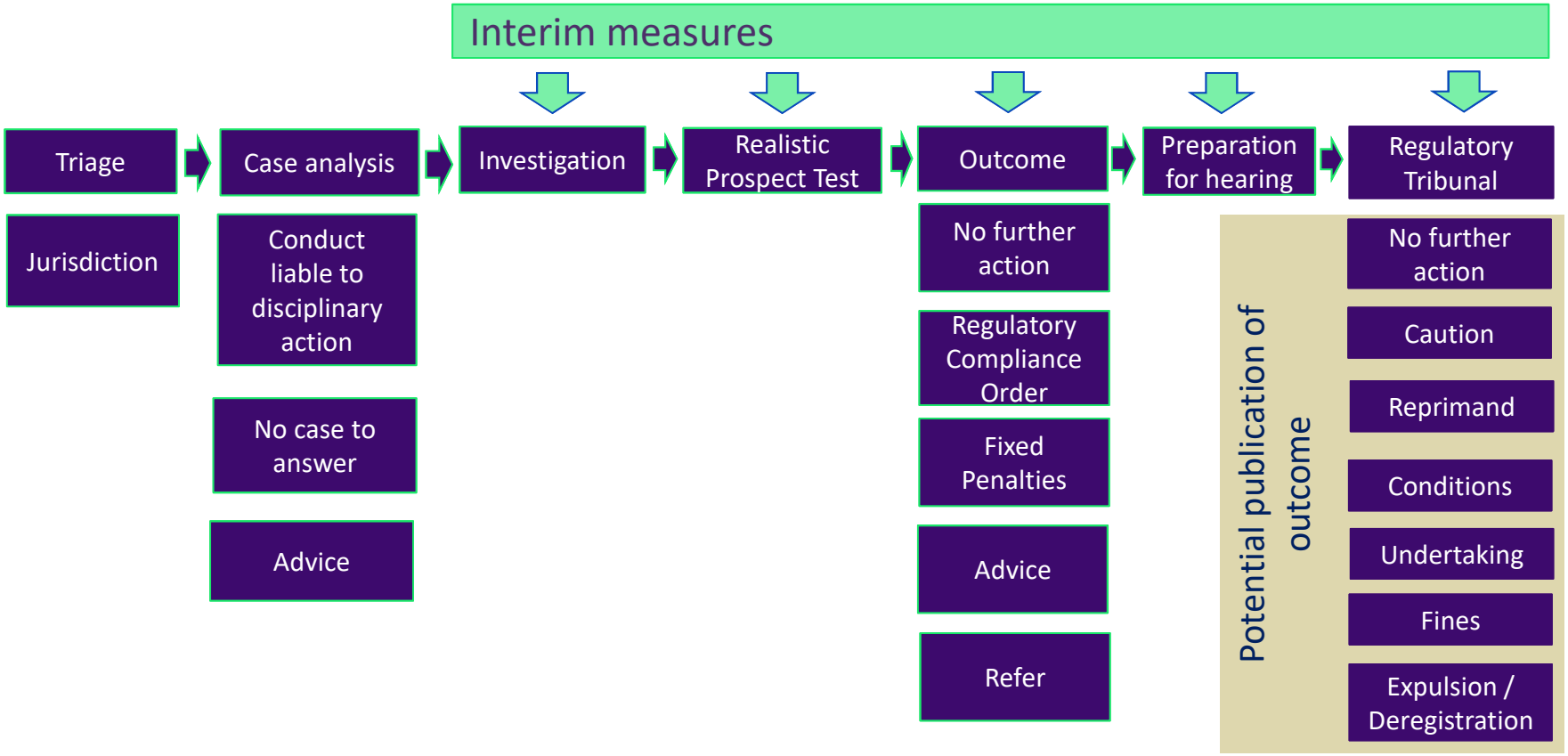
43
Expulsions

10,572
Regulated Firms

135,274
Regulated Professionals and Trainees

FY2019/2020

Lifecycle of a case



Challenges

- People
- New procedures and rules at a time of change
- Built in agility
- Maintaining global consistency

Thank you.

Theresa Thorp
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ARDL Annual Conference

"What keeps regulators awake at night?"

Jim Percival, Deputy General Counsel
General Medical Council

General Medical Council

Working with doctors Working for patients

Tackling key areas of inequality and differential attainment in the medical profession

General Medical Council

Supporting a Profession under Pressure

General Medical Council

Regulatory Reform programme

Medical Act 1983

CHAPTER 54

Promoting professionalism, reforming regulation

Government response to the consultation

Published July 2019

Regulating healthcare professionals, protecting the public

Executive Summary

Health Act 1999

CHAPTER 8

General Medical Council

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

1st October 2021 | Shannett Thompson, Partner

Drafting Allegations

Agenda – 1st October 2021

- Drafting allegations
  - Structure
  - Style
  - “Top tips”

- Pleading sexual motivation
  - *Haris v General Medical Council* [2021] EWCA Civ 763;
  - *PSA v HCPC and Leonard Ren-Yi Yong* [2021] EWHC 52; (Admin)

What is an allegation?

- Fitness to practise is impaired
- Unacceptable Professional Conduct / misconduct
- Dishonesty
- Serious Professional Incompetence
- Sexual misconduct
- Health conditions
- Abuse of position
- Criminal conviction
- Incorrect entry on register
- Fraudulent entry on register

Basics of a well-drafted allegation

It **should** be-

- ❖ understandable to someone reading it even if they have no prior knowledge of the case;
- ❖ based on the evidence gathered in the investigation;
- ❖ detailed and specific enough for the Registrant to answer it - particularisation;
- ❖ well structured and clear; ensure the full extent and seriousness of the allegation is encapsulated;
- ❖ objective;
- ❖ capable of amounting to the statutory ground;

Basics of a well-drafted allegation

It should **not**:

- be a summary of the case. Background narrative should not be included;
- include emotive language;
- include acronyms;
- be vague or broad in description;
- be duplicitous to other charges;

Basics of a well-drafted allegation - the case law

- ***Ruscillo v CHRE and GMC* [2004] EWCA Civ 1356**; "Serious procedural irregularity" includes "under-charging", that is, omitting from the heads of charge allegations reflecting the true seriousness of the conduct complained of;
- ***PSA v NMC, Duncan Macleod* [2014] EWHC 4354 (Admin)**: there was a serious procedural irregularity in that the charges of misconduct did not sufficiently reflect the gravity of M's conduct. Appeal allowed. NMC directed to amend the charges so as to clearly assert the reason (or motive) for M's failure immediately to escalate his concerns was to support or protect his colleague. Held pleading M's motive was relevant to evaluating (a) the true seriousness of M's behaviour and (b) what the appropriate sanction should be;
- ***Johnson and Maggs v NMC* [2013] EWHC 2140 (Admin);** charges which lack specificity leaves the regulator vulnerable to an abuse of process application;

Structure

Preamble – registrant profession, registration number and ground(s) you rely on;

Facts – use paragraphs and keep one fact/concern/criticism per paragraph. Split up the issue with sub paragraphs if necessary.

- ❖ Use a single concise sentence and include the date;
- ❖ Consider alternatives so that if you fail to prove one issue/date/concern you do not lose the entire particular. For example use ‘On one or more of the following occasions’ or ‘adequately or at all’;
- ❖ Keep incidents together – perhaps via date or patient depending on what is said to have occurred;
- ❖ Focus on the alleged acts or omissions of the Registrant;

Structure continued…

Grounds

- Specify the relevant ground for the fact alleged
- If you have a conviction **and** a conduct issue plead the ground for the conduct issue

Impairment

- Common concluding impairment statement –

By reason of your misconduct/lack of competence your fitness to practise is impaired

Style

- Structure of allegation is dependant on facts of the case:
  - chronologically;
  - by patient and/or Complainant;
  - by theme

- Anonymise individuals referred to. Not with initials but instead use a letter or number – for example - SU1/ Person A;
- Identify the date or a date range;

Style continued…

- Sub divide – if the Registrant has repeated an alleged failing then plead the action, followed by a list of dates or service users as the sub particulars;
- Always use a separate sub particular for each service user;
- Use a schedule if you need to keep information out of the public domain or to restrict the length of the allegation, i.e. when dealing with large numbers of patients in relation to a single course of conduct . Schedules can assist the Committee from a presentational perspective;

In relation to the patients as set out in Schedule A, you failed to provide an adequate standard of root canal treatment…

(1) You have a physical and/or mental health condition as set out in Schedule A;
(2) By reason of your health, your fitness to practise is impaired.

Schedule A
Substance misuse

Top tips

- If you are alleging that a Registrant *'failed to'* do something – there should be evidence that something was not done by the Registrant **and** evidence that there was an obligation to do it in the first place. For example a standard operating procedure/guidance or policy document setting out the requirement;
- For dishonesty cases, avoid pleading *'falsely'* within the factual allegation as it is duplicitous to the dishonesty charge. Consider pleading the Registrant's state of knowledge so as to account for the subjective limb of *Ivey,* i.e. *'your actions were dishonest in that you knowingly included information you knew to be false on Patient A's medical record'*
- 'Inappropriate' – be cautious about using this term unless you have evidence spelling out why that conduct was inappropriate – consider *'did not'* as an acceptable alternative if you aren't able to point to a specific duty but want to retain the allegation supporting misconduct;
- When quoting a phrase within an allegation, include- *'words to the effect of'*. Use a different sub-particular per comment where several comments are made;

Top tips continued…

- Don’t allege breaching policies. It is the action breached within the policy that is the misconduct;
- Causation- typically don’t allege actual or potential harm unless you have definitive expert evidence. Actual or potential harm is typically part of the facts and does not need a separate allegation;
- Don’t plead/ include the outcome of the local/disciplinary investigation (*Enemuwe)*. Plead the conduct that led to that investigation.
- If there has been a local / internal disciplinary investigation don’t automatically use those allegations- make your own independent assessment of the evidence;

Top tips continued…

- Conviction/caution –pleading the conviction is sufficient, you don't need to add further particulars detailing the conduct that led to the conviction;
- If an arrest or charge doesn't result in a conviction – the appropriate charge is misconduct;
- A conditional discharge is not a conviction- the appropriate charge is misconduct;
- Same applies for a determination by another regulatory body. Plead the finding, the date of the finding, the name of the regulator and the Sanction imposed. Do not plead the conduct that led to the determination.

Haris v General Medical Council [2021] EWCA Civ 763

- Wording allegations as ‘sexual’ or ‘sexually motivated’;
- Before the MPT, H denied incidents described by two female patients had occurred, but the MPT found they did. Although the MPT found that they could *‘reasonably be perceived as overtly sexual’* it concluded the GMC had not established his conduct was sexually motivated;
- GMC appealed to High Court before Lady Justice Foster;
- Court of Appeal (‘COA’) upheld Foster J’s finding that the reasoning of the MPT was flawed. The COA judgment adds further commentary on the wording of such allegations in disciplinary proceedings;

Haris v General Medical Council [2021] EWCA Civ 763 continued…

The COA referenced Foster J's comments relating to the wording of sexual allegations, as per Lady Justice Andrews at [49]-[50]:

"As Foster J recognized, what was essentially being alleged in this case was a series of sexual assaults, about which the doctor had lied, and therefore, strictly speaking, proof of sexual motivation was not essential to establish just how serious the conduct was. That was the point she was making when she suggested at [60] that the error into which the MPT fell could have been avoided by using a different formulation of the allegations against the doctor. She may well be right about that, but that does not mean that the formulation that was used gives rise to any basis for a Tribunal rationally concluding that the GMC had failed to prove, on the balance of probabilities, that the conduct in question was sexually motivated."

Haris v General Medical Council [2021] EWCA Civ 763 continued…

She continued:

"In any event, the GMC's case on the irrationality of the MPT's conclusion, and Foster J's finding that it was irrational, were not based on the way in which the allegations were pleaded. They were based upon the facts which the Tribunal found and the absence of any plausible innocent reason for Dr Haris doing what he did."

Haris v General Medical Council [2021] EWCA Civ 763 continued…

Without explicitly commenting on whether simplifying the wording of allegations as *'sexual'* rather than *'sexually motivated'* may avoid the difficulties the Tribunal fell into in this case, Lady Justice Andrew's view was that in any event, the particulars facts supported a conclusion that H's actions were sexually motivated as she referred to in [55]-[56]:

"There was no question of the Judge's approach reversing the burden or standard of proof. The burden remained on the GMC throughout, but there was more than enough evidence to raise (at its lowest) a strong prima facie case of sexual motivation which would discharge that burden in the absence of an innocent explanation for what happened. There was no innocent explanation. The evidence that the touching was sexually motivated was overwhelming."

"There is rarely any direct evidence of sexual motivation (though in some cases adverse inferences might be drawn from what was said by the doctor) and in a case like this, the facts speak for themselves."

"Sexual" or "Sexually motivated"?

- Where does that leave us?;
- COA didn't approve or disapprove the guidance provided by Mrs Justice Foster;
- COA did uphold decision that a sexual motivation was the only rational conclusion to draw from a Medical Practitioners Tribunal (MPT)'s finding that a GP had performed non-clinically indicated, intimate examinations without consent regardless of whether there is direct evidence of sexual motivation;

PSA v HCPC and Leonard Ren-Yi Yong [2021] EWHC 52 (Admin)

- PSA successfully appealed to the High Court on the basis some of the conduct found to be *'inappropriate'* should also be characterised as behaving *'in a harassing manner'* and others as *'sexually motivated'*;
- When considering whether to plead an allegation of *'harassing'* behaviour, one should have regard to the definition of harassment in S.26 of the Equality Act 2010;
- Conduct which falls outside of the statutory definition might still constitute behaviour *'in a harassing'* manner. However, **any** conduct which falls within the S.26 definition must be harassment for the purposes of a disciplinary enquiry;
- Finding of *'sexually motivated behaviour'* and *'harassing behaviour'* is not limited to physical contact;

KINGSLEY NAPLEY
WHEN IT MATTERS MOST

Questions?

ARDL Mentoring Scheme

Developing successful careers within regulatory and disciplinary law.

Mentees: Member of ARDL / 0 - 10 years PQE

Mentors: Member of ARDL / 10 years + PQE

Steve Jobs &
Mark Zuckerberg

Michelle Robinson &
Barak Obama

Christian Dior &
Yves Saint Laurent

Freddie Laker &
Richard Branson

Costs in Regulatory Proceedings

ARDL Conference 1 October, 2021

Vikram Sachdeva QC

General rule in civil litigation

Court's discretion as to costs

- **44.2**
- (1) The court has discretion as to –
- (a) whether costs are payable by one party to another;
- (b) the amount of those costs; and
- (c) when they are to be paid.
- (2) If the court decides to make an order about costs –
- (a) **the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party**; but
- (b) the court may make a different order.

White Book commentary 44.2.13

- As a practical matter, r.44.2(2) poses two questions: (1) who is the successful party? (and who is the unsuccessful party?), and (2) when should the general rule be applied? (or not applied?).
- The judge must look closely at the facts of the particular case before him and ask: who as a matter of substance and reality has won?" Further, it has been said that "success" is not a technical term but "a result in real life" to be determined with the "exercise of commonsense"

Regulatory Proceedings – First instance

- *Baxendale-Walker v Law Society* [2007] EWCA Civ 233 [2008] 1 WLR 426
- Court of Appeal approved the reasoning of the Divisional Court [2006] EWHC 643 (Admin) [2006] 3 All ER 675 in holding:
- The Solicitors Disciplinary Tribunal was entrusted with wide and important disciplinary responsibilities for the profession and section 47(2) of the Solicitors Act 1974 vested it with a very wide costs discretion

Baxendale-Walker v Law Society

Although ordering the Law Society to pay the costs of another party to disciplinary proceedings was neither prohibited nor expressly discouraged by section 47(2)(i) of the 1974 Act, since disciplinary proceedings supervised the proper discharge of solicitors' professional obligations and guarded the public interest by ensuring the maintenance of high professional standards, and since in performing those functions and safeguarding those standards the tribunal was dependent on the Law Society to bring properly justified complaints of professional misconduct before it in pursuance of the society's independent obligation to ensure that the tribunal could fulfil its statutory responsibilities, the Law Society when performing that role was in a wholly different position from a party to ordinary civil litigation and the ordinary rule that properly incurred costs generally followed the event did not apply to disciplinary proceedings against a solicitor.

Baxendale-Walker v Law Society

- There was no presumption that an order for costs should be made in favour of a solicitor who had successfully defended an allegation of professional misconduct.
- That, unless the complaint had been improperly brought, or eg it proceeds as a shambles from start to finish, an order for costs should not ordinarily be made against the Law Society in proceedings brought in the exercise of its regulatory responsibility.

Baxendale-Walker v Law Society

34. Our analysis must begin with the Solicitors Disciplinary Tribunal itself. This statutory tribunal is entrusted with wide and important disciplinary responsibilities for the profession, and when deciding any application or complaint made to it, section 47(2) of the Solicitors Act 1974 undoubtedly vests it with a very wide costs discretion. An order that the Law Society itself should pay the costs of another party to disciplinary proceedings is neither prohibited nor expressly discouraged by section 47(2)(i). That said, however, it is self-evident that when the Law Society is addressing the question whether to investigate possible professional misconduct, or whether there is sufficient evidence to justify a formal complaint to the tribunal, the ambit of its responsibility is far greater than it would be for a litigant deciding whether to bring civil proceedings…

Baxendale-Walker v Law Society

34. (cont) Disciplinary proceedings supervise the proper discharge by solicitors of their professional obligations, and guard the public interest, as the judgment in Bolton's case [1994] 1 WLR 512 makes clear, by ensuring that high professional standards are maintained, and, when necessary, vindicated. Although, as Mr Stewart maintained, it is true that the Law Society is not obliged to bring disciplinary proceedings, if it is to perform these functions and safeguard standards, the tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the tribunal is enabled to fulfil its statutory responsibilities. **The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation. The normal approach to costs decisions in such litigation—dealing with it very broadly, that properly incurred costs should follow the "event" and be paid by the unsuccessful party—would appear to have no direct application to disciplinary proceedings against a solicitor.**

Baxendale-Walker v Law Society

[39]… As *Bolton's case* [1994] 1 WLR 512 demonstrates, **identical, or virtually identical, considerations apply when the Law Society is advancing the public interest and ensuring that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the tribunal**. **Unless the complaint is improperly brought, or, for example, proceeds** as it did in Gorlov's case [2001] ACD 393, **as a "shambles from start to finish", when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs follow the event**. The "event" is simply one factor for consideration. It is not a starting point. **There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow.**

Baxendale-Walker v Law Society

[39] (cont) One crucial feature which should inform the tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. **For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage**."

Competition and Markets Authority v Flynn [2020] EWCA Civ 617 [2020] Costs LR 695

79. The applicable legal principles to be derived from these [regulatory] cases are, in my judgment, as follows:

i) Where a power to make an order about costs does not include an express general rule or default position, **an important factor in the exercise of discretion is the fact that one of the parties is a regulator exercising functions in the public interest.**

ii) That leads to the conclusion that in such cases **the starting point or default position is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity.**

iii) **The default position may be departed from for good reason**.

Competition and Markets Authority v Flynn [2020] EWCA Civ 617 [2020] Costs LR 695

iv) **The mere fact that the regulator has been unsuccessful is not, without more, a good reason. I do not consider that it is necessary to find "exceptional circumstances" as opposed to a good reason.**

v) **A good reason will include unreasonable conduct on the part of the regulator**, or substantial financial hardship likely to be suffered by the successful party if a costs order is not made.

vi) There may be additional factors, specific to a particular case, which might also permit a departure from the starting point." (emphasis added)

A new approach to costs in disciplinary proceedings?

- Supreme Court: granted permission to appeal.
- The specific issue will be: “When considering what costs to award following an appeal before the CAT from an infringement decision of the CMA, is there a starting point and if so, what is it?
- “In particular, was the Court of Appeal correct to decide that there is a starting point that no order for costs should be made against a regulator if it has been unsuccessful, except for a good reason, or is the starting point instead that an order for costs should be made against the regulator where it is unsuccessful?”

Regulatory Proceedings - Appeals

- Costs follow the event
- *Walker v Royal College of Veterinary Surgeons (Costs)* [2008] UKPC 20
- *Bass v SRA* [2012] EWHC 2457 (Admin)
- *Competition and Markets Authority v Flynn Pharma Ltd* [2020] EWCA Civ 617 at [103]

Fountain Court
CHAMBERS

ABUSE OF PROCESS

Richard Coleman QC

1st October 2021

(presentation delivered to ARDL's annual conference)

Introduction

- Sources of the power to control abuse of the tribunal's process:
  - relevant legislation, agreements and rules on which the tribunal's powers are founded
  - Human Rights Act 1998, section 6: It is unlawful for a public authority to act in a way which is incompatible with a Convention right

- Topics:
  - Key principles
  - The decision of the Solicitors Disciplinary Tribunal in Solicitor Z (Case No. 11941-2019)

The legal framework

- Two categories of case in the criminal jurisdiction where proceedings may be stayed as an abuse of process:
- (1) where it is impossible to give the accused a fair trial
- (2) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case

See R v Maxwell [2011] 1 WLR 1837, para [13], per Lord Dyson JSC

It is a jurisdiction which, by its nature, is to be exercised sparingly. *"Stays imposed on the grounds of delay or for any other reasons should only be employed in exceptional circumstances. If they were to become a matter of routine, it would only be a short time before the public, understandably, viewed the process with suspicion and mistrust."* *Attorney-General's Reference (No. 1 of 1990)* [1992] QB 630, p643G per Lord Lane CJ.

Category one: a fair trial is impossible

- E.g. because of the lapse of time
- Very difficult to establish – the trial process can usually accommodate the effects of delay
- See *Attorney-General's Reference (No 1 of 1990)* [1992] QB 630, pp 643-644, per Lord Lane CJ

Category two: trying the accused would offend the court's sense of justice and propriety

- Here the court is concerned to protect the integrity of the criminal justice system. Includes cases where there has been bad faith, unlawfulness or executive misconduct: *R v Crawley* [2014] 2 Cr. App. R 16, [18] to [23]

- The court strikes a balance between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system

- *R v Horseferry Road Magistrates Court, ex parte Bennett* [1994] 1 AC 42 (defendant kidnapped in South Africa and brought to England unlawfully)

- Doubtful that this category of abuse falls within the jurisdiction of a tribunal: see *ex parte Bennett* at p 64, per Lord Griffiths

Solicitor Z – essential facts

- Solicitor Z acted for an individual (Person X) and company in relation to the settlement of claims brought by two employees (Persons A and B) arising out of allegation that Person X had attempted to rape Person B or had otherwise committed a serious sexual offence

- SRA alleged that Solicitor Z knew or suspected, or ought to have appreciated, that the settlement agreements could prevent or deter Persons A and B from making a complaint to the police, from co-operating with criminal proceedings and from seeking medical treatment

- Solicitor Z disputed the allegations, including the SRA's interpretation of the agreement. No findings of misconduct made as the case did not proceed to a determination on the merits

Solicitor Z's application that no case to answer

- Dismissed
- The proper interpretation of the settlement agreements was for the panel that heard the allegations to determine
- There was a case to answer

Solicitor Z's application that the proceedings should be stayed on the grounds of abuse of process

- Proceedings stayed:
- Continuation of the proceedings would pose a real and immediate risk to Solicitor Z's life, and breach his right to life (article 2) and his right to respect for his private and family life (article 8)
- As a result, Solicitor Z could not have a fair trial
- The Tribunal's conscience would be offended if the proceedings continued

The tribunal's concern that Solicitor Z could continue to practise but could not appear before the tribunal

- "The Tribunal was sympathetic to [the SRA's] submission as to the Respondent, by nature of his health, being immune from answering allegations before the Tribunal whilst continuing to work. It was a concern that the Respondent could continue to practise but could not appear before the Tribunal as regards any allegations of misconduct. [Counsel for Solicitor Z] submitted that he Respondent should not be beyond the reach of regulation. The Tribunal found that, whilst the Respondent was still subject to the regulatory regime, the submissions regarding his ill-health (if accepted), meant that the Applicant would not be able to have proceedings against him determined by the Tribunal. It was also likely that the Applicant would not be able to require an explanation from him as to his conduct in the future (unless his condition significantly improved, which the experts considered unlikely). The Tribunal considered such a position was unsatisfactory; a solicitor in practice should be subject to the entirety of the regulatory regime including, where appropriate, proceedings before the Tribunal. However unsatisfactory the position was, it did not mean that the continuation of the proceedings notwithstanding the Respondent's medical condition was a fair outcome. " (Appendix 1, para 60.8)

Three concluding thoughts regarding the right to life in the context of disciplinary proceedings

- (1) Is abuse of process the correct category? Section 6 of the HRA may provide a sufficient basis for staying the proceedings.

- (2) The importance of early involvement of the tribunal.

- (3) As to the scope of the protection afforded by the Convention, is there a relevant distinction between the risk to life posed by the practical demands of the regulatory process, and the risk to life posed by the prospect of findings of professional misconduct?

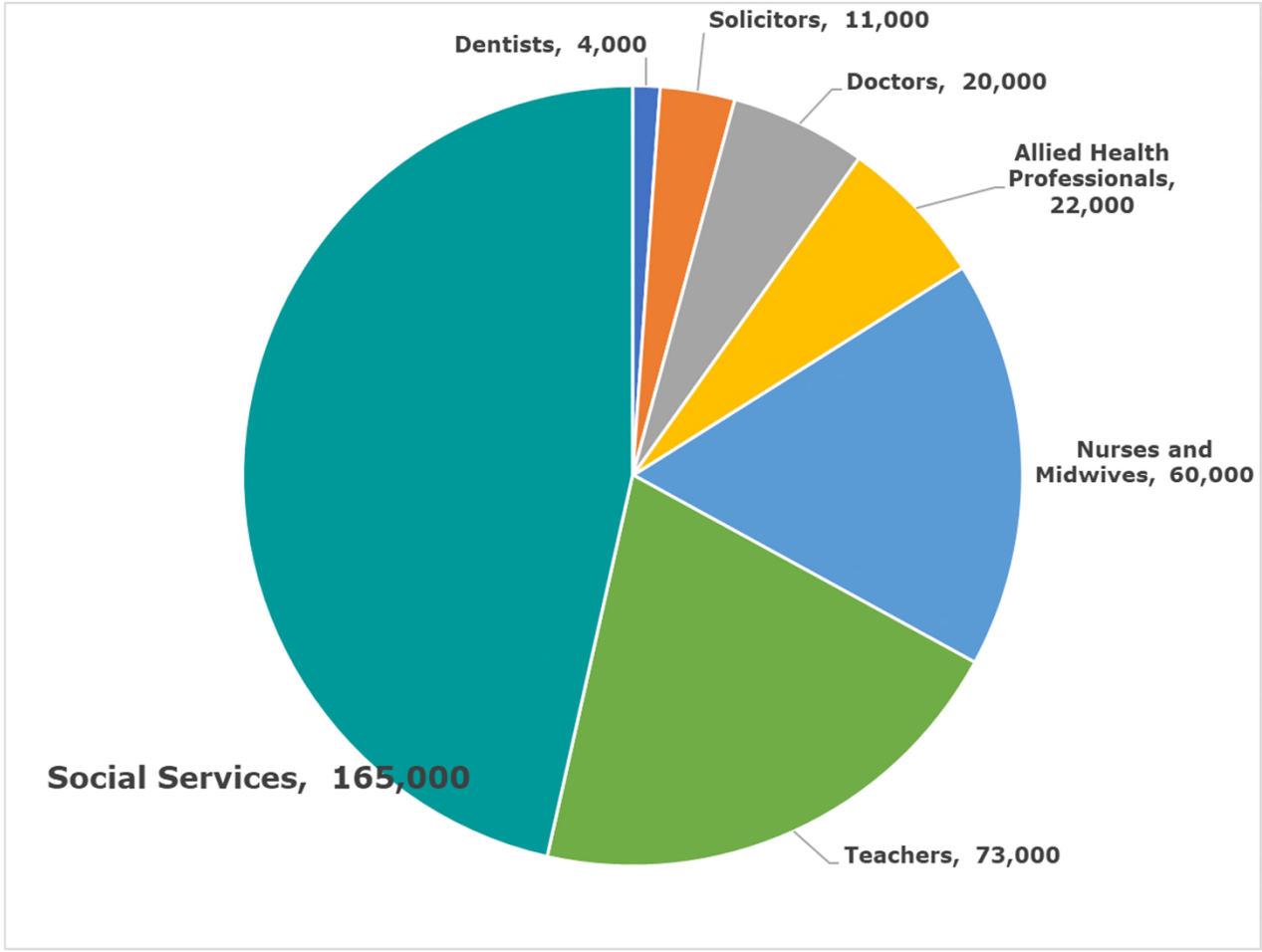
Scottish Social Services Council

ARDL
1 October 2021

Regulating Social Service Workers in Scotland

Maree Allison
Director of Regulation SSSC

Regulator of Social Services Workforce in Scotland



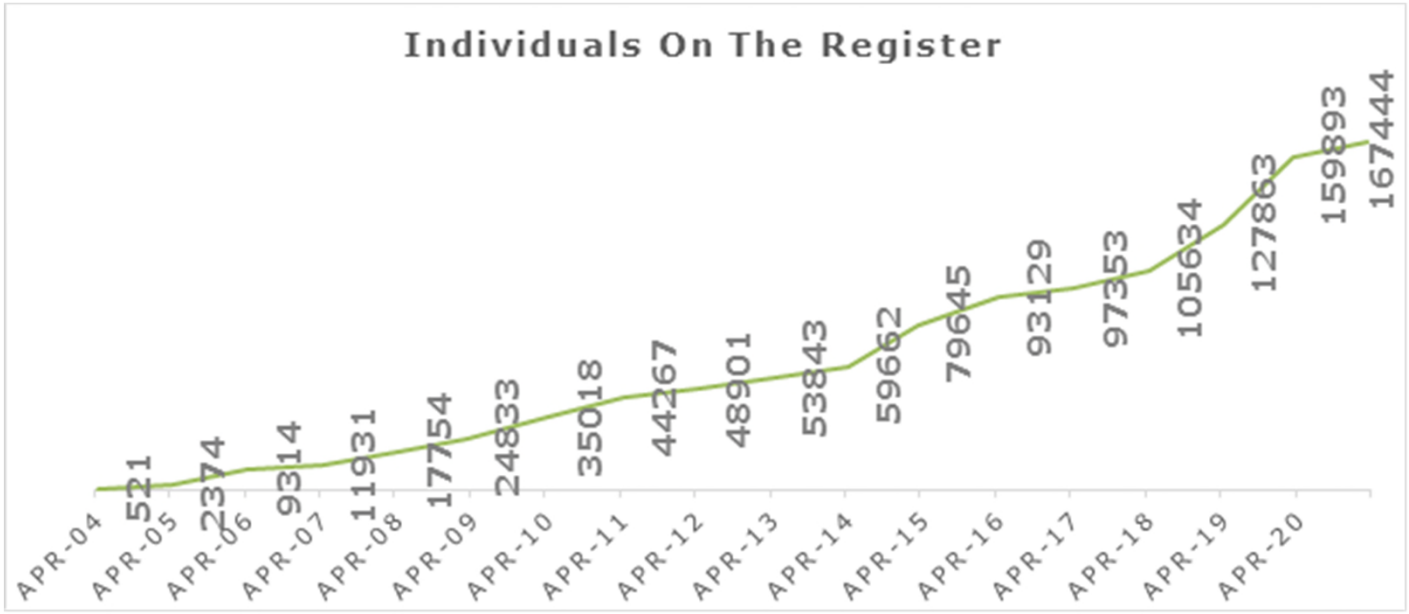
Who we register

11,000 Social Workers

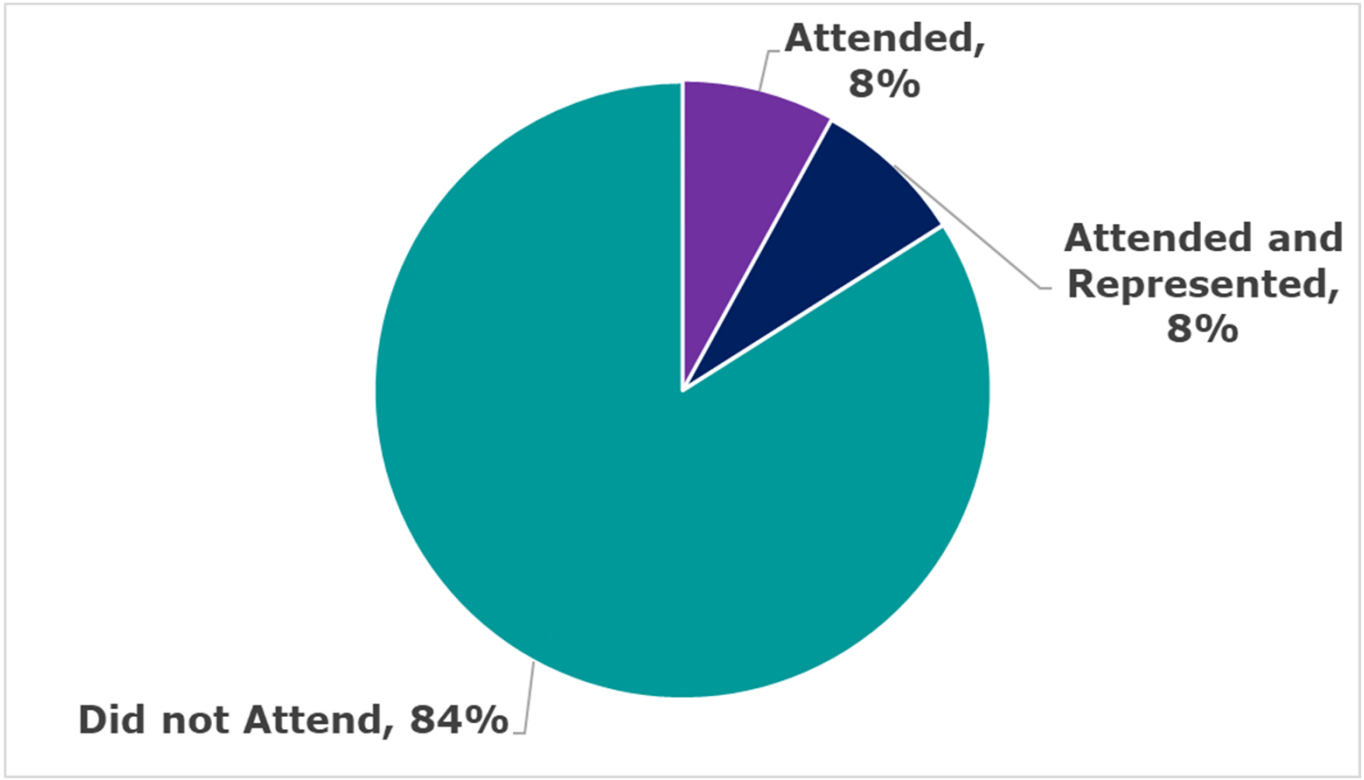
50,000 Early Years and Childcare

104,000 Adult Social Care

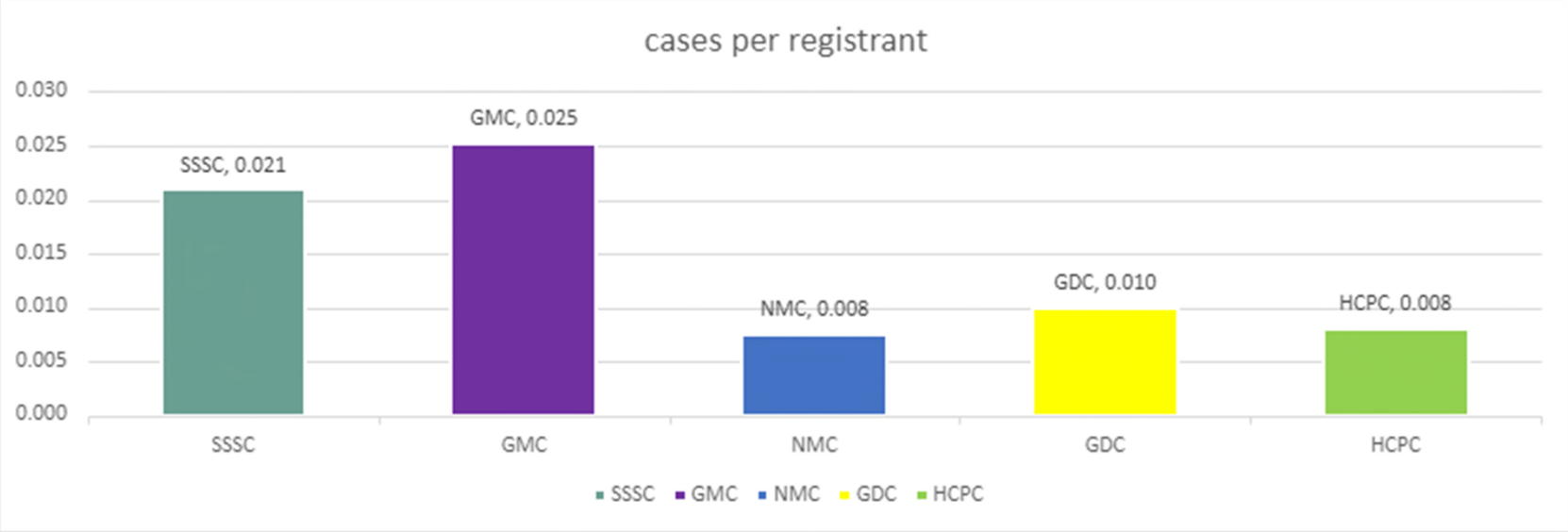
Progress of Registration



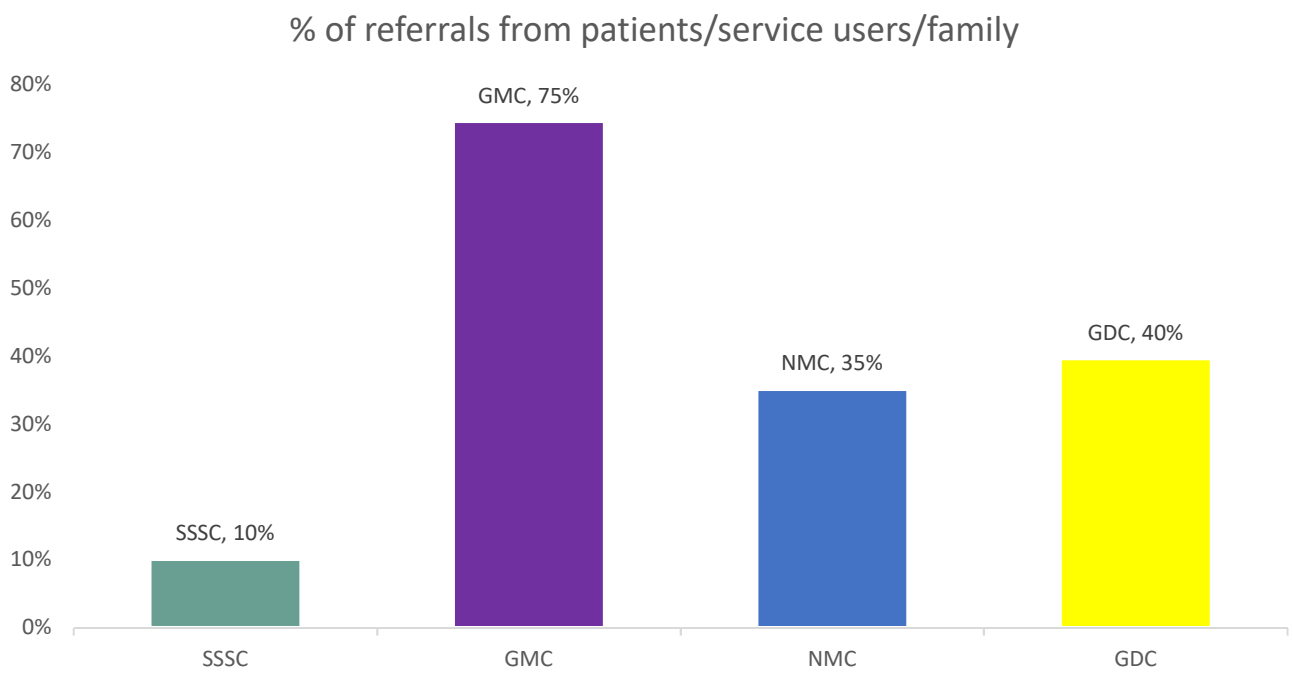
Levels of Representation at Final Hearings



Fitness to Practise Referral Levels



Fitness to Practise Referral Levels



National Care Service Consultation

Questions

Q83. Would the regulator's role be improved by strengthening the codes of practice to compel employers to adhere to the codes of practice, and to implement sanctions resulting from fitness to practise hearings?

Q84. Do you agree that stakeholders should legally be required to provide information to the regulator to support their fitness to practise investigations?

Q85. How could regulatory bodies work better together to share information and work jointly to raise standards in services and the workforce?

Q86. What other groups of care worker should be considered to register with the regulator to widen the public protection of vulnerable groups?

Future: National Care Service Consultation

Expansion of registration

- **Healthcare Assistants**
- **Personal Assistants**
- **Others?**

Scottish Social Services Council

THANK YOU

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HENDERSON CHAMBERS

ARDL CONFERENCE FRIDAY 1 OCTOBER 2021

REGULATORY CASE LAW UPDATE 2020 - 2021

By ***KENNETH HAMER***[1]

[1] Barrister at Henderson Chambers and former Recorder of the Crown Court. Legally Qualified Chairman at Medical Practitioners Tribunal Service (General Medical Council), Legal Adviser to the General Dental Council and Legal Assessor to the Nursing and Midwifery Council. Former chairman of the Appeal Committee of the Chartered Institute of Management Accountants. Former member of prosecuting panel of Bar Standards Board. Author of *Professional Conduct Casebook,* joint editor of the ARDL's *Quarterly Bulletin,* and Council member and director of the Incorporated Council of Law Reporting for England and Wales.

Adjournment

1. *Ramaswamy v. General Medical Council* [2021] EWHC 1619 (Admin)

Failure by practitioner to attend non-compliance hearing – unavailability of counsel – request for adjournment refused by case manager and tribunal – procedural unfairness – decision of tribunal quashed

On 21 October 2020 the GMC referred the appellant to a tribunal for a non-compliance hearing for failure to undertake a health assessment. In August 2018 the GMC opened an investigation into the appellant's fitness to practise arising from concerns about correspondence between her and the GMC and made a formal direction pursuant to rule 7(3) of the GMC (Fitness to Practise) Rules 2004 that she should undergo a medical assessment. The background to the correspondence was a sexual relationship between the appellant and another doctor, and the appellant's subsequent use of that doctor's name. The hearing was scheduled for 11 and 12 January 2021, and the proposed dates were not suitable to the appellant's counsel. Counsel made representations on two occasions seeking an adjournment, and a MPTS case manager made decisions refusing to adjourn the hearing. The non-compliance hearing commenced before the tribunal on 11 January 2021. The appellant did not attend but made a further application to postpone the hearing by two emails sent on that morning. The tribunal made a further decision refusing that postponement and determined to proceed in the appellant's and counsel's absence. On 12 January 2021 the appellant attended in person (but without counsel). The tribunal announced its non-compliance determination that the appellant had failed to comply with a direction made by the GMC to undergo a health assessment. The tribunal then proceeded to suspend the appellant's registration for nine months.

In allowing the appellant's appeal and quashing the decision of the tribunal to refuse an adjournment, Morris J said that neither decision of the case manager amounted to a serious procedural irregularity. The first decision (10 December 2020) was not a definitive refusal of an adjournment and made clear that it remained open to the appellant to make a further application. Whilst there were serious concerns about the regularity of the second decision (7 January 2021), the case manager was not aware of counsel's dates of availability and proceeded on the basis that no dates had been put forward. The decision of the tribunal on 11 January 2021 was open to legitimate criticisms. The case manager had underestimated the complexity of the issues involved, and it was not fair to suggest that the appellant might instruct alternative legal representation. The factual complexity of the case and the consequences of the order sought were such that the ability of the appellant to be represented by her counsel who had been acting for her throughout was a consideration of great weight, and was not adequately taken into account. By the time of the third adjournment decision (on the morning of 11 January 2021), counsel's dates of availability were known to the tribunal. There was no reference in the tribunal's decision to the dates of availability. In refusing the adjournment, the tribunal had failed to take into account a highly material consideration. It was clear that the tribunal was aware that counsel had provided the relevant information as to his dates of availability, but had misinterpreted the information. The tribunal did not say (as it could have done) that it had received the dates of availability, but that they had been received too late to allow the date to be adjourned and that the hearing could not be accommodated within a reasonably short period of time.

Appeals

2. *Sastry and Okpara v. General Medical Council* [2021] EWCA Civ 623

Hearing of appeals by doctors against erasure – appeals from decisions of tribunal – difference between appeal by doctor and appeal by regulator – Medical Act 1983, ss 40 and 40A

The first and second appellants challenged the orders made in the Administrative Court by May J and Julian Knowles J respectively: [2019] EWHC 390 (Admin) and [2019] EWHC 2624 (Admin), dismissing their appeals from decisions of the tribunal under s40 of the Medical Act 1983. In dismissing the doctors' second appeals, the Court of Appeal (Macur, Nicola Davies and Lewis LJJ) held that the jurisdiction of the Administrative Court on an appeal under section 40 was appellate, not supervisory, and that the court was fully entitled to substitute its own decision for that of the tribunal. Giving the judgment of the court, Nicola Davies LJ said that s40 provides a right of appeal to a person in respect of whom an appealable decision has been taken, i.e., to a medical practitioner who has been made the subject of sanction by the tribunal. There is no requirement for permission to appeal. No limitations are imposed upon the ambit of the appeal. S40A permits the GMC to appeal against a relevant decision on the limited basis that 'they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.' It is of note that the statutory purpose of s40 is to permit an unlimited right of appeal to a medical practitioner, whereas s40A provides only a limited right of appeal to the GMC on the ground of 'sufficiency'. The breadth of the section 40 appeal and the appellate nature of the court's jurisdiction was recognised by the Judicial Committee of the Privy Council in *Ghosh v. General Medical Council* [2001] 1 WLR 1915. Lord Millett noted that the statutory right of appeal of medical practitioners under s40 of the 1983 Act 'does not limit or qualify the right of the appeal or the jurisdiction of the Board in any respect. The Board's jurisdiction is appellate, not supervisory. The appeal is by way of a rehearing in which the Board is fully entitled to substitute its own decision for that of the committee.' Nicola Davies LJ, at [102], said that derived from *Ghosh* are the following points as to the nature and extent of the section 40 appeal and the approach of the appellate court:

(i) an unqualified statutory right of appeal by medical practitioners pursuant to section 40 of the 1983 Act;
(ii) the jurisdiction of the court is appellate, not supervisory;
(iii) the appeal is by way of a rehearing in which the court is fully entitled to substitute its own decision for that of the tribunal;
(iv) the appellate court will not defer to the judgment of the tribunal more than is warranted by the circumstances;
(v) the appellate court must decide whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate;
(vi) in the latter event, the appellate court should substitute some other penalty or remit the case to the tribunal for reconsideration.

At [103]-[105], Nicola Davies LJ said that the courts have accepted that some degree of deference will be accorded to the judgment of the tribunal but, as was observed by Lord Millett at [34] in *Ghosh,* 'the Board will not defer to the Committee's judgment more than is warranted by the circumstances'; see further *Preiss v. General Dental Council* [2001] 1 WLR 1926 PC, [27]; *Raschid and Fatnami v. General Medical Council* [2007] 1 WLR 1460 CA, [20]; and *Cheatle v. General Medical Council* [2009] EWHC 645 (Admin), [15]. In *Khan v. General Pharmaceutical Council* [2017] 1 WLR 169 SC (Sc) at [36] Lord Wilson, having accepted that an appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence, approved the approach and test identified by Lord Millett at [34] of *Ghosh.* It follows that the Judicial Committee of the Privy Council in *Ghosh,* approved by the Supreme Court in *Khan,* had identified the test on s40 appeals as being whether the sanction was 'wrong' and the approach at the hearing, which was appellate and not supervisory, as being whether the sanction imposed was appropriate and necessary in the public interest or was excessive and disproportionate. The cases of *General Medical Council v. Jagjivan and another* [2017] 1 WLR 4438 DC, and *Bawa-Garba v. General Medical Council* [2019] 1 WLR 1929 CA were both s40A appeals. In *Bawa-Garba* at [67], the court identified the approach of the appellate court as being supervisory in nature, in particular in respect of an

evaluative decision, whether it fell 'outside the bounds of what the adjudicative could properly and reasonably decide'. The approach of the court in *Bawa-Garba* is appropriate to the review jurisdiction applicable in s40A appeals. The approach of the court in s40 appeals, as identified in *Ghosh* and approved in *Khan,* is appropriate in s40 appeals which are by way of a rehearing. The distinction between a rehearing and a review may vary depending upon the nature and facts of the particular case but the distinction remains and it is there for a good reason. To limit a s40 appeal to what is no more than a review would undermine the breadth of the right conferred upon a medical practitioner by s40 and would impose inappropriate limits on the approach hitherto identified in *Ghosh* and approved by the Supreme Court in *Khan.* Appropriate deference is to be paid to the determination of the tribunal in s40 appeals but the court must not abrogate its own duty in deciding whether the sanction imposed was wrong; that is, was it appropriate and necessary in the public interest.

Bad Character

3. *McLennan v. General Medical Council* [2020] CSIH 12

Evidence of bad character not generally admissible

In dismissing the appellant's appeal from the decision of the MPTS, the Lord President (Lord Carloway), at [80], said that as with evidence of good character, proof of bad character will equally have no direct relevance to a central issue of dishonesty in a particular setting. Even if it had a direct bearing on whether the individual had a "propensity" to act in the manner alleged, that is not relevant to proof of the particular act. As a generality, those pursuing disciplinary proceedings should not be permitted to introduce evidence of general bad character as an element in the proof of dishonesty on a specific occasion. They are not to be encouraged to ingather evidence of bad character either to refute the terms of references, which might be, or have been, produced, or as an attempt to undermine either credibility or reliability. If it were to be otherwise, tribunal hearings would be greatly prolonged, and the tribunal could be deflected from its purpose, by parties addressing matters of peripheral, if any, significance. Although it may be legitimate to establish that an individual has no previous disciplinary record, since that is a matter which is usually readily ascertainable, there must be practical constraints on the extent to which a tribunal should otherwise permit evidence of either general good or bad character, when that character is not the gravamen of the complaint.

Concurrent Proceedings

4. *R (T and I) v. Financial Conduct Authority* [2021] EWHC 396 (Admin)

Proceedings in Commercial Court – outcome likely to have decisive influence on FCA proceedings – risk of prejudice to claimant by continuation of regulatory proceedings – balance between risk of serious injustice to claimant and public interest in regulatory proceedings being concluded

The claimants challenged the decision of the FCA's Regulatory Decisions Committee to refuse to stay disciplinary proceedings pending the outcome of proceedings in the Commercial Court brought by the Danish Customs and Tax Administration that raised the same issues as the FCA proceedings. The disciplinary proceedings rested on allegations arising out of the first claimant's involvement when chief executive of the second claimant in a scheme for rebates of tax under Danish tax law. In the Commercial Court proceedings, the Danish tax authority contended that the tax rebate scheme was operated in breach of the requirements of Danish law and was part of a fraudulent strategy. The first claimant's conduct was directly at issue in the Commercial Court proceedings. In the RDC proceedings the FCA contended that the first claimant's involvement in the strategy was dishonest and lacked integrity and therefore was in breach of Principle 1 of the FCA's Statements of Principle

for Approved Persons. Granting a stay of the FCA proceedings, in the first instance pending judgment of the Commercial Court on the trial of preliminary issues, Swift J said that the allegations advanced by the FCA rested on the complaints made by the Danish tax authority in the Commercial Court proceedings. There was a very close correspondence of issues in the RDC proceedings and the Commercial Court proceedings. It was no exaggeration to describe the RDC proceedings as a satellite of the Commercial Court claim. Any conclusion that the first claimant acted in breach of Principle 1 was likely to depend entirely on whether the tax rebate strategy met the requirements of Danish law. The present situation was one, perhaps relatively rare, instance where the expertise of the members of the RDC may not be critical to the assessment of whether a breach of Principle 1 had occurred. Rather, the situation was one in which conclusions reached by the Commercial Court on the questions of law and foreign law would be of particular assistance to the RDC. The circumstances were unusual. The allegation by the FCA that the first claimant acted in breach of Principle 1 was contingent on the matters before the Commercial Court. The bulk of those issues were outside the expertise of the RDC panel. Given the existence and substance of the Commercial Court proceedings, there was a risk of serious prejudice to the first claimant if the proceedings before the RDC panel resulted in a breach of Principle 1 without account being taken of the findings of the Commercial Court. The learned judge went on to balance the risk of serious injustice against the strong public interest in seeing that regulatory proceedings were not impeded. In the instant case, the misconduct alleged was historic, having taken place between 2013 and 2015; the first claimant was no longer engaged in the provision of financial services, was resident abroad and pursuing an unconnected line of business; any delay until the outcome of the preliminary issue in the Commercial Court would be short and not likely to inflict significant harm on the generic public interest; and any harm that may be occasioned by a stay would be offset by the advantage of the RDC panel being informed of the Commercial Court's conclusions.

5. ***Rayner v. Barnet, Enfield and Haringey Mental Health Trust*** **[2021] EWHC 1263 (QB)**
Psychotherapist registered with UKCP – NHS disciplinary proceedings – whether conduct in breach of professional standards under regulator's Code – no contractual bar preventing NHS employer holding disciplinary hearing prior to regulator – injunction to restrain employer's proceedings dismissed

The claimant was a psychotherapist registered with the United Kingdom Council of Psychotherapy (UKCP) and employed by the respondent Trust, who provided mental health and community health services in Enfield. Under his contract of employment, the claimant was subject to the Trust's Disciplinary and Procedures Policy in respect of any matter that might involve disciplinary action. On 6 August 2019, the Trust suspended the claimant on the basis of a complaint by an adult female patient that he had breached professional obligations. The Trust notified the claimant of the initiation of the disciplinary process and the UKCP determined to place the matter on hold pending the outcome of the Trust's disciplinary proceedings. The claimant maintained that (1) the question of whether he failed to maintain proper and safe professional boundaries with the patient could only be answered by reference to the standards of professional conduct set out in the UKCP's Code of Ethics and Professional Practice; and (2) for the Trust to proceed to a disciplinary hearing before that question had been determined by an adjudication panel of the UKCP would be a breach of the implied term in his employment contract that the Trust would not, without reasonable and proper cause, conduct itself in a manner likely to destroy the relationship of confidence and trust between employer and employee. Dismissing the claimant's application to continue earlier injunctive relief, Murray J said that he started by noting that there was no contractual bar to the Trust holding a disciplinary hearing prior to a determination by the UKCP. The Trusts' disciplinary policy made clear that disciplinary proceedings may precede even a referral to a regulator. That position was consistent with the UKCP's position, whose normal practice was to await the outcome of a registered member's employer's disciplinary process against the member before conducting proceedings against that member under the UKCP Complaints Process. There was no contractual

basis for asserting that the Trust was obliged to await the outcome of the UKCP's determination as to whether he had breached the UKCP Code in relation to his conduct towards the patient; see *Chakrabarty v. Ipswich Hospital NHS Trust* [2014] EWHC 2735 (QB), and *Gregg v. NW Anglia NHS Foundation Trust* [2019] EWCA Civ 387. Further, there was no serious issue to be tried as to whether the Trust's failure to await the outcome of a UKCP Adjudication Panel's determination was a breach of its duty of trust and confidence to the claimant. By reference to the test set out by Lord Steyn in *Mahmud v. Bank of Credit and Commerce International SA* [1998] AC 20 at [53] the Trust's decision to hold a disciplinary hearing without awaiting the UKCP Adjudication Panel's decision was not *calculated* to destroy or seriously damage the relationship of trust and confidence. The Trust was simply seeking to operate its collectively approved Disciplinary and Procedures Policy, which formed part of the claimant's employment contract. It was not acting in a manner *calculated* to destroy or seriously damage the relationship of trust and confidence, especially in circumstances where the UKCP had positively indicated it expected the Trust to hold its disciplinary hearing and complete its disciplinary process before the UKCP operated its own Complaints Process.

Conviction Cases

6. *Achina v. General Pharmaceutical Council* [2021] EWHC 415 (Admin)

Certificate of conviction admissible as conclusive proof and the findings of fact on which it was based – judge's sentencing remarks admissible before fitness to practise committee – sentencing remarks to show factual matrix on which convicted person has been sentenced – General Pharmaceutical Council (Fitness to Practise and Disqualification etc) Rule 2010, r 24(4)

The appellant, who worked as the responsible pharmacist and manager of the Stowmarket, Suffolk Branch of Boots, pleaded guilty in the Crown Court of theft of medications from the store. The loss was approximately 140 packets of diazepam, amounting to 4,000 tablets with a value of £3,333. The appellant was sentenced to 2½ years' imprisonment in respect of the theft. Having withdrawn his basis of plea, which the prosecution did not accept, the appellant was sentenced on the full facts of the prosecution case, and recorded by the judge in his sentencing remarks, that he stole the drugs to order and they were not sent to his family in Ghana. The judge was not satisfied that the drugs were given to an ailing relative abroad. The amount of drugs stolen contradicted personal use by one patient and text messages supported onward sale of drugs to a number of individuals. Before the respondent's fitness to practise committee, the appellant claimed that he did not sell any of the drugs to anybody and the drugs were meant for his dying uncle in Ghana. Dismissing the appellant's appeal removing his name from the register, Lane J, at [84]-[87], said that rule 24(4) of the General Pharmaceutical Council (Fitness to Practise and Disqualification etc) Rules 2010 provides that a certificate of conviction 'is admissible as conclusive proof of that conviction and the findings of fact on which it was based.' In framing rule 24(4), the legislature was treating as conclusive, not only the 'bare' facts to be found in the certificate of conviction, but also the broader factual matrix on which the convicted person has been sentenced. One finds that factual matrix in the sentencing remarks of the judge. In the instant case, the transcript of the sentencing remarks made plain that the findings of fact upon which the judge sentenced the appellant, included that the appellant had sold drugs to third parties. Before the committee, the appellant denied this important factual finding. The appellant had, however, not overturned his conviction, or successfully appealed against his sentence, or put the matter before the Criminal Cases Review Commission. As matters stood at the time of the committee's decision, and as they currently stood, the conviction and sentence were undisturbed. To have permitted the appellant to go behind the finding that he did sell drugs to third parties for profit would have endangered public confidence in the regulatory regime under which the committee was operating, and the proper relationship between that regime and the criminal jurisdiction.

Costs

7. *Professional Standards Authority for Health and Social Care v. GMC and Hanson (Costs)* [2021] EWHC 1288 (Admin)

Appeal by PSA – GMC adopting neutral position – no order for costs against regulator

On 9 March 2021, Chamberlain J allowed an appeal by the PSA against the decision of the tribunal which imposed a 10-month suspension on Dr Hanson, and substituted an order that Dr Hanson's name be erased from the medical register: [2021] EWHC 588 (Admin). Thereafter the PSA sought its costs in the sum of £12,633.72 from the GMC and Dr Hanson. In refusing the PSA's application for a costs order against the GMC, the court's attention was drawn, amongst other authorities, to *PSA v. GMC and Hilton* [2019] EWHC 2192 (Admin), *PSA v. GMC and Sarkar* [2020] EWHC 1896 (Admin), and *PSA v. GMC and Dighton* [2021] EWHC 21 (Admin). Chamberlain J said that *Sarkar* and *Dighton* establish two propositions which are of general application:

(a) The position of the GMC, as the statutory body responsible for the tribunal is no different from that of an inferior court or tribunal in judicial review proceedings. The general rule is that no order for costs will be made against it unless it has actively opposed the appeal: *Sarkar,*[64];

(b) Although it is open to the court to depart from this general rule, the fact that the GMC could have appealed and did not do so will not, in and of itself, be a reason for doing so. This is because the GMC and the PSA may perfectly reasonably take different views as to the appropriateness of a sanction and as to whether an appeal is justified in the public interest: *Sarker*, [59]-[60] and *Dighton,* [29].

In the instant case, Chamberlain J concluded that:

(a) The GMC did not actively oppose the appeal. Therefore, there should be no order for costs against them absent some special reasons for departing from the general rule.

(b) There was no special reason here. The GMC were not asked to consent to the disposal of the appeal, no doubt because their consent would have been irrelevant while Dr Hanson was not engaging.

(c) The fact that the court found the tribunal's decision to be wrong did not mean that the GMC's decision not to appeal it was unreasonable. The GMC is entitled to decide for itself which decisions of the tribunal to appeal, taking into account its own view of the appropriateness of the penalty, the likely practical effect of an appeal and its own resources and priorities. There was nothing to suggest that the decision in the instant case not to appeal was unreasonable.

Dishonesty

8. *Reilly v. (1) Teaching Regulation Authority and (2) Secretary of State for Education* [2020] EWHC 1188 (Admin)

Head teacher – primary school - relationship with convicted sex offender involving indecent images of children – failure to disclose relationship to school - decision by school to dismiss appellant – Secretary of State referring matter to Professional Conduct Panel – finding by panel of professional misconduct and bringing teaching profession into disrepute – finding that appellant's conduct was dishonest – prohibition order made by Secretary of State – allegation of dishonesty unnecessary complication – conduct aggravated because it was deliberate rather than dishonest

In June 2010, the appellant Ms Reilly was suspended from her duties as head teacher at a primary school in the West Midlands pending disciplinary investigation. The allegations made arose from her failure to disclose to the school that she was in a relationship with a man, referred to as "A". In February 2009, A had been arrested on suspicion of making and processing indecent images of

children. In January 2010 he was convicted of these offences. In 2011 following disciplinary proceedings Ms Reilly was dismissed from her employment. The allegations against Ms Reilly were that by failing to disclose her relationship with A, she had (a) failed to disclose information and material which risked putting the school in breach of its obligation to safeguard the welfare of its pupils and (b) was guilty of professional misconduct in that the failure to disclose was inconsistent with her obligations under her contract of employment. The Secretary of State in accordance with the Teachers' Disciplinary (England) Regulations 2012 referred the case to a Professional Conduct Panel to determine whether Ms Reilly was guilty of unacceptable professional conduct and/conduct that brought the teaching profession into disrepute. The hearing before the Panel was adjourned pending determination of Employment Tribunal proceedings in which Ms Reilly claimed that the school's decision to dismiss her was unfair. These were ultimately dismissed by the Supreme Court: *Reilly v. Sandwell Metropolitan Borough Council [2018] UKSC 16.* In January 2019, the Panel heard four charges against Ms Reilly namely, that she failed to disclose her relationship with A to her employer despite advice from the National Probation Service, that she misled the investigation by stating that she was advised there was no reason to disclose it, that she failed to demonstrate insight and that her conduct was dishonest. The Panel found the allegations proved and made a recommendation to the Secretary of State that a prohibition order should be made with provision for a review after two years, which the Secretary of State made.

In dismissing Ms Reilly's appeal from the decision to make the prohibition order, Swift J said that the formulation of the complaint and the Panel's reasoning was over-complicated. The true point arising from Ms Reilly's conduct was not complex. As head teacher at a primary school, she had failed to disclose to the school's governors the relationship she had (personal, and not professional) with a person convicted of creating and possessing indecent images of children. Rather than state in a plain and straightforward way that that was serious misconduct or conduct that might bring the teaching profession into disrepute, it was addressed through four overlapping and elaborate allegations. The allegation that Ms Reilly's conduct was "dishonest", was at the least, clumsy. The substance of the allegation was that Ms Reilly's failure to tell the school about her relationship with A was the result of conscious choice rather than error. Thus, it was not just that Ms Reilly ought to have realised that a competent head teacher would have disclosed her situation to her employer, but rather that Ms Reilly did realise that she should, but chose not to. Putting the matter in terms of "dishonesty" failed to capture the substance of the situation and added an unnecessary layer of complication. The suggestion of dishonesty aggravates an allegation of misconduct. But in this case where the misconduct alleged was failing to disclose information, what was relevant was not really whether the failure could be labelled "dishonest" but whether the failure was deliberate rather than merely negligent. Ultimately, the Panel concluded that Ms Reilly had acted dishonestly because she had acted deliberately. The conclusion of dishonesty was inappropriate only to the extent that the legal notion of dishonesty is inept to capture the Panel's conclusion that Ms Reilly's conduct was aggravated because it was deliberate. Although the allegation was mis-formulated in that it applied an inappropriate label, the Panel did not fall into any material error. The substantive conclusion reached was that Ms Reilly had acted deliberately. That was a relevant aggravating feature; and the conclusion on that matter was certainly one that the Panel was entitled to reach: paras 17 – 25.

<u>Evidence</u>

9. *El Karout v. Nursing and Midwifery Council* [2019] EWHC 28 (Admin); [2020] EWHC 3079 (QB)

Evidence – hearsay – admissibility of hearsay evidence from patient – distinction between admissibility and weight of hearsay evidence – serious procedural irregularity

The appellant had some 20 years' experience as a midwife, with no previous findings of misconduct. She was employed as a Band 6 midwife by Brighton and Sussex University Hospitals NHS Trust. In

short, the allegation was that on the ward where she worked the appellant had stolen packs of Dihydrocodeine tablets prescribed to patients to take home when discharged from hospital after giving birth and had falsified medical records to facilitate and conceal the thefts. It was alleged that the appellant had stolen Dihydrocodeine in this way in relation to seven patients, although the panel found the allegation of theft proved in relation only to five of the seven. The relevant events took place in June and July 2015. The delay of nearly three years before the disciplinary proceedings were heard in May 2018 arose in part because there were criminal proceedings which did not conclude until March 2017. The appellant was tried in the Crown Court for the offences of theft alleged in relation to two of the patients. She was acquitted by the jury. Spencer J, at [88], said the fact that the appellant was acquitted by the jury of stealing the Dihydrocodeine prescribed for Patients A and B – precisely the allegation she faced in the disciplinary proceedings – obviously did not preclude the panel from reaching a contrary conclusion. This was not least because the standard of proof was different. However, the fact of her acquittal was not altogether irrelevant. As a matter of common sense and common fairness the panel were obliged to proceed with greater caution in differing from the jury's conclusion on the very same allegations of theft, particularly in view of the serious consequences of such a finding for the appellant's career as a midwife. Although as a matter of law the standard of proof remained the civil standard, it is well established that the more serious the charge alleged, the more cogent is the evidence needed to prove it: see *R v. H* [1996] AC 563. The panel were so advised by the legal assessor, although no reference was made to it in their reasons.

In allowing the appeal, and quashing the decision to strike off the appellant from the register, and remitting the case to be re-heard by a differently constituted panel, Spencer J said that the striking feature of the NMC's case against the appellant was that of the seven allegations of stealing Dihydrocodeine, four depended entirely on hearsay evidence to establish that the patient had not received the Dihydrocodeine prescribed for her. The only witnesses called before the panel were patients A, B and C. In relation to patients D, E, F and G, the only evidence that the patient had not received Dihydrocodeine as part of her "to-take out" medication came from an audit conducted by an employee of the Trust and her colleagues in which these and other patients were telephoned at home, on the pretext of a welfare call, in order to ascertain whether they had been given Dihydrocodeine as part of their to-take out medication. The "investigation" conducted by the Trust in relation to these seven patients, based solely on replies in "welfare" telephone calls, could never have been a proper foundation in itself for disciplinary proceedings whose outcome could jeopardise the appellant's whole career as a midwife. The investigation was conducted principally for the benefit of the Trust as her employer, to determine whether she should be dismissed from her employment. Patients D, E, F and G declined to co-operate with the NMC proceedings. The learned judge said that it was extremely regrettable that no consideration was given by the NMC initially in framing the charges, or by counsel or the legal assessor at the hearing, to the *admissibility* of the hearsay evidence from these four patients, as opposed to the *weight* to be attached to the hearsay evidence. That distinction is very important and has been emphasised in the authorities; see *Nursing and Midwifery Council v. Ogbanna* [2010] EWCA Civ 1216, and *Thorneycroft v. Nursing and Midwifery Council* [2014] EWHC 1565 (Admin). There were several reasons why the panel would have been obliged to find that the hearsay evidence in relation to patients D, E, F and G was inadmissible. First, it was not even a case where reliance was placed on a properly recorded witness statement from any of these four patients. All four of them had declined to engage with the process. The hearsay evidence was the oral response which each of them purportedly made to an enquiry by the Trust over the telephone. There was no audio recording of the conversation. There was no precision in the noting of the conversation. Although a template was used, there was no

"script" produced to show exactly what was to be said in each conversation to ensure consistency in the questions answered. Whatever contemporaneous note may have been made of any of the conversations had not apparently been preserved, which was extremely poor practice. Second and equally important, even if the panel could fairly and properly rely on the accuracy of what the patient was reported as saying, the context of the telephone conversations was very different from the formal setting of a request for information which might be used in disciplinary proceedings with the career of a midwife at stake. Third, the hearsay from the telephone conversations was the sole and decisive evidence to prove each of the charges relating to these four patients. Fourth, there was an obvious consequent unfairness if the hearsay evidence were admitted, in that the panel would then inevitably rely upon the greater accumulation of examples of patients who had not received their Dihydrocodeine as rebutting any suggestion of innocent coincidence. It follows that had there been no mention of patients D, E, F and G at the hearing (as should plainly have been the case), it is impossible to say that the panel's overall conclusion in relation to patients A, B and C would necessarily have been the same. Put another way, the fact that the panel wrongly found the charges proved in relation to patients D and G (although not proved in relation to patients E and F) may very well have reinforced, improperly and unfairly, their conclusion in relation to patients A, B and C. The proceedings were thereby rendered unfair through a serious procedural irregularity.

At a rehearing, the Committee found the charges proved in relation to patients A, B and C and imposed a six-month suspension order, having heard and accepted there were significant mitigating circumstances. Linden J, [2020] EWHC 3079 (QB), dismissed an appeal and substituted a sanction of four and a half months in relation to the suspension order.

10. *General Medical Council v. Udoye* [2021] EWHC 1511 (Admin)

Failure to give evidence – drawing an adverse inference – procedural fairness – one factor to be taken into account when determining whether regulator proved its case

At the close of the GMC's case, the tribunal found that the practitioner had a case to answer that his statement on a GP Induction & Refresher Scheme application form that he was on the GP register was untrue and dishonest. The practitioner did not give evidence and, in its final determination having summarised the legal principles on drawing an adverse inference, the tribunal found that the allegation had not been proved. Allowing the GMC's appeal and remitting the matter to be redetermined, Holgate J held that when considering whether to exercise the power to draw an adverse inference from silence in disciplinary proceedings, tribunals need to ensure that each of the four criteria in *R (Kuzmin) v. GMC* [2019] 1 WLR 6660 are satisfied, viz: (1) a prima facie case to answer has been established; (2) the individual has been given appropriate notice and an appropriate warning that, if they do not give evidence, then such inference may be drawn; (3) there is no reasonable explanation for the individual not giving evidence; and (4) there are no other circumstances in the particular case which would make it unfair to draw such an inference. Holgate J said that the factors in *Kuzmin,* including the last criterion (there are no other circumstances in the particular case which could make it unfair to draw such an inference) are concerned with the principle of procedural fairness. Where all the criteria are satisfied, a tribunal is not obliged to draw an adverse inference; it may exercise its judgment on whether to do so and, if it decides to draw an adverse inference, on how much weight to give to this factor. Where a decision-maker does consider it appropriate to draw an adverse inference, that by itself cannot be determinative of the allegation in issue; any such adverse inference is one factor to be taken into account in the balance when deciding whether an allegation is proved to the civil standard.

11. *Towuaghantse v. General Medical Council* [2021] EWHC 681 (Admin)

Findings in previous proceedings – Coroner's inquest – narrative verdict containing findings of fact and conclusion – admissibility – GMC (Fitness to Practise) Rules 2004, r.34(1)

The allegations made against the appellant, a consultant paediatric surgeon, raised serious concerns in relation to his management, care and treatment of Patient A, a new born baby, who subsequently died. At an inquest into the death of Patient A, the coroner recorder a narrative verdict. This comprised findings of fact, which occupied 2 ½ pages of text and a narrative conclusion which occupied less than half a page of text. The appellant did not dispute the admissibility of the findings of fact. He did dispute the admissibility of the narrative conclusion on the grounds that, as a matter of law, the coroner's opinion was irrelevant. The finding identified three specific failures by the appellant which 'directly contributed to the death'. Mostyn J, at [31]-[35], said that regulatory proceedings are quintessentially inquisitorial. This is put beyond doubt by the GMC (Fitness to Practise) Rules 2004, r34(1) which provides that the committee or tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law. The receipt of strictly inadmissible material in regulatory proceedings goes back a long way; see *General Medical Council v. Spackman* [1943] AC 627 at 636, citing Lord Loreburn LC in *Board of Education v. Rice* [1911] AC 179, 182. The case of *R (Squier) v. General Medical Council* [2015] EWHC 299 (Admin) (admissibility of High Court judgments in disciplinary proceedings) confirms that the relevancy principle does not apply to inquisitorial regulatory proceedings. Paragraph 47 of Ouseley's judgment in that case is very important, namely, the opportunity for irrelevant or unfair use to be markedly reduced by redactions. In the instant case, the coroner's narrative conclusion was plainly admissible, and was rightly admitted in all three phases of the proceedings (facts, impairment and sanction). The tribunal rightly held that it was not bound by the findings of the coroner. They were weighed with all the other evidence in determining the facts. However, the coroner's narrative conclusion was unfairly used against the appellant when it came to impairment and sanction. The court remitted the determination of impairment and the sanction of erasure to be reconsidered by the tribunal.

<u>Findings of Fact</u>

12. *Dutta v. General Medical Council* [2020] EWHC 1974 (Admin)

Tribunal making findings of fact not addressed by the parties – extent to which tribunal constrained by parties' submissions – unchallenged documentary evidence – need to consider documents before assessment of witness's uncorroborated evidence

Dr D appealed against a decision to suspend him from practice made by the tribunal after a hearing in 2019. By way of background Dr D trained and qualified as a cosmetic surgeon. The case against him arose from allegations that he was guilty of misconduct in his professional dealings with four patients, between 2009 and 2015. In particular, charges 1(a) and 2 alleged that in March 2009, during a consultation with Patient A, Dr D inappropriately pressurised Patient A to undergo breast augmentation surgery in that he offered a discount of £600 if she agreed to undergo the surgery the following week, and that his conduct was financially motivated (the discount charge). Warby J noted that, in relation to Patient A, there was documentary evidence on which Dr D relied in support of his account and in defence of the discount charge. It was not the GMC's case that any of the documents had been fabricated or tampered with. In its determination of the facts, the tribunal said that neither party sought to challenge Patient A's credibility. The tribunal said that whilst weight could be assigned to the documentation, it was not determinative. The documentation did not preclude that during a 30 minute appointment on 5 March 2009 Dr D had offered the discount to Patient A, although this was not an interpretation of the facts that had ever been put forward by the GMC or Patient A, or put to Dr D for comment or response. The tribunal said it "assessed that Patient's A's

account of Dr Dutta offering her a discount was emphatic and assured": a clear statement that the tribunal believed Patient A's account.

Warby J concluded that the tribunal erred in finding the discount charge proved and that the tribunal's findings were procedurally flawed and untenable. The 2009 allegations also should not have been before the tribunal because the decision to refer then was contrary to the five-year rule. In allowing Dr D's appeal in relation to the discount charge, Warby J said:

> 38. In any event, I regret to say, in my judgment the Tribunal's reasoning process is vitiated by at least three fundamental errors of approach. First, the Tribunal approached the resolution of the central factual dispute by starting with an assessment of the credibility of a witness's uncorroborated evidence about events ten years earlier, only then going on to consider the significance of unchallenged contemporary documents. Secondly, the Tribunal's assessment of the witness's credibility was based largely if not exclusively on her demeanour when giving evidence. Thirdly, the way the Tribunal tested the witness evidence against the documents involved a mistaken approach to the burden and standard of proof.

After referring to, amongst others, *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* [2013] EWHC 3650 (Comm); *Lachaux v. Lachaux* [2017] EWHC 385 (Fam), [2017] 4 WLR 57; *Carmarthenshire County Council v. Y* [2017] EWFC 36, [2017] 4 WLR 136; and *Kimathi v. Foreign and Commonwealth Office* [2018] EWHC 2066 (QB), Warby J continued:

> 42. …. Instead of starting with the objective facts as shown by the authentic contemporaneous documents, independent of the witness, and using oral evidence as a means of subjecting these to "critical scrutiny", the Tribunal took the opposite approach, starting with patient A's evidence. It is an error of principle to ask "do we believe her?" before considering the documents. Further, the Tribunal's approach to the oral evidence of Patient A involves the second of the two "common errors" identified by Leggatt in *Gestmin.* Reliance on a witness's confident demeanour is a discredited method of judicial decision-making….
>
> 43. The third error I have mentioned emerges from paragraph [31] of the Determination. When deciding what to make of the apparent mismatch between its impressionistic assessment of Patient A and the contemporaneous documents, the Tribunal's approach was to ask itself whether the documentation was "determinative", and as such as to "preclude" the novel case theory which the Tribunal came to adopt. This was, in effect, to require Dr Dutta to establish to the criminal standard a defence to the Charge (and to an amended version of the Charge, which had not been put to him). The Tribunal's task was, however, to assess the evidence in the round and decide whether the GMC had discharged the burden of showing that it was more likely than not that pressure was applied by means of a discount offer, for financial motives, as alleged in charges 1(a) and 2.

13. *Khan v. General Medical Council* [2021] EWHC 374 (Admin)

Credibility – tribunal's approach to evidence – tribunal reaching conclusion on witnesses' credibility before considering all the evidence – need for tribunal to consider evidence before reaching conclusion on credibility – tribunal placing undue reliance on witnesses' demeanour – Dutta v. GMC followed

Following a lengthy hearing the tribunal found that the appellant had behaved in an inappropriate and sexually motivated way towards three female members of staff (Miss A, Miss C and Miss D) at

Barnsley Hospital NHS Foundation Trust, where he worked as a consultant orthopaedic surgeon. The tribunal determined that the appellant's name should be erased from the medical register. In allowing the appeal and quashing the sanction of erasure, Julian Knowles J said that he found the tribunal's determination was based on a fundamentally flawed approach. At [99] – [136], the learned judge analysed the tribunal's findings. Right at the start of the section of the determination dealing with Miss C's complaints, and before it had considered any of the evidence in detail, the tribunal said that it had 'first considered Miss C's credibility' and, having made an 'assessment of her demeanour', it found her to have given a 'genuine, sincere and credible account' in relation to matters other than one matter, namely, the authorship of an anonymous letter. However, by then the tribunal's conclusions were foregone because it had already decided that she was 'genuine' and 'credible'. By beginning with the question of credibility generally and without reference to the specific allegations she had made, the tribunal was, in effect, beginning its analysis by asking 'Do we believe her?', which is the very thing which Warby J said in *Dutta v. GMC* at para 42 should not be done. True it was that the tribunal then went on to consider Miss C's lies about the authorship of the letter. However, the tribunal's analysis was flawed because in deciding she was telling the truth about everything other than the letter it based its conclusion on her 'demeanour' and its assessment that she was 'genuine' and 'sincere'. This begged the question which the tribunal had to decide, namely: had the GMC proved each of the allegations made by Miss C on the balance of probabilities? Moreover, given Miss C's willingness to lie, the most careful and accurate scrutiny of her evidence was called for, adopting proper fact-finding methodology. In the case of Miss A, the tribunal made, at the outset, a global assessment that she was telling the truth based impermissibly on her demeanour. In the second paragraph of its discussion, it described Miss A as 'confident, credible' and 'sincere and consistent'. In the case of Miss A, there was also a direct conflict in evidence between her and two of the GMC's witnesses which had a direct bearing on her credibility which the tribunal needed to confront and resolve as part of its assessment of Miss A's credibility. In the case of Miss D, the tribunal said she was 'credible' again before it had considered any of the evidence relating to the allegations and how they had emerged, and the evidence which tended to undermine her credibility. Again, there was a conflict between Miss D's evidence and other evidence called by the GMC which had a direct bearing on Miss D's credibility. It was not open to the tribunal baldly to declare at the outset that Miss D was 'credible'. The tribunal was given a cross-admissibility direction, i.e., a direction that if it found the allegations of one complainant proved, and was satisfied that that established a propensity on the registrant's part to engage in unwanted sexual touching, then that propensity could be taken into account in determining whether the other complainants' allegations were proved; see *R v. Chopra* [2007] 1 Cr App R 16. However, the tribunal's approach to the evidence of all three complainants was erroneous and the determination could not stand and must be quashed.

14. *Forsyth v. Financial Conduct Authority and Prudential Regulation Authority* [2021] UKUT 162 (TCC)

Lack of contemporary documentary evidence – whether appropriate to draw adverse inference from absence of relevant witness

F, the chief executive of a small mutual insurance firm, referred decision notices issued by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) to the Upper Tribunal. The FCA and the PRA contended that F's conduct in relation to his remuneration and salary and bonus arrangements with the firm demonstrated a serious lack of integrity in breach of the FCA's and the PRA's Conduct Standards. Holding that the regulators had not make out their case that F failed to act with integrity, the Upper Tribunal found F to be an honest and credible witness in respect of all disputed matters and allowed both references. In relation to how much work was actually done by F and his wife as opposed by the firm's accountants, the Tribunal said that much of the work was not supported by documentary evidence because much of the time was spent in Mr

and Mrs F's home in producing revised drafts of documents of which there was no longer a record and the Tribunal heard no evidence from the accountants as to their work. In *NatWest Markets PLC and others v. Bilta (UK) Limited (In Liquidation) and others* [2021] EWCA Civ 680, the Court of Appeal, at [50], referred to the situation where there may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. Even in cases which are fairly document-heavy, there may be critical events or conversations which are completely undocumented. The Court of Appeal said:

> 51. Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment.

In commenting on the absence of evidence from the accountants, the Tribunal said that the principle enunciated in *Wisniewski v. Central Manchester Health Authority* [1998] 1 PIQR 324 was relevant in this regard. As was stated at page 340 of the judgment in that case, in certain circumstances the court may be entitled to draw adverse inferences from the absence of a witness who might be expected to have material evidence to give on an issue. In circumstances where the reason for the absence of the witness satisfies the court, then no such adverse inference may be drawn but in circumstances where it might have been expected that a party would call a particular witness then such an inference may be drawn. If the court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, produced by the party who might reasonably have been expected to call the witness.

15. *Haris v. General Medical Council* [2021] EWCA Civ 763

Allegation that practitioner's conduct was sexually motivated – tribunal accepting evidence of complainant – deliberate, uncontested, touching of a woman's sexual parts – tribunal's finding that conduct was not sexually motivated set aside

The allegation made against Dr H in the proceedings before the tribunal arose from his work as a GP. Patient A alleged that Dr H had undertaken a non-clinically indicated, intimate examination without informed consent on 23 February 2017 whilst working as a locum GP in the out of hours service in Morecombe. Patient B alleged effectively the same, in a separate incident on 5 March 2017, whilst Dr Haris was working as the GP in the Minor Injuries Unit at Leeds General Infirmary. The tribunal accepted in strong terms the evidence of the two complainants as to what happened at the relevant times, rejecting Dr H's account. They went on to find that Dr H's actions were not sexually motivated. The High Court appealed to the High Court: *GMC v. Haris [200] EWHC 2518 (Admin).* Allowing the GMC's appeal against this finding of fact, Foster J said that it was clear beyond argument that the intimate touching of Patients A and B was sexual and that answering a question as to the motivation of the toucher, the only available answer, is yes, the motivation must have been sexual. This is another way of saying the only reasonable inference from the fact is that the behaviour was sexual. This derives from (a) the fact that the touching was of the sexual organs, (b) the absence of a clinical justification, and (c) the absence of any other plausible reason for the touching. The absence of any suggestion of accident and the absence of any consent gives further colour to the acts. In the instant case, there was no alternative reason given at all at the hearing at

which the finding was made. The tribunal became muddled as to what they had to ask themselves and were concerned unnecessarily with the burden of proof and/or evidential burdens. It remained for the GMC to show it was more likely than not, looking at the material in the round, that the motivation was sexual. This was, on these facts, overwhelmingly the likeliest deduction to be made. The acts in question cannot reasonably be described, as the tribunal accepted, as 'formulaic and potentially inappropriate examination procedures. This was deliberate, unconsented, touching of a woman's sexual parts: in other words what was, absent clinical indication, a sexual assault in all but name. Dismissing Dr H's further appeal the Court of Appeal (Newey, Phillips and Andrews LJJ), said that in reaching its conclusions the tribunal ignored the fact that the best evidence as to Dr H's motivation was his behaviour. As a matter of common sense, when a patient presents with pain in the upper back in consequence of a fall, there is no reason whatsoever for a doctor to examine her vagina, or to fondle her buttocks or breast. The behaviour was sexually motivated, and there is no other way in which it could have been perceived.

16. *R (Chief Constable of Dyfed Powys Police) v. Police Misconduct Tribunal and England (Interested Party)* [2020] EWHC 2032 (Admin)

Charge alleging unwanted conduct of a sexual nature and use of sexualised language – tribunal finding conduct inappropriate and objectionable but not sexual – irrational

The interested party, PC England, was alleged to be guilty of five incidents of misconduct amounting to a breach of the Standards of Professional Behaviour of authority, respect and courtesy. In summary, four of the charges involved one charge of sexual harassment of a fellow officer that amounted to 'unwanted conduct of a sexual nature', and three charges of sexualised language or behaviour to colleagues that had the effect of creating a 'degrading, humiliating or offensive environment'. The fifth charge was a discrete allegation of failing to follow orders. The tribunal found all of the factual assertions proved and that the interested party was guilty of gross misconduct. The tribunal issued him with a final written warning. In its findings of fact, the tribunal found his actions were not sexual but were wholly inappropriate and objectionable.

In quashing the tribunal's decision as to the disciplinary findings of incidents (1) to (4) and remitting them to be reheard by a differently constituted panel, Nicklin J said that the tribunal's fact-finding in relation to these incidents was flawed. Largely, this was due to the tribunal not directing itself to consider the terms of the charges that PC England faced. The tribunal never asked itself whether the evidence had demonstrated that PC England's behaviour had, in the language of the charge, amounted to 'unwanted conduct of a sexual nature', or was conduct that had the effect of creating a 'degrading, humiliating or offensive environment'. The tribunal's conclusion that PC England's conduct was inappropriate and objectionable but was not sexual and not intended to be sexual was, in public law terms, irrational. But more importantly, the tribunal needed to assess the events as a whole and decide whether his conduct was 'unwanted conduct of a sexual nature'. On the unchallenged evidence there was only one answer to that question: it was. Yet the tribunal made no finding on this point. The only conclusion available to a rational tribunal on the unchallenged evidence was that PC England used highly sexualised language that was unwanted. Objectively judged, it had the effect of violating the dignity of others and it created a degrading, humiliating and offensive environment. The argument that the tribunal found PC England guilty of misconduct was superficial. The basis on which gross misconduct is found by the tribunal is crucial, not least when it comes to the outcome's decision. The tribunal's failure to make proper findings of fact effectively prevented it on sanction from carrying out a structured assessment of culpability and harm.

Health (Adverse physical or mental)

17. *Teewary v. General Medical Council* [2021] EWHC 376 (Admin)

Health assessment – failure by practitioner to undergo health assessment – risk of safety to patients – suspension for 12 months justified

In January 2019, the GMC received a complaint of harassment against the appellant from Ms V, a woman the appellant had met on holiday. The GMC was concerned at the tone, manner, structure and volume of emails sent by the appellant to Ms V and the GMC's investigation officer. It sought advice from a GMC medical case examiner and decided to direct a health assessment based on the information before it which suggested the appellant's health may be affecting his fitness to practise due to a delusional disorder; mania; a schizoaffective disorder; or a personality disorder or mental and behavioural disorder due to use of cocaine and cannabis. Despite the appellant providing the GMC with completed health assessment consent forms, no health assessment took place. The tribunal suspended the appellant's registration for 12 months by reason of his non-compliance with a direction by the GMC to undergo a health assessment and concluded that he might pose a risk to the safety of patients. Dismissing the appellant's appeal, His Honour Judge Keyser QC (sitting as a judge of the High Court) held that the starting point for the tribunal was that there was a valid direction that the doctor undergo a health assessment under Schedule 4 to the Medical Act 1983 and Schedule 2 to the GMC (Fitness to Practise) Rules 2004. Any challenge to the direction would properly have been made by a claim for judicial review. A claim made in 2020 failed at the permission stage. The tribunal was also not concerned with the merits of Ms V's complaint (who prior to the hearing had withdrawn her complaint) and was dealing solely with the question of non-compliance under rule 17ZA of the Rules. That said, questions of the level of the need for a health assessment and of the merits of Ms V's complaint were not entirely irrelevant for the tribunal. If the original grounds for believing that the appellant might have mental health problems was shown to be baseless, a finding to this effect might possibly be material to the tribunal's decision as to how to deal with a nevertheless unjustified failure to undergo a health assessment. On the facts of this case no such considerations arose. As regards the question of non-compliance, Ms V's retraction of her compliant had little if any relevance. The appellant remained under an obligation to undergo the assessment. The tribunal was concerned to decide whether the appellant had failed to comply with the direction. It held that he had so failed. There was no basis for questioning that finding, which was obviously correct. The appellant's main argument before the tribunal and on appeal was that he was justified in refusing to attend the medical examinations for the purposes of the health assessment, because the GMC was conducting the assessment in an unfair manner. The tribunal rejected an application by the appellant for a stay of the proceedings on the ground of an abuse of process. Its reasoning was equally applicable to the contention that the appellant's non-compliance was justified by some unfairness of the assessment procedure. The court agreed with the reasoning of the tribunal and noted that the tribunal contained two medically qualified members, whose judgement as to how a medical examination might fairly be conducted was deserving of respect by the court. The appellant did not direct any submissions as to whether suspension was the appropriate sanction. The court saw no basis for supposing that the tribunal's decision on sanction was wrong.

18. *Ramaswamy v. General Medical Council* [2021] EWHC 1619 (Admin)

Failure to comply with GMC direction – whether good reason for failure to comply with direction – failure not a risk to public protection if GMC can still investigate the concern – GMC Non-compliance guidance for tribunals, para A24(e)

The appellant, Dr Sheela Ramaswamy, practised as a speciality doctor in elderly medicine. In August 2018 the GMC opened an investigation into the appellant's fitness to practise arising from concerns about correspondence between her and the GMC. The background to that correspondence was a

relationship between the appellant and another doctor (the Doctor), and the appellant's subsequent use of that doctor's surname. The appellant in the past had an intimate sexual relationship with the Doctor and contended that in 2014 she was married the Doctor according to Hindu custom. That relationship ended and the Doctor sought to deny having ever had that relationship. As a result the appellant was suspected of having a delusional belief about its existence. The GMC considered the tone and content of the appellant's correspondence to be extremely aggressive, accusatory, repetitive and conspiratorial, suggesting an unfounded belief that she was being persecuted. The GMC made a formal direction pursuant to rule 7(3) of the GMC (Fitness to Practise) Rules 2004 that she should undergo a medical assessment. The appellant did not comply with that direction and, in October 2020, the GMC referred that non-compliance to the tribunal. In the meantime the appellant continued to practise as a doctor with no complaint about her fitness to do so. She contended that at no stage had it been suggested that she was anything other than a good and competent doctor. At a hearing held on 11 and 12 January 2021, the tribunal found that the appellant had failed to comply with a direction to undergo a health assessment and further directed that her registration be suspended for a period of nine months. In quashing the non-compliance direction and the sanction determination, Morris J, at [136]-[157], held that on a reference for non-compliance, the tribunal must consider whether there is 'good reason' for failure to comply. The GMC's guidance contained in *Non-compliance guidance for Medical Practitioner's Tribunals* provides that when considering the issue of the doctor's compliance with a GMC direction, the tribunal should ask itself whether there is a 'good reason' for the doctor's failure to comply; para A16. The guidance, at para A24, sets out examples of a good reason, which include where (e): "*a doctor can demonstrate that their failure to comply did not create a risk to public protection because the GMC can still investigate the concern".* The learned judge said that the doctor will demonstrate a good reason if he can establish that the direction is not necessary in order to enable the GMC to investigate the concern, even if the direction is reasonable and appropriate. In the *Teewary* case, His Honour Judge Keyser QC considered that a challenge to a direction should be made by way of judicial review. Morris J said that whatever the correct position as regards the route to challenge the direction, it was open to a doctor, on a reference to a tribunal, to content that the tribunal cannot find non-compliance, because he has established good reason under paragraph A24 (e), i.e., because the direction is not necessary to enable the GMC to investigate the concern. The 'concern' being investigated was the appellant's fitness to practise (and not her health condition on its own). In the instant case, the basis of the tribunal's assessment was seriously flawed. The tribunal concluded that without a health assessment the GMC was 'unable to proceed'. It appeared to reject a possible A24e defence and its conclusion was based centrally on its assessment of the medical evidence. However, the paragraph A24 (e) defence would have had some prospect of success before the tribunal.

Human Rights

19. *BC and others v. Livingston, Chief Constable of the Police Service of Scotland and others* [2020] CSIH 61

Article 8 – sexist and degrading WhatsApp messages shared amongst police officers – whether officers entitled to reasonable expectation of privacy of private life or correspondence – whether messages admissible in disciplinary proceedings – held, no reasonable expectation of privacy

The petitioner police officers appealed against the decision of the Lord Ordinary refusing their petition for judicial review preventing the Chief Constable of the Police Service of Scotland to use WhatsApp messages sent to, from and amongst the petitioners in misconduct proceedings under the Police Service of Scotland (Misconduct) Regulations 2014. The WhatsApp messages were contained in group chats shared amongst the petitioners that a reasonable person would conclude were sexist and degrading, racist, anti-Semitic, homophobic, mocking of disability and included a flagrant disregard of police procedures. The petitioners claimed that to use the WhatsApp messages in

disciplinary proceedings would infringe their common law right of privacy in Scotland and article 8 of ECHR. Dismissing the reclaiming motion, the Inner House, Court of Session (Lady Justice Clerk (Dorrian), Lord Menzies and Lord Malcolm) held that the present case turned to a significant extent on the question of whether the reclaimers had a reasonable expectation of privacy. There was no question of surveillance, covert operations, bugging or the like. The information was discovered by the police in the course of an inquiry. The real question was the extent to which collateral use of information properly obtained for a legitimate investigative purpose may be permitted. The recent case of *Sutherland v. HM Advocate for Scotland (Director of Public Prosecutions intervening)* [2020] UKSC 32 (which concerned the sending of sexually explicit messages and images and the defendant's right to respect for private life and correspondence) emphasised that whether there is a reasonable expectation of privacy is a question requiring an objective assessment of all the facts. The decision in *Sutherland* supports the view that the reclaimers did not have a reasonable expectation of privacy, sometimes described as a legitimate expectation of protection, in respect of the messages and photographs forwarded to their colleagues. Disclosure for the purposes of possible disciplinary proceedings would not offend the officers' private lives or their correspondence and the values of autonomy, dignity, and personal integrity which article 8 was designed to protect and promote.

20. *R (Fijten and others) v. General Medical Council* [2020] EWHC 3800 (Admin)
Article 8 – private correspondence – referral by case examiners to tribunal – whether referral judicially reviewable

The claimants were all doctors who were members of a closed encrypted WhatsApp group. As a result of a police investigation into a third party, messages between members of the group were brought to the attention of Health Education England which, in turn, made a formal referral to the GMC. Expressly referring to the GMC's statutory objectives the case examiners determined that there was a realistic prospect of a tribunal finding, in the case of each claimant, that their fitness to practise was impaired by reason of misconduct in relation to their actions as members of the group. The claimants sought to challenge these decisions of the case examiners on the ground that the decisions breached their article 8 right to respect for their correspondence. Refusing the claimants' renewed application for permission to apply for judicial review, Eady J said that, accepting that the claimants have article 8 rights in respect of their private communications, the private communications have already been disclosed to the police, Health Education England and the GMC. Disclosure to the MPTS would not constitute a separate interference. The tribunal may decide to sit in private or take other measures to ensure the privacy of the content of the claimants' correspondence. Relevant case law, for example, *R (Remedy UK Ltd) v. GMC* [2010] EWHC 1245 confirms that professional misconduct encompasses dishonourable or disgraceful conduct unrelated to clinical practice where this conduct brings the profession into disrepute. Private communications are not exempt from consideration in professional disciplinary proceedings. It is unarguable that a professional body must be entitled to seek to uphold proper standards within the profession, even in relation to what would otherwise constitute private conduct. It will be for the tribunal to decide what degree of further interference with the claimants' article 8 rights is to be allowed.

21. *Diggins v. Bar Standards Board* [2020] EWHC 467 (Admin)
Articles 8 and 10 – barrister charged with breach of Core Duty 5 (behaving in a way likely to diminish trust and confidence which public places in you or in the profession) – barrister posting racist and sexist tweet on Twitter in response to open letter – whether disciplinary proceedings necessary and proportionate

D, an unregistered (i.e., non-practising) barrister, posted through Twitter a racist and sexually explicit response to an "open letter" from a young black female university student in the English Faculty about reading lists alongside the existing curriculum. D was charged with using racist and

sexist language contrary to Core Duty 5 of the BSB Handbook which provides that "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession…". The disciplinary tribunal of the Council of the Inns of Court found the charge proved and D was reprimanded and fined £1,000. The tribunal concluded that the tweet was not purely a private matter. It was a seriously offensive tweet to the world at large and accompanied by a link to D's website, on which he identified himself as a barrister, and was likely to diminish trust and confidence in the profession. D's appeal to the High Court was dismissed by Warby J. The learned judge said he had reservations about the tribunal's reasoning about a link to D's website identifying him as a barrister. To take a hypothetical example: a barrister who, on occasions wholly unrelated to his professional practice, committed a number of rapes. The conduct, as opposed to any consequent criminal proceedings, could be characterised as private. The question for a tribunal in a case under CD5 is whether the conduct admitted or proved is likely to undermine trust and confidence in the individual barrister (as a barrister) or the profession. It cannot be necessary for a barrister to be immediately identifiable as such before a charge under CD5 can be brought or made out. Nor can the link to the website in this case be a key factor. The tweet was in the public domain and as a public tweet was accessible to anybody. Did the tribunal ignore or err in its approach to D's human rights under the ECHR? The learned judge, at [74], applying his judgment in *Khan v. Bar Standards Board* [2018] EWHC 2184 (Admin), said that D's tweet is speech protected by article 10(1) of the Convention, which extends to cover speech which offends, shocks or disturbs, or which is painful or distasteful satire. The imposition of sanctions is respect of the tweet interferes with D's right to freedom of expression. It therefore requires justification pursuant to article 10(2). Whether or not the tweet is "correspondence" within the meaning of article 8(1), his conduct in posting it was an aspect of his private life, respect for which is guaranteed by article 8(1). The interference requires justification pursuant to article 8(2). The legitimate aims specified in articles 8(2) and 10(2) are to be construed strictly. The word "necessary" in articles 8(2) and 10(2) and test of necessity requires the party charged with the interference to persuade the court that the measure at issue corresponds, and is proportionate, to a "pressing social need". At [75] the judge said that the essential issues (as will normally be the case where a barrister faces disciplinary proceedings over speech) are those of necessity and proportionality. In the instant case, the tribunal addressed those factors and did not err in its approach to *Stocker* or its regard to D's right to freedom of expression. Unlike the conduct complained of in *Walker v. Bar Standards Board,* PC 2011/0219, 19 September 2013 (unreported), the tweet in the instant case was a grossly offensive and inappropriate message, worthy of disciplinary measures. D had failed to identify any misdirection or error of law on the part of the tribunal in this case.

22. ***In the Petition of Calum Steele for Judicial Review*** **[2021] CSOH 65**

Article 10 – death of member of public in police custody – announcement that no police officer would be prosecuted – comment and discussion of decision on social media – police officer posting comical graphics interchange format image on Twitter – freedom of expression – whether police disciplinary proceedings necessary and proportionate interference with officer's article 10 rights

Following the death of a member of the public in police custody, the Lord Advocate announced that the police officers who were involved in the incident would not face criminal prosecution. The announcement of that decision was widely reported and was the subject of comment and discussion on social media. The petitioner, who was the general secretary of the Scottish Police Federation and a serving officer subject to the Police Service Scotland (Conduct) Regulations 2014, posted various messages on his personal account on Twitter. One post included a graphics interchange format image (known as a GIF) showing a man lightly tapping another on the cheek before running away. The GIF image was apparently a clip taken from a comedy film called 'Napoleon Dynamite'. The petitioner's post drew a number of negative comments from other users on Twitter and several referred to his status as a police officer or to his position as general secretary of the Scottish Police

Federation. On 15 September 2020, a Chief Inspector of Police Scotland, acting under delegated authority from the Deputy Chief Constable of the Police Service of Scotland, determined that the petitioner had a case to answer in respect of misconduct and referred the matter to a misconduct meeting under the 2014 Regulations. Refusing the petitioner's petition for judicial review, Lord Fairley said that the use of the GIF constituted an 'expression' for the purposes of article 10(1) of ECHR ('Everyone has the right to freedom of expression'). The central issue was whether the respondent was able to justify the interference by the making of a formal allegation of misconduct in the circumstances of this case, as being 'necessary in a democratic society' in terms of article 10(2) of ECHR. Having regard to the principles described in *Ahmed and others v. United Kingdom* (2000) 29 EHRR 1, the respondent must identify a pressing social need (or 'legitimate aim'), and must also show that the interference in question is proportionate to the pursuit of that aim and supported by reasons which are relevant and sufficient. The article 10(2) aims relied on by the respondent in this case are 'public safety' and 'the prevention of disorder or crime'. Those aims are achieved through the maintenance of public confidence in the police service, and the police to be regulated by proper and efficient disciplinary procedures. The issue was whether the respondent had established that, in order to maintain public confidence in the police, it was a necessary and proportionate interference with the petitioner's article 10 right to be invited to attend a disciplinary meeting to consider whether or not the GIF within his tweet was misconduct consisting of conduct which discredited the police service. In the court's view, the decision of the respondent that there was a case to answer could not be said to be irrational. Some members of the public would regard the use of the GIF by a police officer as inappropriate and offensive in the context of a discussion about a death in police custody. The view of the respondent that the use of a clip from a comedy film in that context might constitute discreditable conduct was tenable and one that she was entitled to reach – at least to the standard of there being a case to answer.

Impairment of Fitness to Practise

23. *Professional Standards Authority for Health and Social Care v. General Pharmaceutical Council and Ali* [2021] EWHC 1692 (Admin)

Use of antisemitic language – meaning of words used – objective test – intention of speaker and good character not relevant to whether words used were antisemitic

On 18 June 2017, Mr Zamin Ali (Mr A), a registered pharmacist and managing partner of a pharmacy, attended an event which was held to demonstrate support for Palestinian rights. He led the rally and used a loudhailer. In the course of a long speech during the rally, he made various comments. Disciplinary proceedings were brought against him, alleging that that he had used antisemitic and offensive language during a public speech. Mr Ali admitted using words that were offensive (charge 2b), but contended that he did not have any antisemitic intent and his comments were not antisemitic (charge 2a). A fitness to practise committee of the GPhC found that the words he had used were not antisemitic, but that they had been offensive, that this amounted to misconduct, that Mr Ali's fitness to practise was impaired, and that he should be given a warning. Allowing an appeal by the PSA and remitting charge 2a to be determined afresh, Johnson J said the allegation was simply that the words used by Mr Ali were offensive and antisemitic. In order to find whether the allegation was established it was necessary for the committee to consider the meaning of the words used so as to determine whether they were offensive, and whether they were antisemitic. In *Loveless v. Earl* [1999] EMLR 530 CA, Hirst LJ said at 538 (in the context of defamation) that meaning is an objective test, entirely independent of the defendant's state of mind or intention. The committee in seeking to apply an objective test erred by taking account of what it considered to be Mr Ali's intention. The allegation was that the comments were antisemitic. The allegation required a focus on the comments themselves, not Mr Ali's intent. If the words used are antisemitic then there

is nothing objectionable in them being labelled antisemitic. If the person had not intended that meaning then that might be relevant to other issues, including any required remediation or sanction. For similar reasons, the committee erred in taking account of Mr Ali's character. The fact that Mr Ali had no previous convictions or misconduct findings recorded against him was not relevant to an assessment of the objective meaning of the words he used. The committee also erred in not taking account of the cumulative impact of the language used by Mr Ali, and the meaning of his comments when considered as a whole. This required consideration of how one or more of the individual comments might inform the meaning to be attached to the others.

24. ***Professional Standards Authority for Health and Social Care v. Health and Care Professions Council and Roberts*** **[2020] EWHC 1906 (Admin)**

Paramedic – racist abuse about patient – isolated incident out of character and unlikely to be repeated – finding of misconduct but no current impairment – whether finding of impairment required in public interest – panel satisfied public interest would not be undermined by finding of no impairment - appeal by PSA dismissed – finding of impairment not required

Before the HCPC, R, a paramedic for East of England Ambulance Service NHS Trust, admitted that while attending Patient A he referred to him as having DPS (dying Paki syndrome), or words to that effect and that his comments were racist and constituted misconduct. The comment was made in the course of handover to an ambulance team and outside the house and out of earshot of the patient or the public. R's evidence was that he was extremely shocked at himself immediately after he said it. He referred himself very shortly after the events to the HCPC and was entirely candid and cooperative, admitting the words from the start and that they were racist. The case was – and was accepted by the HCPC as being – that the remark was a one-off, out of character and that R was remorseful, embarrassed and ashamed of what he said. R denied impairment, explaining the detailed and significant steps he had taken to seek to remediate, change, and improve and to understand and to address the factors which had precipitated his behaviour on that occasion. The panel decided that R was guilty of misconduct, but that his fitness to practise as a paramedic was not impaired. Accordingly, there was no power to impose a sanction upon him. Dismissing the PSA's appeal that the panel's decision was wrong, Foster J said that the panel did not fail to mark R's wrongdoings: it failed to impose a finding that offered an opportunity to impose a sanction and it was entitled to do so. Generally speaking, any conduct of a professional person of a racist nature is likely to result in a finding of impaired fitness to practise. However, there is no rule that such a result *must* follow. The very fact that it did not in the current case does not mean that the panel's views must be characterised as unlawful.

25. ***General Medical Council v. Armstrong*** **[2021] EWHC 1658 (Admin)**

Dishonesty – tribunal making finding of dishonesty but not current impairment – need for tribunal to identify factors before concluding protection of public does not necessitate a finding of impairment

The respondent qualified as a doctor in 1999 and in 2012 emigrated to Australia, returning to the UK in 2015. In 2016, the respondent worked as a locum GP at several practices in the North East of England when she was not registered on the required Medical Performers List (MPL). In September 2017, she sent a message to one practice falsely stating that she was on the Newcastle MPL. Following a referral by NHS England to the GMC, an interim order of suspension was imposed on the respondent's registration. Thereafter when completing application forms for posts in the UK the respondent falsely stated that she had not been the subject of any disciplinary proceedings and when applying for the position of a GP in Australia she did not disclose that her UK registration was subject to an interim order of suspension. In addition, she made other false statements. Before the tribunal, the respondent admitted all of the allegations and gave evidence at the impairment stage

of the hearing. Counsel for the respondent, whilst accepting that the respondent's conduct amounted to misconduct, submitted that her current fitness to practise was not impaired. The tribunal determined that the respondent's dishonest conduct 'did fall far short of the standards of conduct reasonably expected of a doctor and was so serious as to amount to misconduct' but that her fitness to practise was not currently impaired.

On an appeal by the GMC pursuant to section 40A of the Medical Act 1983, Lane J quashed the tribunal's decision on impairment and substituted a decision of his own that the respondent's fitness to practise was currently impaired, and remitted the matter to the tribunal to make a decision on sanction. At [33], the judge said that there is an expectation that medical (and other) professionals will be honest when undertaking their regulated activities; and that this expectation is a key component of any regulatory regime for protecting the physical safety of the public and promoting and maintaining public confidence in the profession. The appellate court will, therefore, be expected to scrutinise the tribunal's decision, in order to satisfy itself that the tribunal has recognised the inherent weight to be given to the importance of honesty; and that, consequently, the tribunal needs to identify weighty factors in favour of the person concerned if it is to conclude that the protection of the public does not necessitate a finding of impairment. The court was informed that the only appeal cases that the appellant had been able to identify in which a finding of dishonesty did not lead to impairment were *PSA v. GMC and Uppal* [2015] EWHC 1304; *PSA v. A decision of the Conduct and Competence Committee of the Nursing and Midwifery Council* [2017] CSIH 29; and *PSA v. GMC and Hilton* [2019] EWHC 1638 (Admin). The judge said that the tribunal's decision in the present case failed to have proper regard to the nature and extent of the respondent's dishonesty. There was a serious disconnect between the tribunal's finding of misconduct and breach of a fundamental tenet of the profession, which in addition brought the profession into disrepute, and its finding that the respondent's fitness to practise was not currently impaired. In finding that the second ground of challenge was also made out, namely, that the tribunal placed wholly excessive weight upon factors in favour of the respondent, the judge, at [52], said:

> The fact that the assessment of impairment is forward-looking means the Tribunal must appreciate that any loss of public confidence in the regulatory regime, resulting from erroneously lenient decisions, is likely to be of an ongoing nature. It does not necessarily fall to be discounted or downplayed, merely because the practitioner in question is unlikely to repeat their dishonesty. Undue leniency risks undermining general public confidence in the ability of the regulatory regime to protect the public from harm. In the present case, there is legitimate concern that the integrity of the list required to be kept by the [National Health Service (Performers List) (England) Regulations 2013] would be put at risk, in that others may lie about being on it and yet escape formal sanction.

<u>Insight</u>

26. *General Medical Council and Professional Standards Authority v. Bramhall* [2021] EWHC 2109 (Admin)

Conviction for assault by battery – surgeon leaving his initials on transplanted livers of two patients – tribunal imposing suspension – departure from sanctions guidance – insufficiency of reasons – need for decision to consider appropriateness of erasure – attitudinal issues relevant to sanction

B was a transplant surgeon at the University Hospitals Birmingham NHS Foundation Trust. He pleaded guilty at the Crown Court in Birmingham in December 2017 to two counts of assault by battery, committed six months apart in 2013 against patients under general anaesthesia during transplant surgery. He had marked his initials on their livers with an argon beam coagulator, a surgical instrument used for cauterisation. B was sentenced to a one year community order with an

unpaid work requirement of 120 hours and he was fined £10,000. On 18 December 2020, the tribunal imposed a suspension of five months. Quashing the sanctions determination and remitting the case for a fresh determination by a differently constituted tribunal, Collins Rice J said that the tribunal in this case made errors of principle in its sanctions evaluation, resulting in, and including, an insufficiency of reasons for departure from the Sanctions Guidance. The court said that B was convicted of more than one offence of deliberate violence. He was sentenced on the basis that his offences had targeted patients who were particularly vulnerable because of their personal circumstances; that his acts were an abuse of power and of a position of trust; and that he had caused serious and lasting harm to one of his victims (albeit unintentionally). The Sanctions Guidance provides that any one of those factors on its own may indicate that erasure is appropriate. Here, multiple factors were present. The authoritative steer was towards the proportionality of erasure. While that did not necessarily constrain a tribunal's final decision, it did properly engage a duty to state clear reasons for departure (*PSA v. HCPC and Doree* [2017] EWCA Civ 319) in the form of a careful and substantial case-specific justification *(GMC v. Khetyar* [2018] EWHC 813). The determination in the instant case did not provide that. Under the heading 'Attitudinal Issues', the court said:

> 45. Mr Bramwell's perspective on his own conduct, and his engagement with the various procedures examining and responding to it, were matters of relevance to the determination of sanction. As a point of principle, *'the way in which a healthcare professional reacts to the discovery of their misconduct is an important part of the assessment of their attitude, their insight into the wrongdoing and effects on a victim, and the sanction necessary in the public interest'*; *PSA v. HCPC and Wood* [2019] EWHC 2819 (Admin) at [73]. Moreover, this is a case in which, on the facts, *motivation* presents itself as an acute regulatory question. Again, *the reasons why a person acts in a particular way, or their motivation for acting, are significant in evaluating (a) the true seriousness of their behaviour and (b) what the appropriate sanction should be; Wood* at [56]. Motivation, in other words, potentially goes to gravity and also to insight and remediability.
>
> 47. …. *Candour* is a continuing professional obligation of openness and honesty, embracing full and proactive co-operation with regulatory and other investigative action, putting self-interest behind that of the patient.
>
> 48. *Insight* goes to the subsequent development of fair, objective understanding of the nature and gravity of the misconduct. It typically requires demonstration of a degree of empathetic identification with the perspective of others: victims, professional colleagues, the public (including other patients and organ donors, actual and potential). It is a necessary precondition of *remorse,* or genuine regret for the impact of others. It is distinguishable from willingness to offer an apology, from the development of self-serving narrative, and from chagrin at the personal consequences of public exposure and regulatory and criminal justice action.

27. *General Medical Council v. Awan* [2020] EWHC 1553 (Admin)

Registrant's evidence disbelieved and defence rejected by tribunal – lack of insight - effect on sanction - whether aggravating factor in determination of sanction

On 15 November 2019, the tribunal made an order suspending the registrant from practice for a period of nine months followed by a review at the end of that period. The GMC appealed that order under section 40A of the Medical Act 1983. It contended that the sanction was insufficient to protect the public. The tribunal found that the registrant, a GP in Leeds and Wakefield, had engaged in sexually motivated conversations via an online chatroom, text messages and WhatsApp with Person

A, who he believed was a 13-year-old girl but who was in fact a police officer conducting an undercover sting operation. The tribunal robustly rejected the registrant's defence that he realised Person A was an imposter and an older female and was probably a police agent, and that he engaged with her to reveal her true age. The GMC appealed on the ground that in considering impairment and sanction the tribunal failed to have regard to the manner in which the registrant gave his evidence. The GMC argued that the registrant's "implausible, incredible and inconsistent explanations" provided on oath were plainly relevant to his insight and the risk of repetition and that the tribunal failed to reflect this aggravating factor in its determination on sanction. In dismissing the appeal, Mostyn J said that it was inconceivable that the tribunal did not have in mind the registrant's dogged, yet ridiculous, defence when making its findings about insight and it was obvious that this must have been the principal factor that influenced its conclusion on sanction. It is too much to expect of an accused member of a profession, who has doughtily defended an allegation on the ground that he did not do it, suddenly to undergo a Damascene conversion in the impairment phase following a factual finding that he did do it. In *Misra v. General Medical Council* [2003] UKPC 7, Lord Hoffman deprecated additional charges being brought based on a disbelieved defence. Mostyn J said that it seemed to him that an accused professional has the right to advance any defence he or she wishes and is entitled to a fair trial of that defence without facing the jeopardy, if the defence is disbelieved, of further charges or enhanced sanctions. Explicit admissions of culpability tend not to be given in the impairment and sanctions phase. In *General Medical Council v. X* [2019] EWHC 493, following the factual finding, Dr X instructed counsel to admit on his behalf that what the tribunal had found proved was serious and deplorable. In the absence of any significant hiatus between the factual finding and the impairment/sanctions phases in which full reflection can be undergone, that was as much as can reasonably be expected of an accused professional who has defended the case on the ground that he did not do what was alleged.

28. *Sayer v. General Osteopathic Council* [2021] EWHC 370 (Admin)

Denial of allegations – relationship between contesting charges and insight; principles

In dismissing the appellant's appeal, Morris J, at [25], said:

> As regards the relationship between contesting the charges and insight, I have been referred to a number of authorities: including *Nicholas-Pillai v. GMC* [2009] EWHC 1048 (Admin) at §19; *Amao v. Nursing and Midwifery Council* [2014] EWHC 147 (Admin) at §160 to 164; *Motala v. GMC* [2017] 2923 (Admin) at §§30, 31 and 34; *Yusuff v. GMC* [2018] EWHC 13 (Admin) at §§18 to 20; *GMC v. Khetyar* [2018] EWHC 813 (Admin) at §49; *GMC v. Awan* [2020] EWHC 1553 (Admin) at §38 and *Dhoorah v. Nursing and Midwifery Council* [2020] EWHC 3356 (Admin) at §36. From these, I draw the following principles:
> (1) Insight is concerned with future risk of repetition. To this extent, it is to be distinguished from remorse for past misconduct.
> (2) Denial of misconduct is not a reason to increase sanction: *Awan* §38.
> (3) It is wrong to equate maintenance of innocence with lack of insight. Admitting misconduct is not an absolute bar to a finding of insight. Admitting misconduct is not a condition precedent to establishing that the registrant understands the gravity of the offending and is unlikely to repeat it: *Motala* §34 and *Awan* §38.
> (4) However attitude to the underlying allegation is properly to be taken into account when weighing up insight: *Motala* §34. Where the registrant continues to deny impropriety, that makes it more difficult for him to demonstrate insight. The underlying importance of insight and its relationship with denial of misconduct was usefully analysed by Andrew Baker J in *Khetyar* (at §49) as follows:
>
> > "'Of course, no sanction was to be imposed on him for his denials as such; however, insight requires that motivations and triggers be identified and understood, and if that is possible at all without there first being an acceptance that what happened

did happen it will be very rare, and any assessment of ongoing risk must play close attention to the doctor's current understanding of and attitude towards what he has done."

(5) The assessment of the extent of insight is a matter for the tribunal, weighing all the evidence and having heard the registrant. The Court should be slow to interfere: *Motala* §§30 and 31.

In the instant case, Morris J, at [147], said that the committee was entitled to take into account the fact that the appellant had denied the allegations in considering the extent of the insight he had shown. This was particularly the case given his denial of the sexual motivation behind his conduct. The assessment of insight was principally a matter for the committee, particularly since it had had the benefit of hearing the appellant in person at the fact finding and impairment stages.

Integrity (lack of)

29. *Yaseen v. Secretary of State for the Home Department* [2020] EWCA Civ 157, [2020] 1 WLR 1359

Immigration – application for indefinite leave to remain - failure of applicant to make timely tax returns – finding by tribunal of lack of integrity – meaning of lack of integrity

The applicant, who is of Pakistani nationality, failed to make timely tax returns for the years 2010/11, 2011/12 and 2012/13 and filed them only in December 2015, after the point when his continued residence in the United Kingdom was in issue. On 23 January 2016, the Secretary of State refused the applicant's application for indefinite leave to remain, taking into account his delay in filing his tax returns. The First-tier Tribunal dismissed an appeal on the grounds that the delay in filing the tax returns represented a "lack of integrity" sufficient to justify the test in paragraph 276B(ii) of the Statement of Changes in Immigration Rules (1994) (HC 395), but made no finding of dishonesty. The Upper Tribunal upheld that decision. In allowing the applicant's appeal in the Court of Appeal, Irwin LJ (with whom Simler LJ and Sir Jack Beatson agreed) said:

> 45. Resort to the phrase "lack of integrity" may well confuse rather than illuminate decision-making in this field. Although the phrase is good English, and apt as a matter of common sense, it can be hard to distinguish from dishonesty. It has also acquired something of a special meaning, as analysed by Jackson LJ in *Wingate* [2018] 1 WLR 3969, implying a breach of obligations derived from a professional or other special status, rather than poor conduct or character in an ordinary citizen.

30. *Beckwith v. Solicitors Regulation Authority* [2020] EWHC 3231 (Admin)

Partner in firm engaging in sexual activity with associate solicitor – tribunal concluding conduct inappropriate – events occurring in professional person's private life – no unfair advantage of professional status – whether lack of integrity and breach of SRA Principles – rules regulating professional conduct – Solicitors Act 1974, section 31 – Article 8 ECHR

Following a 9-day hearing before the SDT, the tribunal found proved that on 2 July 2016, the respondent, a partner in Freshfields Bruckhaus Deringer (the firm), initiated and engaged in sexual activity with Person A in breach of Principle 2 (you must act with integrity) and Principle 6 (you must behave in a way that maintains the trust the public places in you and in the provision of legal services) of SRA's Principles 2011 set out in the SRA Handbook. The tribunal imposed a fine of £35,000 and ordered the appellant to pay £200,000 towards the SRA's costs. The tribunal found that what it described as a "sexual encounter" had occurred between the appellant and Person A during the evening of 1 – 2 July 2016. Earlier that evening the appellant and Person A had been part of a

group drinking in a pub near the firm's London office. Person A was an associate solicitor with the firm in the same department the appellant worked in. The drinks on 1 July 2016 were in anticipation of Person A's departure from the firm on 8 July 2016. The tribunal found that the appellant was in a position of seniority and/or authority over Person A; that the appellant knew that Person A was heavily intoxicated and that her judgment and decision-making ability was impaired; that the appellant's judgment was also influenced by his own alcohol consumption that evening; that the appellant and Person A agreed to share a taxi; that Person A had agreed that the appellant could enter her home to use the toilet, and that the appellant knew that Person A had not allowed him into her home with a view to sexual activity taking place; and that the appellant's conduct, in engaging in sexual activity with Person A in her home, was inappropriate.

In allowing the appellant's appeal, and quashing the fine and order for costs, the Divisional Court (Dame Victoria Sharp P and Swift J) said that what the appellant did was, as the tribunal concluded, inappropriate. But it was not conduct which on a proper reading of the 2011 Principles was capable of being characterised as showing a lack of integrity within Principle 2. In the context of the course of conduct alleged in the Allegation in the instant case, the requirement to act with integrity obliged the appellant not to act so as to take unfair advantage of Person A by reason of his professional status. On the findings made by the tribunal, that did not happen. Section 31 of the Solicitors Act 1974 contains a power to make rules "for regulating in respect of any matter the professional practice, conduct, fitness to practise and discipline of solicitors". Rules made in exercise of the power at section 31 of the Act cannot extend beyond what is necessary to regulate professional conduct and fitness to practise and maintain discipline within the profession. The requirement to act with integrity must comprise identifiable standards. There is no free-standing legal notion of integrity in the manner of the received standard of dishonesty; no off-the-shelf standard that can be readily known by the profession and predictably applied by the tribunal. The rules made pursuant to section 31 cannot extend beyond what is necessary to regulate professional conduct and fitness to practise and maintain discipline within the profession. The tribunal's conclusion on Principle 6 rested on the same findings on matters of fact and assessment as its conclusion on Principle 2. The facts as found and assessed by the tribunal were not capable of supporting the conclusion that the appellant acted in breach of Principle 6. Conduct amounting to an abuse by a solicitor of his professional position is clearly capable of engaging Principle 6. But that was not this case.

At [50] of its judgment, in relation to the right to respect for private life guaranteed by article 8 of ECHR, the court said:

> [T]he requirements to act with integrity and to act so as to maintain public trust in the provision of legal services, are requirements which will, on occasions require the SRA or the Tribunal to adjudicate on a professional person's private life. Common sense dictates that such cases must and will arise. The Appellant's submissions give rise to two related issues. The first is whether the requirements imposed by Principle 2 and Principle 6, respectively, meet the minimum standard of legal certainty; which is one part of the article 8(2) justification requirement. The second concerns the extent to which Principle 2 and Principle 6 may reach into private life and whether, at the level of principle that is consistent with the required fair balance between the public interest and private rights. These are significant matters. It is one thing to accept that any person who exercises a profession may need, for the purposes of the proper regulation of that profession in the public interest, to permit some scrutiny of his private affairs; to suggest that any or all aspects of that person's private life must be subject to regulatory scrutiny is something of an entirely different order.

32. *AB, a barrister v. Bar Standards Board* [2020] EWHC 3285 (Admin)

Conduct in barrister's private or personal life – proceedings concerning barrister's children – acts closely connected with court proceedings – whether conduct capable of giving rise to breach of BSB handbook

The appellant appealed against a decision of the Bar Tribunals and Adjudication Service convicting her of misconduct and disbarring her. The proceedings arose out of disputes with Mr X about their twin children, of whom Mr X was the father. In outline, the allegations which the tribunal upheld were that the appellant misled the family court about Mr X's receipt and/or knowledge of a draft order and/or an application (charge 1), failed to comply with four court orders (charge 2), misled the court by telling a judge that a hearing had been listed before Mostyn J when it had not (charge 3), and had made a range of applications that were without merit, leading to the imposition of an order under s91 of the Children Act 1989 in the nature of a civil restraint order (charge 4). On appeal the appellant contended (amongst other grounds) that the tribunal erred in holding that she breached CD5 of the BSB Handbook ('you must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession') or Rule C8 ('you must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4)'). The appellant, relying on paragraph gC27 ('conduct which is not likely to be treated as a breach….includes ….your conduct in your private or personal life, unless this involves abuse of your professional position, or committing a criminal offence, other than a minor criminal offence'), contended that the conduct alleged by the charges, if proved, should not have been treated as a breach of the Code because it was conduct in her private or personal life which did not involve any abuse of her professional position or any criminal offence. Dismissing the ground of appeal, Bourne J said, at [68] – [78], that the tribunal was invited to consider and did consider the distinction between public and private conduct. The public/private distinction was a filter which a disciplinary tribunal is bound to apply in any case clearly involving a barrister's conduct in his or her private life rather than in his or her practice as a barrister. Applying the guidance, conduct in a person's private or personal life is in general not likely to be treated as a breach of CD5 but nevertheless can be so treated for good reason. The reason could be that the conduct, though personal or private, clearly is or is analogous to conduct which contravenes other provisions of the Code. In the present case, the relevant conduct involved acts and omissions in, or closely connected with, court proceedings. There is no doubt at all that conduct such as misleading a court, disobeying court orders and wasting or misusing the court's time to the detriment of other court users would be professional misconduct if committed in the course of a barrister's professional practice. It was open to the tribunal to rule that conduct of that kind was professional misconduct though committed in a personal capacity, if in fact it infringed a provision such as CD5 or rC8. In *Iteshi v. Bar Standards Board* [2016] EWHC 2943 (Admin), it was held that a barrister's conduct in response to a court order and his being made subject to an order restraining him from bringing proceedings could (and almost invariably would) amount to misconduct.

<u>Investigation of Allegations</u>

33. *Ogunsanya and Taylor Wood Solicitors v. General Medical Council* [2020] EWHC 1500 (QB)

Claimant registered as medical practitioner and solicitor – conduct carried out by claimant in capacity of solicitor – power of GMC to investigate in circumstances of dual registration - whether conduct capable of amounting to professional misconduct – Medical Act 1983, section 35C(2)(a)

The claimants sought a declaration (and associated injunctive relief) that the defendant General Medical Council had no power to investigate the first claimant, O, pursuant to the Medical Act 1983, in circumstances in which O, who is both a registered medical practitioner and a solicitor, was acting in his capacity as a solicitor. It was the claimants' case that, as the conduct in question was carried out in O's capacity as a solicitor and partner of the second claimant, the GMC was not entitled to investigate the alleged misconduct, not least as it was unfair to investigate matters which were covered by legal professional privilege (LPP). O was a solicitor advocate and also a medical doctor who worked part-time as a general medical practitioner. In July 2019, NHS England wrote to the GMC raising various matters of concern regarding O arising from his handling of a case before the First-tier Tribunal, in which O represented two doctors who challenged a decision by the Care Quality Commission suspending their GP practice. In the course of the proceedings one of O's clients attested that O had told her that he had spoken to a former caretaker-doctor, J, who had agreed to continue to provide cover for the practice while she and her partner challenged the CQC findings. J, had, however, firmly denied that account, and the First-tier Tribunal rejected the suggestion that J had given such confirmation. It was also alleged that O had been rude to an associate medical director at the CQC and had sent forceful emails to various NHS England staff. It was common ground before Eady J that (i) there was no difference in meaning between *"misconduct"* in section 35C(2)(a) of the Medical Act 1983 and *"serious professional misconduct",* which was the relevant term used in earlier versions of the legislation: *R (Remedy UK Ltd) v. GMC* [2010] EWHC 1245 (Admin) at para 15; (ii) that *"serious professional misconduct"* requires that the misconduct must be linked to the profession of medicine and must be serious: *Roylance v. GMC* [2000] 1 AC 311, at p 331B-C; and (iii) *"professional misconduct"* does not merely concern clinical misconduct; it must maintain a link to the profession of medicine and may involve conduct of a morally culpable or otherwise disgraceful kind which may, and often will, occur outwith the course of professional practice itself, but which brings disgrace upon the doctor and thereby prejudices the reputation of the profession: *Remedy* at para 37, per Elias LJ. In considering the GMC's power to investigate in circumstances of dual registration, Eady J said:

> 38. The touchstone here is section 35C of the 1983 Act and that does not limit the question of impairment to conduct in a specific capacity. Although the conduct must maintain a link to the profession of medicine *(Roylance),* it may occur outwith medical practice if it is conduct that would bring disgrace upon the doctor and thereby prejudice the reputation of the profession *(Remedy UK).* As [counsel for the claimants] accepted in oral argument, if the practitioner in question was qualified in another profession and, *in that other capacity,* acted dishonestly or in a discriminatory way, that would well prejudice the reputation of the medical profession and thus engage the [GMC's] jurisdiction for section 35C purposes.
>
> 39. The fact that there may be an overlap with another statutory regulatory regime (here the SRA) does not, in my judgment, oust the jurisdiction of the [GMC] in this regard. Membership of each profession brings separate regulatory oversight; each regulator has the untrammelled jurisdiction to investigate its own registrants and the [GMC] cannot delegate its functions under s. 35C (2) to the SRA. It will no doubt be unusual, but that may mean that an individual with dual registration could face separate investigations by two different regulators over substantially the same matter.
>
> 40. In such circumstances, it may be relevant for the [GMC's] Case Examiners to consider whether it is appropriate for the matter to proceed further in respect of that individual's position as a medical practitioner (and they may determine that it should not, see Rule 8(2) [of the GMC (Fitness to Practise) Rule 2004]). Moreover, where the conduct in issue relates to the individual's work as a solicitor, it may be necessary to have regard to the potential unfairness that might arise due to LPP issues. At the Rule 4 stage, however, the question for

the Registrar is merely whether the allegation in issue is capable of producing a finding of misconduct (*R (Rita Pal) v. GMC* [2009] EWHC 1061 (Admin)); if so, then the Registrar is mandated to refer that matter to Case Examiners, pursuant to Rule 4(2).

41. The question for the Registrar is not defined by the context of the conduct in issue, but by its impact upon public confidence in the medical profession. It is the [GMC] that is required to determine this question and it plainly has the relevant expertise to do so. A Rule 4 decision will not be susceptible to challenge merely because it relates to conduct that could also be the subject of investigation by another regulatory body and the real question is thus whether the decision in this case is outwith the [GMC's] powers because the specific allegations in issue cannot properly be said to be capable of producing a finding of misconduct for section 35C purposes.

On the facts, the judge said the allegation suggests that O dishonestly told his client that J had given an assurance when that was not the case. That would potentially raise a question as to O's probity. Although O was acting in his capacity as a solicitor, the court could not say that this could not provide a proper basis for the GMC to find that the allegation was capable of producing a finding of misconduct for section 35C purposes. However, concerning the allegation of O's alleged rudeness and forceful emails to NHS England, it was notable that the GMC decision-taker observed that "on their own, these allegations may not be concerning". Having regard to the litigation context in which O was acting, there was no proper basis for concluding that this allegation could result in a finding of misconduct.

Legal Assessor/Legally Qualified Chair

34. *Professional Standards Authority for Health and Social Care v. Health and Care Professions Council and Yong* [2021] EWHC 52 (Admin)

Harassment – legal assessor's omission to give direction to committee – definition of harassment – Equality Act 2010, s26

The overarching allegation against the registrant, a social worker employed by the London Borough of Lambeth, was that between September 2016 and June 2017, he behaved inappropriately and/or in a harassing manner towards seven female colleagues. The HCPC's panel found that while the registrant behaved inappropriately towards female colleagues, it did not in any case find that he had behaved in a harassing manner towards them. The PSA appealed on the grounds, amongst others, that the legal assessor failed to provide the panel with any direction in respect of what constituted harassment and failed to provide the panel with any guidance as to how they may differentiate between the terms 'inappropriate' and 'in a harassing manner' (ground 1), and that the panel failed to provide adequate reasons as to why they concluded that the registrant's behaviour was not harassing (ground 2). Allowing the appeal, supported by the HCPC, Griffiths J noted that it was not pointed out to the panel that the HCPC was subject to the public sector duty imposed by section 149 of the Equality Act 2010. Section 149 of the 2010 Act provides that a public authority must, in the exercise of its functions, have due regard to the need to eliminate harassment. The learned judge said, at [52], that the HCPC is a public authority bound by section 149. Therefore, it has a duty to have due regard to the need to eliminate harassment. It follows that the HCPC panel should have due regard, specifically, to the definition of harassment in section 26 of the Equality Act. Section 26 provides that a person harasses another if they engage in unwanted conduct of a sexual nature for the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. However, the panel did not mention that definition or have any regard to it when reaching its decisions on harassment. Applying the definition of harassment in the Equality Act, the court concluded that based on the evidence before the panel the registrant had acted in a harassing manner to some of his female colleagues.

Note: The judge's attention may not have been drawn to s 149(9), and Schedule 18, para 3, to the Equality Act 2010, which provides that the section does not apply to the exercise of a judicial function conferred on a court or tribunal. While the HCPC as a public authority is no doubt bound by s149, the panel was exercising a judicial function under schedule 18 of the Act. It did not, therefore, follow that the HCPC panel should have had regard to the definition of harassment in the Equality Act. The case most frequently cited on the meaning of harassment is *Majrowski v. Guy's and St Thomas's Hospital NHS Trust* [2007] 1 AC 224, para 30, where Lord Nicholls of Birkenhead said that conduct has to be oppressive and unacceptable to cross the boundary to amount to misconduct. See also *Ferguson v. British Gas Trading Ltd* [2010] 1 WLR 785, CA. A sexual motive means that the conduct was done in pursuit of sexual gratification or in pursuit of a sexual relationship: *Basson v. GMC* [2018] EWHC 5050 (Admin). The best evidence of whether conduct is overtly sexual is the defendant's behaviour; see *Haris v. GMC* [2021] EWCA Civ 763 at [37].]

35. *Arowojolu v. General Medical Council* [2019] EWHC 3155 (Admin)

Allegation of sexually motivated misconduct – complainant making earlier similar allegation against grandfather – whether complainant having propensity to make false allegations – issue relevant to credibility – direction by legally qualified chair found to be lacking – need for tribunal to properly and fairly determine whether complainant has propensity to make false or untrue allegations

The tribunal found a number of allegations of sexual misconduct in July 2013 by the appellant towards a receptionist, Ms A, at the health centre in Essex where they both worked. As a consequence, the tribunal directed that the appellant's name be erased from the medical register. The principal ground of appeal was that the tribunal was misdirected in law by its legally qualified chair about how to approach an allegedly false complaint of sexual offences made by Ms A against her grandfather when she was a teenager. The appellant was arrested on the morning of 22 July 2013. In October 2014 he was convicted of a single count of sexual assault of Ms A contrary to section 3 of the Sexual Offences Act 2003 and was sentenced to 2 years' imprisonment. He appealed against his conviction, and on 1 April 2015 his conviction was quashed by the Court of Appeal for reasons not directly relevant to this appeal. When the case was listed for re-trial in 2016, the prosecution disclosed unused material which had not been disclosed previously. The material related to a claim by Ms A that when she was a teenager, she had been sexually abused by her grandfather over a two year period. The grandfather denied the allegations and was never charged. In statements to the police, Ms A's family not only disbelieved her but provided evidence which undermined her claims. At the appellant's re-trial, the first jury could not agree. The appellant was then re-tried and was acquitted by the jury. At the hearing before the MPTS, the appellant's case was that Ms A was a liar and a fantasist who had a track record of making false allegations against older men in positions of authority. In evidence Ms A repeated her claim that she had been sexually assaulted by the appellant and maintained that the allegations against her grandfather were true. Counsel for the GMC and the appellant were agreed that the tribunal would first need to find on the balance of probabilities whether the allegation against the grandfather was an untrue allegation. If the tribunal did not find it was false or untrue, then it had no relevance. The legally qualified chair advised the tribunal that the allegations against the grandfather had not been determined by a court of law, and that the tribunal did not need to determine the truth or otherwise of the historic allegations although it should consider the evidence about these matters alongside all the other evidence in determining whether the facts in the allegation had been proved. In its determination the tribunal said it found no evidence that Ms A was lying about the events involving the appellant or that she was a fantasist. In allowing the appellant's appeal, Julian Knowles J, at [74] – [77], said that the evidence about the grandfather was admitted because it was relevant to the question of whether Ms A had a propensity to be untruthful. The crucial question was whether the chair's direction properly and fairly directed the tribunal about how to approach this vital evidence. It was not sufficient for the chair merely to direct the tribunal to consider the grandfather's evidence as

part of the entirety of the evidence it had heard. Such a direction did not assist the tribunal on the issue to which the evidence was relevant, namely, Ms A's credibility. The tribunal *did* need to try and determine the truth or otherwise of the historic allegations, because then – and only then – would it have been in a position properly and fairly to have considered the central contention on behalf of the appellant that Ms A had a propensity for making up false allegations against men in positions of authority (emphasis in judgment). It would have been correct for the chair to have directed the tribunal that in the event that they were unable to resolve the issue of whether Ms A was telling the truth then the issue went no further, but what the chair should not have done was to absolve them from even trying. The learned judge went on to say that this was a case of one person's word against another. Ms A's credibility lay at the heart of the appellant's case and the court was unable to say that the chair's misdirection on this core issue made no difference.

Misconduct

36. *Sastry v. General Medical Council* [2019] EWHC 390 (Admin); [2021] EWCA Civ 623

Misconduct – assessment of misconduct – treatment of patient in India – behaviour to be judged by UK standards taking into account local conditions and practices – sanction of erasure necessary for protection of public and to ensure public confidence in medical profession

On 1 August 2018, a Medical Practitioners Tribunal (the tribunal) determined to erase S from the medical register. The allegations arose out of S's treatment of a lady in India, referred to as Patient A, during 2013-14 when he was working as a Consultant Medical Oncologist at Kokilaben Dhirubhai Ambani Hospital in Mumbai. S was referred to the GMC by Patient A's son who alleged that his mother's death on 10 July 2014 was as a result of negligent treatment by S. Before the tribunal, it was alleged that S, being registered under the Medical Act 1983, acted inappropriately in his collection of stem cells from Patient A, and in recommending that Patient A undergo, and proceeding with, high dose chemotherapy with BEAM and autologous stem cell transplantation when Patient A had failed to mobilise an adequate number of CD34 positive cells and/or an adequate number of CD34 positive cells/kg had not been collected. S had been practising in the UK for 4 years without complaint since coming back from India. The tribunal found the allegations proved and that S's fitness to practise was currently impaired by reason of misconduct. The foundation of S's complaint on the appeal was that the tribunal failed to have any or any sufficient regard to what was referred to as "the Indian context", and that the sanction of erasure was disproportionate. May J dismissed the doctor's appeal: [2019] EWHC 390 (Admin). In dismissing S's appeal, May J said that once it is accepted (as it is) that the tribunal has jurisdiction to consider complaints about a registrant's behaviour and conduct occurring anywhere in the world, then the advice given by the legal assessor in the present case was right, namely that S needed to be judged by UK standards, GMC standards, but taking into account the circumstances such as the hospital, the patient, and the facilities that were available to S in India. The learned judge said that since the GMC's remit is to protect the public in the UK and to promote and protect proper professional standards in the UK pursuant to section 1(1B) of the Medical Act 1983, it is bound to assess conduct with those standards in mind. That is not to say that in applying UK professional standards a tribunal simply translates the behaviour directly to a UK setting, that would obviously be wrong. In considering whether or not a registrant undertaking professional duties outside the UK has fallen short of levels of professional conduct which the UK public is entitled to expect from its doctors, a Tribunal must take account of any particular limitations or local practices which apply in the foreign location. In short, a registrant's behaviour is to be judged by reference to UK standards but taking into account local conditions and practices. That is the approach that the legal assessor advised the tribunal to take here. In the instant case, the learned judge said that the tribunal did take account of

the Indian context when making its decision on misconduct and impairment, and in assessing sanction the tribunal had regard to the context.

In dismissing the doctor's second appeal, the Court of Appeal: [2021] EWCA Civ 623, [116], said that the proven allegations were grave and properly considered by the tribunal. The fact that the matters arose in India, where there is no multidisciplinary approach and systems may differ, cannot detract from the fact that Dr Sastry knew what he was doing in embarking upon such a course of treatment when he knew the same to be clinically inappropriate. The sanction of erasure was both necessary and appropriate for the protection of the public and to ensure public confidence in the medical profession.

37. *Sheehan v. Solicitors Disciplinary Tribunal, Bernard Bingham and Viola Bingham, and Law Society of Ireland* [2020] IECA 77

Solicitor – threat to destroy papers belonging to former client – claim against client for unpaid fees dismissed - whether solicitor still entitled to lien on papers – solicitor guilty of bringing profession into disrepute

On 5 July 2016, the Solicitors Disciplinary Tribunal of Ireland found the appellant solicitor was guilty of misconduct in respect of a complaint made by his former clients Mr and Mrs B (the clients) relating to the appellant's threat to destroy their entire file unless they settled his bill of costs. Between January 2006 and February 2008, the appellant acted for the clients on a contingency fee basis in respect of a medical negligence claim arising from the death of their son. In February 2008, the appellant sought to vary the contract of retainer and proposed charging a fixed hourly rate. The clients declined to sign the contract and the appellant treated his retainer as terminated, and was granted leave to come off the record in the proceedings. The appellant sued the clients to recover unpaid legal costs and outlays and on 24 May 2012, the Circuit Court dismissed the action. The appellant subsequently withdrew his appeal before the High Court. On 19 June 2014, the appellant emailed the clients stating that he would shortly be arranging for their voluminous files to be destroyed so as to free up much needed storage space, and was prepared to afford the clients one final opportunity to make an offer in respect of his outstanding bill of costs. The clients lodged a complaint against the appellant with the Solicitors Disciplinary Tribunal. The Tribunal gave its decision on 13 May 2016. It was of the view that the email of 19 June 2014 was a clear and unambiguous threat that if the clients did not make an offer to pay the costs of the appellant that he would destroy the files. The Tribunal found the appellant guilty of misconduct and censured the appellant, ordering him to pay Euros 5,000 to the Solicitors Compensation Fund. The High Court dismissed the appellant's appeal. Dismissing his further appeal to the Court of Appeal, the court said that the appellant failed to appreciate the legal impact of the dismissal of his Circuit Court proceedings, and the withdrawal of his appeal before the High Court. A lien can only be exercised where there is a debt outstanding. At the time of sending the email of 19 June 2014, there was no debt outstanding because the appellant had failed in his claim to recover his costs and that order had been affirmed by the High Court. The true meaning of the email must be viewed in the light of the fact that the appellant was not, in fact, entitled to any fees from the clients, and was not entitled to exercise a lien of the files. If the appellant wished to free up the much needed space to which he made reference, he could return the files to the clients or, with the consent of the clients, destroy the files. He was not entitled to destroy the files in circumstances where the client expressly forbade him to do so. The appellant linked the demand for payment with a threat to destroy files over which he had no lien. The email was a threat to destroy the property of a client with a view to extracting payment which was not in fact due to him. This was professional misconduct.

38. *Garaffa v. General Medical Council* [2021] EWHC 539 (Admin)

Systemic failures – vaginectomy – failure in procedures contributing to outcome – failure to obtain patient's consent to operation

The appellant, a consultant urological surgeon, carried out a vaginectomy (removal of the vagina) on a patient, Patient A, without his consent. Patient A's gender at birth was female and had a history of cross-gender identification. Patient A underwent gender reassignment surgery but did not give consent to a vaginectomy. The tribunal accepted that there had been systemic failures which contributed to the outcome, but considered that these did not absolve the appellant of responsibility. There had certainly been significant failings for which the appellant was not responsible. These included the compilation of the booking form and the theatre list, both of which wrongly referred to a vaginectomy, and neither of which were the responsibility of the appellant. Moreover, the tribunal accepted that the appellant believed that Patient A had consented to a vaginectomy. In dismissing the appellant's appeal against findings of misconduct and impairment, and the sanction of 5 months' suspension imposed by the tribunal, Johnson J said that the appellant's erroneous belief in Patient A's consent was not wholly due to the booking form or the theatre list. It was also due to the fact that he did not see Patient A before the surgery, did not read Patient A's notes with sufficient care, and did not adequately check that Patient A had consented to a vaginectomy. The tribunal heard evidence from two expert witnesses who were agreed that it was a serious failure to perform a vaginectomy where there was no written consent. The expert evidence, the GMC's published guidance 'Consent: patients and doctors making decisions together', and the tribunal's own sense, as an expert tribunal, of the standards of professional conduct that are to be expected, all pointed to a finding of misconduct. The learned judge said he accepted the appellant's submission that the misconduct concerned a single patient and that the appellant had changed his approach. However, the tribunal was required to have regard to the over-arching statutory objective. An anaesthetised patient is in a paradigm position of vulnerability. The imperative for public confidence in the consent process that is carried out before an anaesthetic is administered is self-evident. For that reason, it is imperative that the medical profession ensures rigorous compliance with the consent requirements, as the expert witnesses both recognised, and as is made clear in the published guidance. There was no error in the tribunal's finding of impairment. That was so irrespective of the question of remediation, insight and risk of repetition.

<u>No case to answer</u>

39. *McLennan v. General Medical Council* [2020] CSIH 12

Medical report – report prepared in connection with employment claim – report containing multiple inaccuracies – whether case to answer of dishonesty – whether appropriate to consider alternative explanations for inaccuracies at conclusion of prosecution case

The appellant, a NHS consultant specialising in psychiatry, was instructed by the Ministry of Justice, to provide a report on Mr A's condition following a claim in the Employment Tribunal against his former employers. Mr A had covertly recorded his examination by the appellant, and the appellant's notes extended to only three pages for the 1 hour and 48 minutes of the examination. The GMC's case was that the appellant's report contained some 17 inaccuracies about what Mr A had said and his behaviour during interview which the appellant knew to be false and that her actions had been dishonest. After a hearing lasting 26 days, the tribunal found the allegation proved and directed that the appellant's name should be erased from the medical register. Dismissing the appellant's appeal in the Inner House, Court of Session, the Lord President (Carloway) (with whom Lord Menzies and Lord Glennie agreed on the issue of sufficiency of evidence) said, at [68] – [71], that the tribunal's approach, to the issue of whether there had been a sufficiency of evidence at the conclusion of the GMC's case, was very much in favour of the appellant. Sufficiency of evidence is not about whether

one version of events is more or less probable than another. It is whether, on the evidence already led at that stage of the proceedings, a tribunal would be entitled to draw the inference that the facts, which form the allegation, have been proved. It is not normally legitimate at the stage of determining sufficiency to take into account alternative explanations, especially if there has been no evidence to support the existence of alternatives. The evidence led by the GMC, if it were ultimately accepted by the tribunal, was capable of demonstrating that a significant proportion of what the appellant had attributed to Mr A in her report had not been said by him. In the absence of an acceptable explanation from the appellant, which did not exist at the sufficiency stage of the proceedings, the tribunal would be entitled to infer dishonesty on the part of the appellant from the fact of multiple discrepancies alone. In any event, when testing sufficiency, the tribunal ought to disregard any explanation because, after the evidence is led, that explanation may either not be live or may be rejected as not capable or reliable (*Fox v. HM Advocate* 1998 JC 94, LJG (Rodger) at 101). It was not for the appellant to proffer alternative causes in advance of giving evidence. The court must disagree with the *dicta* to the contrary effect in *Soni v. General Medical Council* [2015] EWHC 364 (Admin) (Holroyde J at paras 61 and 62.

40. *Solicitors Regulation Authority v. Sheikh* [2020] EWHC 3062 (Admin)

Claim for costs under criminal defence costs order – solicitor signing bill of costs – costs order revoked by court following investigation and report by registrar of appeals – referral to SRA – SDT dismissing proceedings against solicitor as no case to answer – SDT wrongly approaching its task

The respondent, S, was the senior partner of the firm of Neumans LLP which had been intervened by the Law Society on the grounds of suspected dishonesty. The firm acted for a client, Mr Hitendra Patel, on an appeal against conviction to the Court of Appeal (Criminal Division): the respondent having overall charge of the matter. Mr Patel, who carried on a very substantial pharmaceuticals business, faced a number of criminal charges, which included charges of placing on the market medicinal products without holding the relevant authorisation. The proceedings were potentially of considerable complexity and split trials of Mr Patel and the other accused in the Crown Court were directed. The trial of Mr Patel himself started in November 2007 and, following a ruling by the trial judge that certain charges were offences of strict liability, he pleaded guilty to 2 charges. The appeal against conviction was heard at the end of October 2009. At the conclusion of that hearing, the court announced that the appeal was allowed, with reasons to follow. Judgment was handed down on 12 November 2009; and on the application of Mr Patel (by Neumans) a Recovery of Defence Costs Order (RDCO) was made in favour of Mr Patel on 20 January 2010. Neumans lodged a bill of costs in the sum of £2,916,396 plus VAT, the largest bill the Court of Appeal (Criminal Division) had ever received. The bill of costs was signed by S as partner and was certified as "accurate and complete" and as not breaching the indemnity principle. In January 2007 Mr Patel and S had agreed that Neumans' fees were to be capped at £275,000 although the capping agreement was said to be superseded by an oral agreement in early 2009, followed by a Deed of Variation dated 13 October 2009, so that there was no cap on Neumans' fees and the firm's hourly charging rates were to be increased with retrospective effect. The size of the bill of costs caused great concern, indeed suspicion. Concerns included, but were not limited to, a possible breach of the indemnity principle and the capping agreement and deed of variation. The court directed Master Egan QC (the then Registrar of Criminal Appeals) to conduct an investigation. He produced a lengthy report dated 20 May 2015. He considered there was clear evidence of fraud in the making of the claim for costs. The matter was ultimately referred back to the Court of Appeal, which revoked the RDCO and directed that the papers be referred to the Director of Public Prosecutions and the SRA. The SRA's detailed statement pursuant to rule 5 of the Solicitors (Disciplinary Proceedings) Rules 2007 included allegations against S as to the propriety and validity of the capping agreement and the deed of variation, and alleged that S, in breach of the Solicitors Code of Conduct 2007, dishonestly caused the bill of costs for £2,916,396 plus VAT to be submitted to the Court of Appeal pursuant to the

RDCO which did not reflect the work actually undertaken. At the conclusion of the SRA's case the SDT held that there was no case to answer. In its decision in dismissing the allegations against S the SDT said that the report of Master Egan QC "presented both fact and opinion". As to that, it said; "when an opinion was expressed the Tribunal disregarded the same", and that Master Egan was not an expert.

In allowing the SRA's appeal and remitting the matter for a fresh hearing before a differently constituted panel, Davies LJ (with whom Edis J agreed) said, first, that while the tribunal was in no way bound by the report of Master Egan QC, or the views of Newey J, who had upheld the intervention of Neumans, that did not make the report and judgment of Newey J irrelevant. On the contrary, they had to be taken into account even if the ultimate decision was that of the SDT. Master Egan QC was a judicial officer expressing conclusions in that capacity (albeit for investigatory purposes) on the documents provided to him. It was also plainly wrong in effect to dismiss his conclusions on the basis of "misconceived assumptions". Second, the SDT was wrong to dismiss out of hand the evidence of the regulatory supervisor with the SRA who had analysed time recorded on attendance notes and time recorded on the firm's iLaw computer system. It was not expert evidence but evidence based on the witness's analysis of the documents and of his recording what they showed. Third, the SDT purported to find, at the half-way stage, that S had relied entirely on specialist costs lawyers in relation to the bill of costs and regarding certain documents not being disclosed. But S had made no witness statement, and if that was his position, then he should have said so in a witness statement and been prepared to be cross-examined. Bare assertions to that effect – not assertions against one's interest but assertions in favour of one's interest – as raised in correspondence or as advanced through submissions of counsel cannot have weight when it is open to the individual to give evidence. In any event it is well established that the signature of a solicitor (an officer of the court) to a bill of costs is an important matter. It is no empty gesture. A solicitor will not be allowed to disassociate himself from all responsibility by saying that he relied on costs draftsmen: see *Gempride Ltd v. Bamrah* [2018] EWCA Civ 1367. In conclusion, the decision of the SDT to accept S's submission that there was no case to answer was not reasonable. It was plainly wrong and revealed an inadequate understanding of the proper application of the principles of *Galbraith,* and other such cases, to the allegations and evidence advanced by the SRA.

41. *Davies v. Greene* [2021] EWHC 38 (Admin)

Allegation that solicitor deliberately misled court in obtaining judgment – action to set aside judgment dismissed – complaint filed by unsuccessful party with SDT – whether no case to answer – whether abusive collateral attack on decision of court – whether lack of merits

On 16 March 2019, the appellant filed a complaint with the SDT against the respondent, the senior partner in the firm of solicitors Edwin Coe LLP. The appellant was the sole director of a company called Eco-Power (UK) Ltd, a former client of Edwin Coe, and in December 2012, following a trial in the county court, Edwin Coe obtained a judgment against the appellant on the grounds that he was liable for unpaid fees owing to the firm in the sum of £7,218.74, with interest and costs. In 2016, the court struck out an action brought by the appellant against the respondent seeking to set aside the judgment on the grounds that the court had been deliberately misled by the evidence of the respondent at the time of the 2012 order. On 16 March 2019, the appellant filed a complaint with the SDT which alleged that the respondent had deliberately and dishonestly lied to the court in his evidence in December 2012. The appellant alleged that the respondent's conduct constituted breaches of Principles 1, 2 and 6 of the SRA Principles 2011, namely, to uphold the proper administration of justice and the rule of law, to act with integrity, and to maintain public trust in the provision of legal services. The application was considered by a division of the SDT which certified that there was a case to answer pursuant to rule 6(3) of the Solicitors (Disciplinary Proceedings) Rules 2007. In July 2019, the respondent applied for the case certified by the SDT to be struck out. In

September 2019, a different division of the SDT struck out the complaint on the grounds it lacked merit and was an abusive collateral attack on the 2016 judgment. Allowing the appellant's appeal and holding that there was a case to answer, the Divisional Court (Popplewell LJ and Garnham J) said that the SDT's decision of September 2019 was flawed both in its analysis of abuse of process and on the merits. The court accepted the respondent's submission that, as Supperstone J concluded in *Baxendale-Walker v. Middleton & Others* [2011] EWHC 998 (QB), the principle of abuse of process identified in *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 applies to disciplinary proceedings. However, in striking out the claimant's action in 2016 the court was not addressing the question of whether the respondent's conduct in obtaining the 2012 judgment fell short of relevant professional standards. The court in 2016 was not determining whether the respondent should be exonerated or condemned for breach of professional standards. It was not purporting to test the respondent's conduct against the SRA's Principles or the SRA's Code of Conduct. There may be cases where a complaint to the SDT is inconsistent with a civil judgment that would make it unfairly vexatious for the solicitor to be required to relitigate in the disciplinary proceedings the issues which had been investigated and resolved in the civil proceedings. Each case will depend upon its own facts, and the extent of the vexation. In the instant case, however, the appellant's complaint was sufficiently arguable to raise a case on its merits. The test to be applied in deciding whether there is a case to answer against a solicitor in SDT proceedings is a stringent one; see *SRA v. Sheikh* [2020] EWHC 3062 (Admin). In the instant case, the crux of the appellant's complaint was that the respondent misled the court in 2012 in two related aspects of his evidence in order to support Edwin Coe's case that there was a new and separate retainer with the appellant for what was a claim by Eco-Power. Popplewell LJ and Garnham J concluded that it was arguable that the respondent's evidence in 2012 was misleading in both those respects. The court wished to make clear that it was not expressing any concluded view and the respondent had not yet responded to the merits of the complaint. It would be for the SDT to consider whether such a case was made out having heard all the evidence.

42. *Dad v. General Dental Council* [2021] EWHC 1376 (QB)

Application for restoration to register – NHS counter fraud investigation – failure to disclose investigation – whether investigation by a regulatory or licensing body – submission of no case to answer dismissed

The charge against D was, that being registered as a dentist, on 24 June 2019, the GDC received an application for restoration in which he dishonestly did not declare that he was currently subject to an investigation by NHS National Services Scotland Counter Fraud Services. At the close of the GDC's case, D submitted that he had no case to answer because, on a proper interpretation of the application form, it did not require him to declare the investigation. The form required disclosure of 'any police investigation' or 'proceedings or investigations by a regulatory or licensing body'. It was common ground that the NHS counter fraud investigation was not a police investigation. The committee rejected the submission that the NHS counter fraud investigation was not an investigation by a regulatory or licensing body, and by a decision of 11 September 2020 ordered D's name to be erased from the dentists' register. Dismissing D's appeal against the committee's decision of erasure, Collins Rice J, said that the audience to which the application was addressed is limited: dentists not on the register who wish to be restored. The context is restoration procedure. Two perspectives are involved. First, the GDC, with its duty to protect the public, must elicit the information it needs to make a start on assessing the merits of the application and identifying points to follow up. So, the form asks about: registration details and identity; character and identity referees; professional insurance/indemnity arrangements; language proficiency; CPD compliance; arrangements for paying annual fees; health; and, under the heading of 'self-declaration', past, present and future criminal proceedings/police investigations and regulatory matters. Secondly, there is the applicant's perspective. It is the applicant who has all the information and must

complete the form. A lot is potentially at stake. It is right to expect individual applicants to focus carefully and with precaution on exactly what is asked for. The form should be capable of being taken fairly at its word. Both of these perspectives – the intention of the GDC and the fairness to the applicant – are proper aids to the interpretation. Police investigations are the paradigm, but criminal investigations may be undertaken by other law enforcement agencies. Can an applicant under investigation by, say, the Serious Fraud Office confidently tick the 'no' boxes? The GDC form has a limited, functional and transactional purpose, which is to elicit relevant material from those who have it. It is not a statutory instrument, and the statutory interpretation principle that specificity is exclusive is not a reliable guide to what must be declared. The whole exercise is about assessing whether an applicant is fit to be registered as a responsible professional. The NHS counter fraud investigation was obviously and centrally relevant to D's application. It was a criminal investigation with a view to prosecution, and of some gravity. It was carried out under the auspices of the NHS into possible offences committed by a health care professional in the administration of his practice.

Publicity

43. *Onwude v. Dyer and others* [2020] EWHC 3577 (QB)

Defamation – article published in medical press reporting on tribunal decision striking off doctor – article omitting to state that doctor could appeal – tribunal's decision quashed on appeal – whether article protected by qualified privilege or matter of public interest – Defamation Act 1996, s 15 and Defamation Act 2013, s 4

The claimant, a gynaecologist, sued the defendants, a journalist and the editor of the British Medical Journal, for defamation over an article published on the BMJ website which reported that a medical practitioners tribunal had struck off the claimant for dishonesty. The article did not report the fact that an order of immediate suspension had been imposed, pending the outcome of any appeal. The tribunal's decision, including the finding of dishonesty, was later quashed on appeal by the High Court. Following the claimant informing the defendants of the decision of the High Court, a second article was published on the BMJ website, reporting the outcome of the appeal. At the same time, a note was added to the first article making clear that the High Court had quashed the decision of the tribunal, and providing a hyperlink to the second article. The claimant issued proceedings for defamation, contending that he had not in fact (contrary to the wording of the first article) been struck off, and would only have been struck off had he not appealed within 28 days. The erasure was not in force, pending appeal. It was the claimant's case that the offending article should have made that clear. Dismissing the claim, His Honour Judge Richard Parkes QC (sitting as a judge of the High Court) held that the omission of reference to the right of appeal, or the effects of the right to appeal, did not render the article either inaccurate or unfair. The article was technically inaccurate in stating that the claimant had been struck off, when in fact the direction for his erasure did not take effect immediately (and might not take effect at all, depending on the outcome of an appeal). However, the claimant was in fact suspended with immediate effect, and therefore fell to be treated as if his name had been erased from the register. He was unable to practise as a doctor, not in 28 days' time, but immediately. In that context the technical inaccuracy was a minor matter, and one of form, not of substance. It was difficult to see how the claimant's position would have been improved had the article spelled out that the direction was subject to appeal, and that erasure would not take effect for 28 days, subject to the exercise of the right to appeal. The fact that the tribunal had ordered a practising doctor to be erased from the medical register was of the highest public interest. The article was based on a fair and accurate report of the tribunal's decision and the defendants reasonably believed that the publication was in the public interest. The defendants had a defence of

qualified privilege under s15 of Defamation Act 1996, and a public interest defence under s4 of Defamation Act 2013.

44. *Frensham v. Financial Conduct Authority* [2021] UKUT 0083 (TCC)

Decision notice – publication – privacy applications – principles to be applied whether to prohibit publication – contents of press release

The applicant, a financial adviser and sole director of a small authorised financial advice firm, made privacy applications to the Upper Tribunal. The applicant sought for a direction pursuant to paragraph 3(3) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 that the register of references maintained by the Upper Tribunal contain no particulars of his reference of a Decision Notice issued by the Authority on 1 October 2020, and pursuant to rule 14(1) of the rules to prohibit publication of information by the Authority of the Decision Notice pending the outcome of the substantive hearing of his reference. On 10 March 2017, the applicant was convicted by a jury under section 1(1) of the Criminal Attempts Act 1981 of attempting to meet a child under the age of 16, following acts of sexual grooming contrary to section 15 of the Sexual Offences Act 2003. He was sentenced to 22 months' imprisonment, suspended for 18 months, and added to the Sex Offenders Register for 10 years. Dismissing the application, Judge Timothy Herrington said that the relevant principles to be applied whether to grant privacy in response to applications of this kind were most recently summarised in *Prodhan v. FCA* [2018] UKUT 0414 (TCC) at [20]-[26] and approved in *Foley v. FCA* [2020] UKUT 0169 (TCC). In *Prodhan,* the Upper Tribunal said the effect of the section 391 of the Financial Services and Markets Act 2000 and the 2008 Rules can be summarised as follows:

(1) Section 391 gives rise to a presumption that publicity will be the norm and this is equally the case with decision notices as it is with final notices although regard has to be paid to the fact that a decision notice that is being challenged in the Upper Tribunal is necessarily provisional: see paragraph 45 of *Arch Financial Products LLP and others v. FCA* [201] FS/2012/20;
(2) The exercise of the power to prohibit publication under Rule 14(1), and by analogy the exerciser of the power under paragraph 3(3) of Schedule 3 to the Rules is a matter of judicial discretion to be considered against the context of this presumption; and
(3) The discretion should be exercised taking into account all relevant factors ignoring irrelevant factors and giving effect to the overriding objective in Rule 2 of the Rules that requires the Tribunal to deal with cases fairly and justly. This involves carrying out a balancing exercise between those factors that tend towards publication and those that would tend against.

In *PDHL Limited v. FCA* [2016] UKUT 0129 (TCC) at [36]-[37] it was common ground that the principles established in *Arch v. FCA* and *Angela Burns v. FCA* [2015] UKUT 0601 were applicable to privacy applications. In order to tip the scales heavily weighted in favour of publication the applicant must produce cogent evidence of how unfairness may arise and how it could suffer a disproportionate level of damage if publication were not prohibited. A ritualistic assertion of unfairness is unlikely to be sufficient. It is clear that if publication would result in the destruction of a firm's business, then it would be unfair to publish a decision notice; see *Angela Burns v. FCA* at [89]-[90] where the Upper Tribunal said that the possibility of severe damage or destruction of livelihood is insufficient; the evidence should establish that there is a significant likelihood of such damage or destruction occurring. It would be too high a hurdle to surmount which would make the jurisdiction illusory if the requirement were to show that severe damage or destruction was an inevitable consequence of publication. The risk of damage to reputation is unlikely to be sufficient to justify a prohibition on publication. In the instant case, the Upper Tribunal concluded that the privacy

applications must be dismissed. The Authority had indicated that it would ensure that any publicity given to the Decision Notice would make clear that the decision was provisional. The Upper Tribunal would direct that any press release issued by the Authority must state prominently at its beginning that the applicant has referred the matter to the Upper Tribunal where each party will present their respective cases and the Tribunal will then determine what (if any) is the appropriate action for the Authority to take. In referring to the findings made in the Decision Notice, rather than give any suggestion of finality, those findings must be prefaced with a statement to the effect that they reflect the Authority's belief as to what occurred and how the behaviour in question is to be characterised. The Tribunal further directed that there should be a period of 21 days from the date of release of the Upper Tribunal's decision before publication of the Decision Notice to enable the applicant to discuss the situation with his clients.

Registration

45. *MS v. General Teaching Council of Scotland* [2021] CSIH 17

Teacher – teacher suffering Asperger's syndrome – lack of professional competence – removal from teaching register – failure by panel to take sufficient account of appellant's evidence

In April 2020, a panel of the General Teaching Council for Scotland's Fitness to Teach Panel was convened following a recommendation from the local authority employing the appellant teacher, that his provisional registration should be cancelled because his fitness to practise was impaired by lack of professional competence. A case review report alleged that the appellant had failed to meet expected standards. The appellant accepted that he had not met the standards for full registration. He maintained that key factors in his failure were the effects of, and the failure of the schools where he worked to make sufficient reasonable adjustments to assist him with, his Asperger's syndrome. He asked for a further probationary year to seek to meet the relevant standards. The panel removed his name from the register maintained by the General Teaching Council for Scotland, and prohibited him from applying for re-registration for a period of one year from the date of removal. Allowing the appellant's appeal and directing the matter to be reconsidered by a fresh panel, the Lord Justice Clerk (Lady Dorrian) giving the judgment of the Inner House, said that the grounds of appeal reflected one underlying issue. The appellant challenged the panel's determination on the basis that it failed to take account of the effect of his Asperger's and the absence of reasonable adjustments by the schools to accommodate the same. By proceeding to determine his fitness to teach without having regard to that essential issue the panel's decision was vitiated. The court agreed with senior counsel for the appellant that the effect of the panel's decision was that it proceeded as if the issues relating to Asperger's, reasonable adjustments, and their possible effect on his progress could be ignored. The panel had to engage with those aspects of the appellant's evidence and it was not open to the panel to disregard that evidence without properly explaining the basis upon which it was taking that course. The panel fell into further error when it went on to consider the appellant's fitness to teach. If the appellant's evidence about his Asperger's related difficulties and his failure to meet the standards being attributable to the insufficiency of reasonable adjustments was correct, it would be likely to have a very material bearing upon (i) whether he was unfit to teach; and (ii) whether an extension of his probationary period would be likely to be fruitful.

Review hearings

46. *Simawi v. General Medical Council* [2020] EWHC 2168 (Admin)

Suspension of practitioner's registration following substantive fitness to practise hearing – direction made for review of suspension imposed by tribunal – whether direction for review itself is an appealable decision – s 40(1) of Medical Act 1983

Pursuant to s 40(1) of the Medical Act 1983, Dr S appealed against the sanction for suspension imposed upon him on 21 November 2019 by the tribunal. The sanction was a nine-month suspension of his medical registration pursuant to s 35D(2)(b). The tribunal also gave a direction that the suspension period be reviewed prior to its expiry, pursuant to s 35D(4A). Section 40(1) provides that a decision of a tribunal under s 35D giving a direction for erasure, suspension or conditions are appealable decisions. Dr S submitted that nine months' suspension was too long and that there was no proper basis for the tribunal to have directed a review. Julian Knowles J, having dismissed the appeal against the substantive order of nine months' suspension, considered whether a direction made by a tribunal under s 35D(4A) for a review is itself an appealable direction. In other words, whether a direction for a review was an "appealable decision" in the language of s 40(1). The learned judge, at [87] – [93], said that the correct analysis is as follows. It was clear from the wording of s 40(1) that a review direction made under s 35D(4A) is not an appealable decision. Section 40(1) is quite specific as to what directions can be appealed, and a review direction is not amongst them. A review direction of itself is not referred to, reinforcing that it is not, of itself, an appealable decision. Therefore, where there is an appeal against a direction for suspension, and against a review direction, then if the former is unsuccessful so that the tribunal's direction remains in being, there is no freestanding right of appeal in respect of the latter. Where there is an appeal against a direction for suspension which is quashed, then it is clear that the review direction must also fall away. If the tribunal's direction of suspension has been quashed, then there is, quite simply, nothing to review. The same conclusion follows where the court substitutes for the direction appealed against any other direction which could have been given or made by the tribunal. In that case the tribunal's review direction must also fall away. That is because a review direction made under s 35D(4A) is a review of a direction made by the tribunal. Hence, where the court substitutes its own direction, the tribunal's direction ceases to exist and is replaced by the court's direction. In this situation, however, it is open to the court to impose its own review condition if appropriate to do so.

47. *Dhoorah v. Nursing and Midwifery Council* [2020] EWHC 3356 (Admin)

Reflective statement – need to address misconduct found by panel – original panel finding fitness to practise not impaired on public protection grounds but impaired on public interest grounds – review panel finding current impairment on public protection and public interest grounds – review panel entitled to reassess the risk posed to the public at date of review

The appellant appealed against the decision of a review panel to extend by six months an earlier 12 months' suspension order with a review imposed by the Respondent's Fitness to Practise Committee. The original committee found that the appellant's actions towards a student nurse were sexually motivated and concluded that while there was some risk of repetition, in the light of the appellant developing insight, his behaviour was unlikely to be repeated. The original committee found that the appellant's fitness to practise was not currently impaired on public protection grounds but was impaired on public interest grounds. It said that any future panel may be assisted by a personal reflective statement on the learning the appellant had undertaken around professional boundaries. The appellant did not attend the review hearing but submitted certain documentation including a reflective statement entitled 'Professional Boundaries: A Nurse's Reflective Report through Experienced Learning". The review panel said that the reflective piece did not demonstrate insight into the impact of the misconduct found proved by the substantive panel and read like an academic essay and that the only part written in the first person concerned the impact of the suspension on him personally. The review panel considered that such was the appellant's current lack of insight that there was now a risk that he could repeat the misconduct, and therefore he posed a risk to the public. The review panel concluded that the appellant's fitness to practise was currently impairment on the ground of public protection as well as on wider public interest grounds. Dismissing the appellant's appeal, Eady J said that having read the appellant's document she could not disagree with the review panel's description that it was like an academic essay. The problem

with the evidence was not one of form but of substance: the review panel was required to assess whether the appellant had demonstrated insight into his failings and the seriousness of his past misconduct; it was entitled to find that could not be done by means of a highly theoretical work focusing on relationships rather than the specific misconduct found in this case, and there was no apparent reflection on how such matters might relate to the misconduct in this case. Had the appellant attended the hearing in person, he might have been able to speak to his essay to better explain how he considered it demonstrated the requisite remediation. Given the misconduct found – effectively a sexual assault on a more junior colleague – the review panel was entitled to then reassess the risk posed to the public. The original panel had allowed that there was 'some risk of repetition' but had concluded that the appellant's behaviour was 'unlikely to be repeated'. On the material before it, the review panel was entitled to find that it could not be reassured as to the possibility of repetition.

Sanction

48. *Kavaarupo v. Nursing and Midwifery Council* [2020] EWHC 731 (Admin)

Registered nurse and midwife – misconduct arising in the context of midwifery practice – interim order previously permitting registrant to continue working as a nurse, though not as a midwife – whether appropriate to strike off appellant from both midwifery and nursing registers

The appellant was registered in the NMC register both as a nurse and as a midwife. After a hearing before the respondent's Fitness to Practise Committee lasting 15 days, the panel found 22 out of a total of 42 charges proved including two allegations of dishonesty. The charges against the appellant related to five separate episodes between February and September 2016 in which, in the course of her practice as a midwife, she gave care to five women in labour that was found to be deficient. The panel decided that the appropriate sanction was a striking off order, which would prevent her from practising either as a midwife or as a nurse. The NMC's Sanctions Guidance provides that if a panel wants to prevent someone who is registered as both a nurse and a midwife from practising in only one of those professions, it must do so using a conditions of practise order, which would say (for example) "you must not practise as a nurse". In the instant case, interim orders in place prior to the hearing before the panel had permitted the appellant to continue working as a nurse, though not as a midwife. The appellant appealed the striking off order, contending that the panel was never given legal advice as to the effect of a such an order and that there was no reference in the panel's decision to any intention to stop the appellant from working as a nurse. In dismissing the appellant's appeal, Chamberlain J rejected the submission that the panel misunderstood the effect of a striking off order for three reasons. First, the panel made numerous references to the Sanctions Guidance. Although the panel did not refer specifically to the relevant part of the Sanctions Guidance, the Appellant's representative did not invite the panel to make a conditions of practise order which would have permitted the appellant to practise as a nurse. Secondly, the panel considered whether to impose a conditions of practise order and decided it would not be appropriate. That was because, in addition to showing the appellant's incompetence as a midwife, the charges found proved demonstrated, in the words of the panel, 'attitudinal problems' and 'it was not possible to formulate conditions which would address the matters emanating from the findings of dishonesty'. Chamberlain J observed that these were matters which were obviously relevant to practise as a nurse as much as practise as a midwife. Third, when making an interim suspension order following the decision on sanction, the panel made clear that they considered it necessary to prevent the appellant from practising either as a midwife or as a nurse. The panel's decision on sanction was a multi-factorial one and was squarely within the range of decisions properly and reasonably open to them.

49. *X v. General Dental Council* [2020] CSIH 71

Dentist practising with health condition – health condition dishonestly concealed from employers – appellant putting patients at risk – sanction – erasure – committee's decision upheld in public interest and to maintain confidence in profession and regulatory process

In July 2010, the appellant, having earlier been diagnosed with a health condition, was diagnosed with a second health condition of carrying a virus which, under the then current Department of Health guidance, prevented him from practising dentistry. He told the medical staff treating him that he was a receptionist. He did not inform his employers, a Health Board, of his condition. He continued to treat patients. In October 2011, following his appointment to a particular hospital position, he completed a health declaration form to the effect that he had no medical conditions and was not receiving treatment. In September 2013 he applied for and obtained some private dental work. In January 2014, dentists carrying out the second health condition could practise dentistry if they were registered as such. However, the appellant continued to conceal his condition. In December 2016, the appellant's second health condition was uncovered when, by chance, a colleague saw computer records which indicated that the appellant was attending a clinic. He was suspended by the Health Board. In due course the matter was referred to the GDC. A number of charges were made to the general effect of misleading and dishonest behaviour amounting to misconduct which impaired the appellant's fitness to practise. Dishonesty was admitted and the appellant did not resist a finding of impairment. Notwithstanding the traumatic circumstances of the discovery of the appellant's health condition, the remediation, and the public interest in retaining the services of an otherwise competent dentist, the committee concluded that a 12 month period of suspension would not be sufficient to mark the misconduct and maintain public confidence in the profession. The appellant had lied to his employer and, while concealing his status, he decided to secure specialist part-time work to increase his income. In all likelihood the dishonesty would have continued had it not been discovered by chance. Dismissing the appellant's appeal against the committee's decision of erasure, the Inner House (Lord Justice Clerk, Lord Malcolm and Lord Woolman) said that the committee had assessed matters by reference to the wider public interest and as to what was required in order to maintain confidence in the profession and the regulatory process. When regard is had to the factors prayed in aid by the committee, it was plain that they were entitled to reach the decision that erasure was the only appropriate course

50. *Watkins v. British Medical Association* [2021] UKEAT/0125/20/JOJ

Trade union disciplinary proceedings – comments made during contested election – acts likely to be viewed as gross misconduct – sanction – whether conduct sufficiently serious to merit suspension

In the summer of 2017, the BMA, a trade union, held elections for the deputy chair of its Council. Dr H was elected. The appellant had supported another candidate and posted a message visible to all Council members which expressed severe criticism of Dr H and that her candidature had been used to further ulterior motives of some voters whom the appellant described as 'malevolent'. Disciplinary proceedings were commenced against the appellant and a panel determined that he had failed to meet the standards of behaviour required of the BMA's code of conduct and that, by way of sanction, he should be suspended from all BMA committees and other elected roles for 12 months. The appellant appealed to an appeals panel, which dismissed his appeal, and his application to the Certification Officer under s108A of the Trade Union and Labour Relations (Consolidation) Act 1992 was rejected. The appellant appealed under s108C to the Employment Appeal Tribunal contending, amongst other grounds, that the Certification Officer should have ruled that when determining sanction, the disciplinary and appeal panels should have asked themselves whether the appellant's conduct was of equivalent seriousness to the examples justifying suspension or expulsion for gross misconduct in rule 7.6 of the code of conduct, namely, 'acts likely to be viewed as gross misconduct at the BMA are likely to include theft, fraud, physical violence, sexual assault/harassment, gross

negligence or serious breaches of confidentiality'. The BMA argued that rule 7.6 contained mere illustrative examples and that gross misconduct in this context should have the meaning which it is given in employment law generally, and that gross misconduct is a form of repudiatory conduct evincing an intention no longer to be bound by the contract of employment. Dismissing this ground of appeal, Bourne J said the analogy between cases of wrongful dismissal and cases of trade union discipline is not a precise one, and repudiatory breach of contract may not always be a helpful concept in trade union disciplinary cases. Having said that, however, trade union membership is a matter of contract and, where expulsion is a possible sanction, repudiation has some logical relevance. However, what employment law and trade union law have in common is that the practical significance of a finding of gross misconduct is not the attaching of that label, but the application of a sanction for it. Ultimately the question to be asked in disciplinary cases as in dismissal cases is whether the conduct is sufficiently serious to merit the sanction. That being so, the question for each panel was not whether the appellant's conduct was of equivalent seriousness to the examples given in rule 7.6 of the code of conduct, but whether the conduct was sufficiently serious to merit suspension. Both panels weighted the nature of the conduct and its impact and arrived at the conclusion that suspension was appropriate.

51. *Towughantse v. General Medical Council* [2021] EWHC 681 (Admin)

Practitioner contesting allegations before tribunal – effect on impairment and sanction – distinction between deliberately misleading tribunal and putting regulator to proof

In its decision on impairment the tribunal said the doctor had 'failed to accept any of the coroner's findings'. In similar vein in its sanctions decision the tribunal said that while there was more evidence of insight at the sanctions stage than at the preceding stages, it could not ignore the fact that he had tried to attribute to others at least some of the responsibility for what happened to the patient. The tribunal said that in its judgment 'that was a particularly regrettable feature of the case.' Mostyn J said it was clear to him that a significant component in the decision-making process, both at the impairment and sanctions stages, was the conclusion that the appellant was seriously faulted for (a) having contested the allegations against him at the inquest, and (b) having contested the allegations against him before the tribunal. In remitting the impairment and sanctions phases to be reconsidered by the tribunal, Mostyn J said that it was not procedurally fair for a registrant to face the risk of enhanced sanctions by virtue of having robustly defended allegations made against him before the tribunal, or before another court; see *Misra v. GMC* [2003] UKPC 7 per Lord Scott at [71]; *Amao v. NMC* [2014] EWHC 147 per Walker J at [161] and [163]; and *GMC v. Awan* [2020[EWHC 1553 (Admin) per Mostyn J at [37]-[38]. In contrast, in *Yusuff v. GMC* [2018] EWHC 13 (Admin), Yip J at [18] observed that refusal to accept misconduct and a failure to tell the truth during the hearing will be relevant to sanction and impairment, and the GMC's Sanctions Guidance states that a doctor is likely to lack insight if they have failed to tell the truth during the hearing. Mostyn J concluded that a distinction should be drawn between a defence of an allegation of primary fact and the evaluation by the decision-maker derived from primary facts. If a registrant defends an allegation of primary concrete fact by giving dishonest evidence and by deliberately seeking to mislead the tribunal then that forensic conduct would certainly say something about impairment and fitness to practise in the future. But if, at the other end of the scale, the registrant does no more than put the GMC to proof then that stance could not be held against him in the impairment and sanctions phases. Equally, if the registrant admits the primary facts but defends a proposed evaluation of those facts in the impairment stage then it would be Kafkaesque if his defence were used to prove that very proposed evaluation. It would amount to saying that your fitness to practise is currently impaired because you disputed that your fitness to practise is currently impaired. In the instant case, the tribunal, in the absence of blatant dishonesty, should not have used against the appellant in the impairment and sanctions phases his decision to contest the allegations made against him in the coroner's court or to accept those findings before the tribunal. Nor should the

tribunal have used against the appellant in those phases his decision to contest the charge before the tribunal. His deployment of a robust defence, which was his right, should not have been construed as a refusal to remediate, let alone an incapacity to remediate.

52. *Al Nageim v. General Medical Council* [2021] EWHC 877 (Admin)

Appeal against sanction – dishonesty – untrue evidence given to the tribunal – finding that doctor lied in evidence to tribunal – effect on sanction - insight

Following a contested hearing on the facts, the tribunal found that the appellant trauma and orthopaedics doctor (a) dishonestly used on-call rooms and surgical day facilities at the Countess of Chester Hospital, which he knew he was not entitled to use as he was no longer employed at the hospital, and (b) dishonestly failed to notify the Royal Liverpool & Broadgreen University Hospital NHS Trust of salary payments made to him over 27 months totalling £41,266.16 following the conclusion of his employment at the Royal Liverpool Hospital, and which he knew had been made in error. The tribunal found that the appellant's fitness to practise was impaired by reason of misconduct and erased his name from the medical register. The appellant appealed against the sanction of erasure on the ground that the tribunal gave undue weight to the fact that his evidence was disbelieved at the fact-finding stage. In its sanctions determination the tribunal said that the appellant had not given a true account on five occasions in the course of his evidence, and that he had not developed any insight into his actions in not telling the truth, particularly to the tribunal. In his judgment dismissing the appellant's appeal, Julian Knowles J, at paragraphs 103-125 under the heading 'Untrue evidence given to the Tribunal', said that the question of whether being found by a tribunal to have given untrue evidence at the fact-finding stage can properly be used at the impairment or sanction stages was considered by Mostyn J in *Towuaghantse v. GMC* [2021] EWHC 681 (Admin), [58]-[77], where earlier authorities were considered. In the instant case, Julian Knowles J said that although the tribunal did not use the phrase 'blatantly dishonest' to describe the appellant's evidence before it, it could aptly be so described. The appellant knowingly advanced a false case before the tribunal both in respect of his use of the on-call rooms at Chester Hospital and his belief that he was entitled to the salary payments made in error after he left Royal Liverpool Hospital. Julian Knowles J, at paragraph 123, said that he regarded the appellant's case before the tribunal about the salary payments as having involved especially egregious untruthfulness and dishonesty. The judge continued:

> 124. It follows that I do not consider the Tribunal was at fault in having regard to this dishonesty when it came to assess the Appellant's level of insight. Its approach was in line with what Mostyn J said in *Towuaghantse,* supra, [72], that dishonesty in knowingly advancing a case of false primary fact certainly 'say[s] something about impairment and fitness to practise in the future'. And there is the point that in this case nine months passed between the facts/impairment stage and the sanctions stage, in which the Appellant had still not developed full insight into his dishonesty.
>
> 125. Taking a step back and looking at the Tribunal's reasons as a whole, this was not a case where the Appellant was being punished for daring to contest the GMC's case against him. The Tribunal found that in March 2020 he had advanced a case as to his states (sic) of mind at the time of the alleged misconduct which he knew to be untrue. By December 2020 the Tribunal was not satisfied that he had full insight into that dishonesty. This was a relevant factor for it to take into account in deciding whether his dishonest misconduct was fundamentally incompatible with his continued registration.

53. *Okpara v. General Medical Council* [2021] EWCA Civ 623; [2019] EWHC 2624 (Admin)
Sexual misconduct towards staff nurse – allegations denied – tribunal identifying corroboration and contemporaneous evidence – tribunal considering inherent implausibility of evidence given – erasure

Between 2014 and 2016 the appellant worked as a locum registrar in the A & E Department at the University Hospital of Wales in Cardiff. The allegation was that on a number of occasions the appellant made inappropriate sexual and other remarks to Ms A, a staff nurse at the hospital, and/or made unwanted sexually motivated physical advances to her. The tribunal found proved a number of allegations against the appellant of sexual misconduct and imposed the sanction of erasure from the register. The appellant denied all of Ms A's specific allegations about his behaviour towards her and denied that most of the encounters happened and made a series of allegations about Ms A's behaviour which in some respects mirrored her account of his behaviour. In its fact-finding determination the tribunal said it took into account evidence from witnesses (all of whom were hospital employees) that Ms A was 'timid' and 'prudish' and 'quite religious with strong values'; that Ms A's account of one allegation was supported by two colleagues, that Ms A had reported another allegation to three witnesses; and that there was corroboration of another allegation in the form of a WhatsApp message sent by Ms A to a friend immediately afterwards which supported her evidence. Julian Knowles J dismissed the doctor's appeal: [2019] EWHC 2624 (Admin). In dismissing the appellant's appeal, Julian Knowles J said that the tribunal was expressly directed by the chair in accordance with the principles in *Re B (A Child) (Care Proceedings)* [2013] 1 WLR 1911, *Re H and others (Minors)* [1996] AC 563, and *Re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499, and *Re B* and *Re H* were referred to expressly in its determination. Where relevant, the tribunal identified evidence which corroborated Ms A's account and contemporaneous evidence, and it also considered the inherent implausibility of the evidence given.

In dismissing the doctor's second appeal, the Court of Appeal: [2021] EWCA Civ 623, [117], said that the proven allegations represented a consistent, predatory and escalating course of sexual misconduct by a doctor to a nurse. The appellant rightly accepted that the facts amounted to misconduct and impairment of his fitness to practise. The tribunal recorded that the behaviour had taken place in a 'hierarchical institutional context' where the appellant, a doctor of 22 years' standing, was much more senior than Ms A, a nurse at the start of her career. The Court of Appeal agreed. One of the complained of incidents was rightly assessed by the tribunal as aggressive, threatening and a gross violation of Ms A. The tribunal was entitled to find that the appellant, in denying the allegations and making a series of counterclaims against Ms A, had demonstrated a complete lack of insight. This was a continuing course of predatory sexual misconduct which wholly warranted the sanction of erasure, and was fundamentally incompatible with continued registration.

<u>Striking Off</u>

54. *Professional Standards Authority for Health and Social Care v. General Medical Council and Dighton* [2020] EWHC 3122 (Admin)
Erasure substituted for one year's suspension for excessive prescribing of drugs to patient – second respondent placing patient at risk of harm including death – excessive drugs prescribed in knowledge that patient was an addict and vulnerable to accidental or deliberate overdose – GMC submission before tribunal that suspension was appropriate sanction and was willing to allow second respondent's application for voluntary erasure – court not deprived of jurisdiction

The tribunal determined that the second respondent (a cardiologist with a private practice as a GP) should be suspended from the register for one year following disciplinary proceedings in which he was found to have excessively prescribed potentially addictive drugs to Patient A over a period of 6 years. The second respondent had no formal GP training and over the same period, Patient A also

obtained multiple prescriptions from her GP for drugs. In its determination on misconduct, the tribunal described the second respondent's lack of insight as 'intractable' such that 'he is unlikely to remediate and there is a material risk of repetition'. In reaching its decision to impose a suspension order, the tribunal gave decisive weight to the fact that the second respondent had ceased to practise as a GP. Following the PSA lodging an appeal, the GMC decided to allow the second respondent's application for voluntary erasure but informed the parties that its decision would (in effect) be stayed pending the determination of the PSA's appeal. The PSA's position was that the tribunal's order, even if now coupled with voluntary erasure would be insufficient for the protection of the public. A court-imposed erasure was necessary in the light of the importance of upholding confidence in the medical profession and the importance of the maintenance of standards. Allowing the PSA's appeal and substituting an order for erasure, Farbey J said she did not accept that the appeal was otiose because the GMC were willing to grant the second respondent's voluntary erasure. The appeal was properly brought, and the court had jurisdiction to determine it under s29(4) of the National Health Service Reform and Health Care Professions Act 2002. Parliament's intention in bestowing the appeal right could be frustrated if a registrant could avoid the scrutiny of an appeal by deciding to opt for voluntary erasure. Although the GMC submitted that a suspension should be imposed, the tribunal was bound to apply the relevant guidance properly. It was under a duty to reach its own decision on sanction in a way that would protect the public. The second respondent's willingness to give up practice as a GP could not reasonably be regarded as weighing decisively in favour of his suspension and against erasure. The second respondent's sustained, excessive prescription of drugs to a vulnerable patient in an area of medicine beyond his expertise placed Patient A at risk of harm including death. He prescribed drugs in excessive quantities in the knowledge that Patient A was an addict and vulnerable to accidental or deliberate overdose. He failed to inform her GP of those prescriptions. As a result, there was no protection against the risk that she would seek the same medication from a second source as part of her addictive behaviour. The tribunal found that the second respondent had shown no insight into his misconduct, and characterised it as amounting to an "intractable" lack of insight. The tribunal reached an unreasonable decision on sanction: the second respondent's intractability was inconsistent with the prospect of remediation in a one-year suspension period or at all.

55. ***Professional Standards Authority for Health and Social Care v. General Medical Council and Hanson*** **[2021] EWHC 588 (Admin)**

Sexual misbehaviour towards nurse – erasure substituted for 10 months' suspension

The tribunal found that the respondent doctor committed misconduct in the form of unwanted, non-consensual, sexually motivated behaviour towards a nurse. It imposed a 10-month suspension with a review. The doctor did not engage with the proceedings before the tribunal or before the court. Substituting erasure for the tribunal's decision on sanction, Chamberlain J said that the tribunal fell into error in five respects. First, although the tribunal recognised that the misconduct was serious, it failed to recognise how serious. The doctor was in a position of authority vis-à-vis Ms A, a relatively newly qualified nurse. He approached her late at night, when he knew she would be alone. The experience caused her significant distress. Second, it was a calculated and deliberate abuse of power which foreseeably caused real harm to a fellow healthcare professional. Third, the tribunal placed reliance on two mitigating factors, but on analysis neither was properly to be regarded as such. The absence of evidence that the doctor had engaged in similar conduct in the past or since was neutral. The tribunal's description of the event as a single isolated incident did not constitute genuine mitigation. Fourth, as the Sanctions Guidance makes clear, a key question is insight. The doctor's complete lack of engagement with the tribunal meant that there was nothing to demonstrate any insight or contrition at all. Fifth, the tribunal should have concluded that the doctor's conduct engaged the list of examples for erasure in the Sanctions Guidance and that his conduct was fundamentally incompatible with continued registration. Suspension might potentially

have been appropriate if there had been strong mitigation providing a basis for concluding that repetition was unlikely.

Unrepresented Practitioner

56. Elefterescu *v. Royal College of Veterinary Surgeons* [2020] UKPC 6

Witness – attendance note of evidence disclosed during hearing – unrepresented party – whether defendant aware of and understood nature of evidence – whether reasonable steps taken to ensure unrepresented party not disadvantaged

The appellant Dr Horia Elefterescu appealed against a direction made by the Disciplinary Committee of the respondent that his name be removed from the register of veterinary surgeons. The appellant faced seven charges against him of disgraceful conduct in a professional respect relating to the treatment of animals whilst working as a veterinary surgeon at various practices. He denied the charges and represented himself before the committee. Charge 4 concerned surgery performed by the appellant in relation to Lucy Allen, a female Bichon Frise. One of the issues at the hearing was whether the appellant took any pre-operative radiographs and he maintained that he did although no such radiographs were found, and none were produced on the appeal before the Privy Council. During the hearing before the committee, the solicitor for the RCVS spoke to a practice nurse, Ms E, who recalled being present during the course of a conversation between the appellant and the owner of the practice about Lucy's radiographs before the appellant performed the procedure. She remembered that the radiographs showed the tear to Lucy's ligament was not straightforward and that this was a matter of concern to the appellant. She also recalled him raising the possibility that a second opinion might be needed. To the best of her recollection, the owner of the practice responded that time was "getting on" and pressured the appellant to start the surgery. The respondent's solicitor made an attendance note of his conversation with Ms E which was disclosed to the appellant and was later produced to the committee. The appellant was invited to make an application if he wished to call Ms E and another practice nurse Ms M (who had no recollection of the events) as a witness. He decided not to do so. Before the Privy Council (where the appellant was represented) it was submitted on his behalf that the committee was not adequately advised of the substance of this further evidence or its potential significance, and that the appellant, an unrepresented party, did not understand the importance of the evidence or the decision he was being asked to make about seeking an adjournment. In the result, the committee did not have the benefit of highly relevant material which would have undermined the respondent's case against him. In reply counsel for the respondent submitted that the committee was given the attendance note and the appellant was invited to make an application for an adjournment if he wished to call Ms E as a witness, but he chose not to do so. The transcript showed that the committee and the legal assessor took proper steps to ensure that the appellant was aware of and understood the nature of the proceeding, how the proceedings were being conducted, and how he should challenge the evidence of a witness with which he disagreed and present his case. In short, reasonable steps were taken to ensure that he was not unduly disadvantaged by appearing in person. In dismissing the appeal, their Lordships (Lord Kerr, Lord Carnwath, Lord Kitchen) said that in all the circumstances the Board could not accept that the respondent had any obligation to call Ms E or Ms M as a witness or that the proceedings and their outcome were rendered unfair or unjust by its decision not to do so.

57. *El-Huseini v. General Medical Council* [2021] EWHC 2022 (Admin)

Litigant in person - appeal against findings of misconduct and health – case management directions for hearing of substantive appeal

In dismissing the appellant's appeal against findings of misconduct and health, Jacobs J, at [51]-[57], recorded the detailed case management directions made by Steyn J on 30 March 2021. Jacobs J said

that Dr El-Huseini represented himself and Steyn J was obviously, and rightly, concerned to ensure that the appeal should be properly focused. The preamble to her order therefore summarised in some detail Dr El-Huseini's grounds of appeal. Eleven grounds of appeal were identified and summarised. These were cross-referenced to Dr El-Huseini's Amended Grounds of Appeal, and to the decision of the MTP. Amongst the matter specifically addressed by Steyn J was the need to make reasonable adjustments for the disability of Dr El-Huseini, who had requested various adjustments in an application dated 14 February 2021 under the Equality Act 2010. It was common ground that the appellant suffered from conductive aphasia and anomia. Her order reflected many of the adjustments which had been requested. At the conclusion of her reasons, Steyn J summarised the reasonable adjustments which had been made for the appellant's disability. These included:

a. By allocating two days rather than one day for the appeal to enable the court to proceed at a slower pace, and to take breaks if appropriate.
b. By enabling the appellant to have a supporter with him.
c. By listing the case in the largest court room on the first floor.
d. By permitting the appellant to make an audio recording of the case management hearing and the appeal hearing (subject to conditions and also the possibility that the judge hearing the substantive appeal might withdraw that permission).
e. By permitting the appellant to amend his grounds of appeal despite the 11-month delay in providing those grounds.
f. By requiring the hearing bundle to be provided 12 weeks before the hearing, allowing the appellant more than 5 weeks thereafter to file and serve his skeleton argument.
g. By putting the court's reasons for the case management decisions into writing.
h. By directing the respondent to prepare the hearing bundle and the authorities bundle, although that was a measure the court would have taken on the basis that the appellant was unrepresented, irrespective of his disability.

Witnesses

58. *Diggins v. Bar Standards Board* [2020] EWHC 467 (Admin)

Barrister charged with breach of Core Duty 5 (behaving in a way likely to diminish trust and confidence which public places in you or in the profession) – barrister posting racist and sexist tweet on Twitter in response to open letter – complainant not giving evidence – no opportunity to cross-examine complainant - whether procedural unfairness – whether breach of article 6 (3) (d) ECHR ("to examine or have examined witnesses against him")

See Human Rights above. D, an unregistered (i.e., non-practising) barrister, posted through Twitter a racist and sexually explicit response to an "open letter" from a young black female university student in the English Faculty about reading lists alongside the existing curriculum. D was charged with using racist and sexist language contrary to Core Duty 5 of the BSB Handbook which provides that "You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession…". The disciplinary tribunal of the Council of the Inns of Court found the charge proved and D was reprimanded and fined £1,000. Before the tribunal were the open letter, the tweet and a small number of other documents. It was not in dispute that D published the tweet with the words complained of. Neither the complainant nor D gave evidence before the tribunal. D's appeal to the High Court was dismissed by Warby J. Amongst the grounds of appeal D alleged procedural unfairness. It was said that the refusal to identify and permit cross-examination of the complainant was a breach of natural justice and D's fair trial rights. D claimed that the complainant was hyper-sensitive to criticism, easily upset and hence incapable of counting as an "ordinary reasonable reader" when applying the test and proper approach to words used in social media

postings identified in *Stocker v. Stocker* [2019] UKSC 17, [2019] 2 WLR 1033. Warby J said, at [60] – [63], that this was muddled. The question for the tribunal was whether the tweet was likely to undermine the trust and confidence reposed by others in the appellant and the Bar. The case of *Stocker* required the tribunal to assess how the hypothetical "ordinary reasonable reader" would be likely to respond to the social media statement under consideration. This is an objective process. It does not require evidence of the reactions of actual readers. The BSB was therefore right to take the view that the identity of the complainant, and other information about the complainant, was wholly irrelevant. For the same reasons, D's fair trial rights were not infringed. The complainant could not give relevant and hence admissible evidence about the likely reaction of the hypothetical reasonable reader. Reliance on article 6 (3) (d) of the Convention ("to examine or have examined witnesses against him……") did not advance this aspect of D's case. There were no witnesses to the facts of the case for D to cross-examine.

59. ***R (Chief Constable of Avon and Somerset Police) v. Police Misconduct Panel (PC Pauline Archer interested party, and Director General of the Independent Office for Police Conduct intervener)*** **[2021] EWHC 1125 (Admin)**

Witness not being called to give evidence – decision of chair that witness not necessary – chair's continuing obligation to keep decision under review in interests of justice – Police (Conduct) Regulations 2012, reg 23(3)

Regulation 23(3) of the Police (Conduct) Regulations 2012 provides that no witness shall give evidence at misconduct proceedings unless the person conducting or chairing those proceedings reasonably believes that it is necessary for the witness to do so in the interests of justice. Prior to a misconduct hearing the police officer concerned admitted the charge of making a racist comment and that her conduct constituted gross misconduct. Accordingly, the chair determined that it was not necessary for the person who made the complaint and overheard the racist remark of the officer to be called as a witness at the misconduct hearing. Regarding the officer's conduct the tribunal imposed a final written warning rather than dismissal. The Chief Constable sought to set aside the tribunal's sanction contending that, amongst other matters, the chair should have called the complaintant and witness to give oral evidence before the tribunal. In rejecting this ground of appeal, and dismissing the Chief Constable's claim, Steyn J said that it was common ground that, prior to the hearing, the question of whether any witness should be called to give evidence was a matter to be determined by the chair alone, applying the test set out in regulation 23(3), that is, whether the chair believed it to be necessary for the witness to give evidence. The learned judge said that she agreed with the submissions of the Chief Constable and the Independent Office of Police Conduct that the chair had an ongoing obligation, during the hearing, to determine whether it was necessary in the interests of justice to call any witnesses, applying the regulation 23(3) test. The power extended to enable the chair to call witnesses even if neither party sought to call any. It is not an exercise of discretion but of judgment, and the chair should call any witness where there is a material dispute of fact: *Chief Constable of Hampshire Constabulary v. Police Appeals Tribunal and McLean* [2012] EWHC 746 (Admin) at [13] and [22]. A separate question of whether to adjourn may arise, if a decision to call a witness is made during the course of a hearing, but this should not be conflated with the prior question of whether it is necessary in the interests of justice to call the witness. Given that regulation 23(3) directs consideration to what is necessary in the interests of justice, and given the overarching requirement to ensure that a decision of whether to adjourn must accord with the principles of procedural fairness, where the questions are bound up together is unlikely to lead to inconsistent conclusions. Examples of when a decision not to call a witness may need to be revisited include (a) where there are three witnesses who speak to a material to a material dispute and the chair decides that one should be called and the others should not, if that one witness becomes unavailable the decision not to call either of the other two witnesses would need to be reconsidered; (b) where the regulation 21 notice or regulation 22 response are amended

in a way that gives rise to a new dispute of fact; (c) where the chair receives further case papers after making the initial regulation 23 decision, from which a need to call a witness becomes apparent; and (d) where, during the course of a hearing, a material dispute of fact emerges that had not been apparent (whether the dispute or its materiality) when the initial regulation 23 decision was made. Police misconduct tribunals are quasi-inquisitorial and they must command the confidence of complainants as well as the wider public. That confidence is served by chairs taking steps to ensure that cases are presented fully and on a sound evidential basis. If a material dispute opens up during the course of the hearing, even if the parties are represented, it is incumbent on the chair to raise the materiality of the dispute and invite submissions as to whether any additional evidence should be called.

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17 September 2021

Judicial Review

1 October 2021

Fenella Morris QC

Judicial Review of Disciplinary Proceedings

Unusual but not extinct

Early challenges

Changes to policy or process

R (BMA) v GMC

Early challenges

The decision to bring proceedings

Baker Tilly UK Audit LLP v FRC

- Appeal remains an option
- Public interest in hearings
- Evidence in full at hearing
- Panel could stay for abuse
- (In this case) panel could award costs

Early challenges

Decision to prosecute after a decision not to do so

- Legal error in application of rules
- Legitimate expectation

Early challenges

Challenges by complainants or other interested parties

Part way challenges

R (Husband) v GMC

- No inflexible rule against such challenges
- Appropriate where no disruption to process
- And where may shorten hearing

Challenges to final decisions

Fundamental flaws

R (Ngole) v University of Sheffield

University's position was untenable from the start – blanket ban not proportionate

Challenges to final decisions

Deference

R (Young) v GMC

Not where

- rule provides important protection to individual
- aimed at finality
- apparently aberrant decision
- public interest considerations not dependent upon professional expertise

End

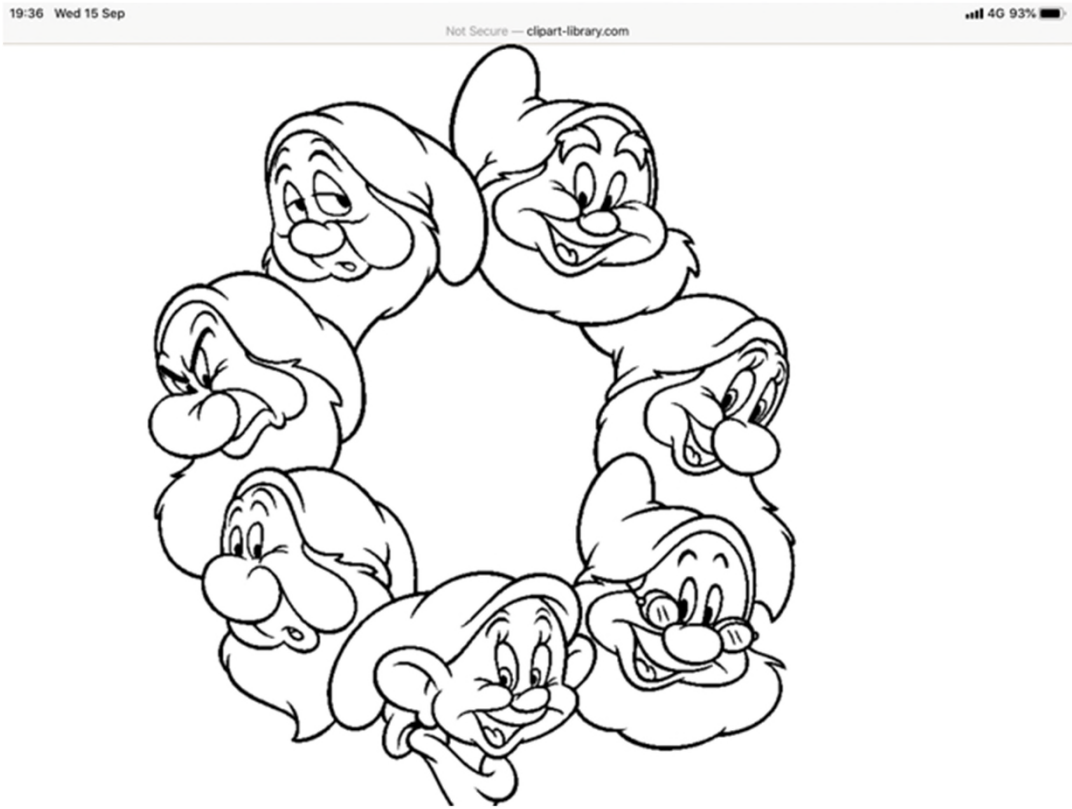
Corporate Governance for Public bodies and Regulators -Has Regulation Failed?

DAVID GOMEZ

ARDL Inaugural Conference

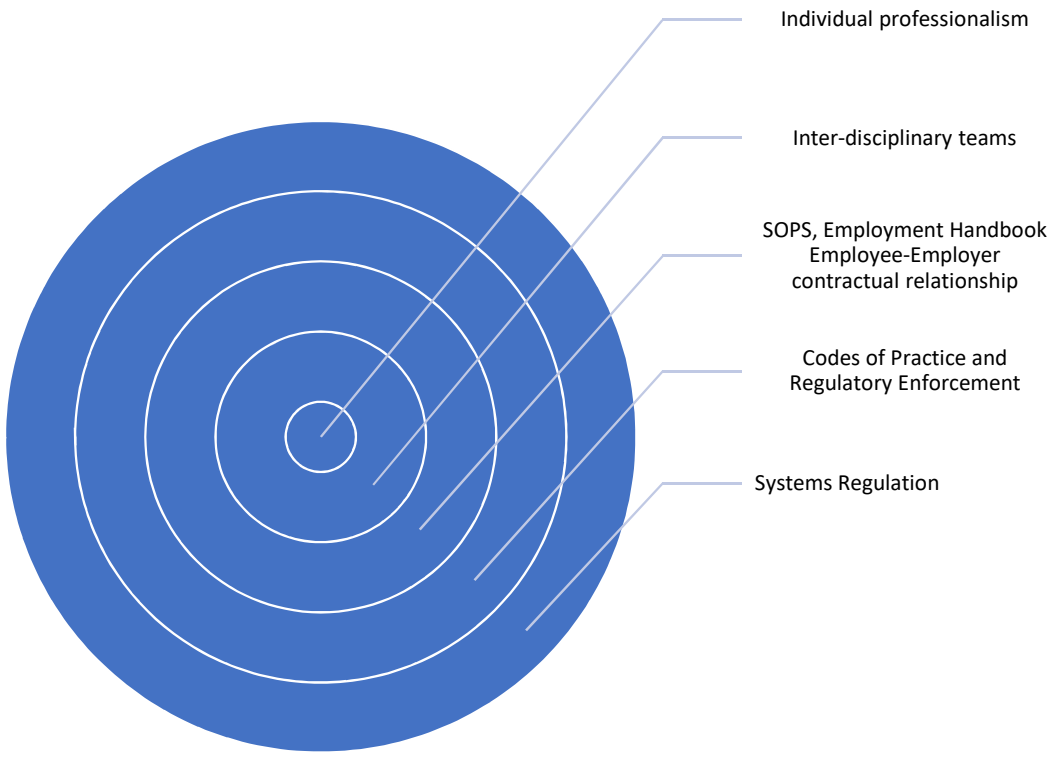
1/10/21

The Seven Principles of Public Life



The Power of Perception

Civil remedies and the Criminal law



Regulation-Definition and Purpose

*"…the totality of the processes and systems for **assuring and improving the safety and quality** of healthcare, including the regulation of healthcare professionals and the regulation of the institutions in which they work"*

Professor Sir Ian Kennedy

- *Purpose* of regulation is public safety (Law Commissions and DHSC)

- Compare the overarching *objective* of PSA and Regulators:

-protect, promote and maintain the health, safety and well-being of the public

-promote and maintain public confidence in the professions

-promote and maintain proper professional standards and conduct

Choosing a regulatory approach: Rules or goals based? Flexibility or certainty?

-timing and cost of interventions

-simplicity or complexity of regulated setting

-nature of the risks being regulated and the potential for harm

-information available to the regulator at different points in time

-degree of innovation in the sector

-characteristics, capabilities and attitude of the regulated community

-ability to develop shared understanding of goals or formulate precise rules

-appetite for risk amongst regulated community and effect on incentives to comply

House of Lords Select Committee on Constitution 2004 Report on “The Regulatory State”

Effective regulation depends on :

- Good regulatory design;

- Control through processes of accountability;

-duty to explain
-provision of information and reasons
-answerability and challenge
-possibility of independent review (complaints, appeals and JR)

- Accountability for outcome and regulatory performance

To Parliament, Government, consumers, regulated community, and the public at large

A PROPOSED DEFINITION:

*"Corporate Governance is the **totality** of the systems, processes, policies, people, culture and outcomes, by which an organisation establishes and **maintains** the **trust** of its share-holders."*

David Gomez

Corporate Governance Frameworks

REMUNERATION COMMITTEE THE CHAIR & BOARD AUDIT COMMITTEE Statutory Committees

CEO (Accounting Officer)

Oversight Regulators

Department

Minister

Comptroller General, PARLIAMENT and SELECT COMMITTEES

Published Standards and Guidance, Enforcement & Sanctions Policy; Annual Reports and Parliamentary Questions; FOI and DPA

Equality Act 2010

Bribery Act 2010

Whistleblowing

Public Procurement

Health & Safety and COMPLAINTS

Managing Public Money

Cabinet Office Guidelines

Nolan Principles

Better Regulation Principles

SYSTEMS AND PROCESSES

ELEMENTS OF A GOOD FITNESS TO PRACTISE PROCESS:

1. SIMPLICITY AND CLARITY
2. FAIRNESS
3. TRANSPARENCY
4. COMMUNICATION
5. TIMELINESS
6. QUALITY
7. CONSISTENCY
8. EFFICIENCY
9. COST

POLICIES

- Threshold for regulatory action
- Real prospect test
- Role of Remediation
- Consensual Disposal
- Indicative Sanctions Guidance
- Case examiners
- Disclosure
- Health and Performance cases
- QUALITY ASSURANCE AT EVERY LEVEL OF THE PROCESS?

CULTURE

- Committed to learning, quality and excellence
- Openness, transparency and fairness
- Diversity and inclusivity
- Outward looking and positive engagement with stakeholders
- Intelligence led
- Proactive in assessing risk
- Caring!
- The case of the FRC
- “Institutional Racism”? The Report into Maternity Services in England

PEOPLE

- ***Legitimacy***

-lay representation

-diversity

- ***Effectiveness***

-criteria

-fit and proper

OUTCOMES

- Standards of Good Regulation and the PSA Performance Review Process
- The role of the Parliamentary Health Select Committee
- *Ariyanayagam*-the “model determination”
- Inconsistency and the kaleidoscope effect
- Does regulation provide value for money?

Inter-Regulatory Sanctions Advisory Panel

Development of an inter-regulatory Sanctions Advisory Panel

Made up of patient and public representatives; regulators and defence organisations; experts; academics; and judges

- Rigorous research into a significant sample of similar cases across the various regulators
- Moderated by an expert group
- Producing guideline cases in which aggravating and mitigating features are clearly and accurately distilled
- Supported by research into public attitudes towards range of sanctions for particular categories of case
- Backed up by full consultation to provide legitimacy

The Aim:

- to lend both objectivity and legitimacy to the sanctioning process; and
- to produce a “consistent body of jurisprudence” (the test in Shah [2011] EWHC 73, paragraphs 22-24)

How to maintain confidence?

- Clear Standards, Thresholds and Criteria
- Collect the Data. Analyse the Data. Use the Data.
- Sanctions Advisory Council
- Economic inducements-lessons from Sport Regulation?
- Beef up the role of Audit Committees and quality assurance

Has Regulation Failed?

A failure of regulation is a failure of corporate governance

The warning signs are in the management data (or lack thereof):
- complaints;
-staff turnover;
-weak boards and in-fighting
-under-resourcing;
-pattern of poor outcomes

Barn door/Rear View Regulation

- ELY
- Bristol-Shipman-Mid-Staffs
- A backward looking disciplinary model?

- Upstreaming
- “Professionalism” and “Shifting the Balance”
- Revalidation
- Task Force on Innovation, Growth and Regulatory Reform

A radical solution?

- Cull the regulatory actors
- Raise the threshold for regulatory action so that fewer cases can be dealt with more effectively and more efficiently
- Replace confidence and professionalism with the single criteria of risk:
- *"is there credible evidence before the decision maker to suggest that this healthcare professional is, or is likely to pose, a (serious) risk to the patients or the public*"
- A duty to audit decisions and to publish audit outcomes
- Give the oversight regulators more teeth

Questions ?????