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ARDL
Association of Regulatory & Disciplinary Lawyers

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HOW LONG IS TOO LONG?

A common problem faced by regulators is when "old" allegations of misconduct come to their attention and/or when a period of time from the alleged misconduct to likely disposal is perceived as being out of the ordinary for such cases. How is a regulator to reconcile, in terms of alleged delay, the competing demands to ensure that a respondent may have a fair trial whilst protecting the public from those whose fitness to practice is called into question, however old the allegations may be? Such regulators may take some comfort from the decision in *Joseph Aaron -v- The Law Society (The Office for the Supervision of Solicitors)* [2003] EWHC 2271 (QBD Admin) which considered an application alleging that there had been an unreasonable delay in bringing the case before the Solicitors' Disciplinary Tribunal (SDT). The case considered the main authorities on the point.

The Appellant maintained that a guilty verdict on 7 charges of conduct unbefitting a solicitor had been made in breach of his Article 6 European Convention on Human Rights right to a fair and public hearing within a reasonable time on a number of grounds, including that there had been unreasonable delay.

Ultimately, the court decided that the delay in the disciplinary proceedings did not reach the threshold required for a breach to be found under Article 6 although some elements of the appeal were allowed. The penalty of 2 years suspension was reconsidered and reduced to 1 year.

BACKGROUND

Allegations were made to the Law Society in October 1996 which related to matters between 1987 – 1991. Additional allegations against the solicitor were made in October 1998, February 1999, April 2001 and June 2001. The SDT listed the allegations together for determination.

The Appellant was found guilty by the SDT, in July 2002, on 7 allegations of conduct unbefitting a solicitor. Seven further allegations were dismissed. The SDT concluded that, considered together, the allegations amounted to conduct unbefitting a solicitor and ordered that the respondent be suspended from practice for 2 years.

The Appellant brought a number of challenges to the SDT decision, which included the ground of unreasonable delay. He attributed the delay to the SDT in resolving the various proceedings from the earliest conduct which was the subject of a complaint (around 1988 – being the date of the earliest allegation) to the SDT hearing on 9 July 2002 or later on Appeal.

The Appellant maintained that the reasonableness of the duration of proceedings should be assessed following consideration:

- of the circumstances of each case – including the nature of what is at stake for the applicant;
- of the complexity of the case;
- of the applicant's conduct;
- in respect of the potential consequence for the applicant, time should run from the institution of proceedings until its final disposal;
- in respect of the multiple complaints or charges, time should run from the earliest of them;
- the manner in which the administrative and judicial authorities have dealt with the matter.

The Law Society contended that there were two periods of alleged delay to be considered. The first period was from the date of the alleged professional misconduct to the commencement of the disciplinary proceedings and/or hearing of them. The second period was the period of the prosecution following their institution. The Law Society maintained that a breach of Article 6 did not depend upon proof of prejudice to a fair trial and, in any event, Article 6 was only engaged where there had been

delay in the proceedings once instituted. Further, the appeal should not be granted because the point had not been canvassed at the original hearing.

Judgment

It was held that the failure to determine disciplinary proceedings within a reasonable time may violate Article 6 without proof being needed that prejudice has actually been caused to the accused. This is important because it had often been said that for such an application to succeed actual prejudice must be proven.

The beginning of the 'timer' starts from the institution of proceedings until its final disposal (*Attorney General's Reference (No. 2 of 2001)* [2001] EWCA Crim 1568; [2001] 1WLR 1869) and if there were multiple complaints then time should run from the earliest of them.

This case also considered whether the court can stay relief for contravention of Article 6, where there was no actual prejudice and to proceed would not amount to an abuse of process. It was suggested that the court should retain its discretion to stay relief where there was no actual prejudice. Discretion in that situation may be in the public interest and may not be unfair to an accused as an abuse of process.

Further consideration, as to whether delay in criminal proceedings was a ground for arguing abuse of process, was given by the House of Lords in the more recent decision in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68; (2004) 148 SJ 25. Lord Bingham determined that the answer was no. Only immense delay could trigger a stay of the proceedings and a case should not be dismissed unless a fair trial was no longer possible or unless it would be obviously unfair to require the defendant to stand trial.

It is clear that the threshold which a respondent must reach before a breach of the Article 6 'reasonable time' requirement will be made out – in terms of the length of the period of delay – is high and is dependent upon the individual facts of the particular case. In this case, the delay did not reach that threshold despite the length of time between the acts of misconduct and the institution of proceedings.

Lord Justice Auld noted that those who were responsible administratively and judicially for regulation of the solicitors' profession should have the reasonable time requirement of Article 6 in the forefront of their minds in any disciplinary process for which they are responsible. We suggest that the same consideration should apply across the spectrum of disciplinary / regulatory bodies.

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MAHFOUZ – PREJUDICIAL PUBLICITY, JUDICIAL REVIEW AND LEGAL ASSESSOR'S ADVICE

A recent judgment of the Court of Appeal in the Administrative Court, *R on the application of Mahfouz v The Professional Conduct Committee of the General Medical Council [2004] EWCA Civ 233*, comments on several issues which arise frequently in disciplinary proceedings, namely:

- the effect of prejudicial press publicity during a disciplinary hearing;
- where a party is dissatisfied with a disciplinary committee's procedural ruling during a hearing, the appropriateness of seeking judicial review, rather than appealing the decision subsequently, and the necessity for adjournments of the proceedings in such circumstances;
- the role of a legal assessor.

The case concerned the application of Dr Fayez Mahfouz, who sought to challenge a ruling of the Professional Conduct Committee ("PCC") of the General Medical Council ("GMC").

Dr Mahfouz had been the subject of a disciplinary hearing before the PCC in June 2003. The charges related to his treatment of several patients in the course of his practice as a cosmetic surgeon during 2000 and 2001. The doctor denied the charges.

The hearing was scheduled for eight days but on the evening of the first day and the next morning national newspaper coverage made reference to Dr Mahfouz's previous erasure from the Medical Register in 1987 and subsequent reinstatement 1992. In addition, one morning newspaper made reference to a further allegation which did not form any part of the current charges against him.

There was no dispute that the information about the erasure and reinstatement was accurate, but it was accepted it would not have been regarded as relevant or admissible in the current PCC proceedings. Several Committee members had seen the various articles and the defence objected to the Committee continuing to hear the case and applied for that Committee to discharge itself and a new Committee to be convened. The application was resisted by the GMC.

In argument before the PCC, it was common ground between the parties that the appropriate test was that expressed by Lord Hope in *Porter -v- Magill [2002] 2 AC 357:*

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased".*

After argument from the parties about whether "bias" included unconscious bias, the PCC decided that the correct test was that set out in *Porter v Magill* (supra). The PCC said it also had regard to *Subramanian -v- General Medical Council, Privy Council Appeal No. 16 of 2002*. The Committee concluded that in the circumstances, a fair-minded and informed observer would conclude there was no real possibility that the Committee would be biased.

The defence indicated they were likely to make an application to the High Court to stay the hearing and sought an adjournment of the PCC proceedings. The PCC rejected the adjournment application, stating that the interests of justice required that the hearing should proceed without delay and that this would not affect the doctor's right to apply for judicial review and have the proceedings halted. The defence withdrew and the PCC hearing continued in the absence of the doctor and his legal team.

The substantive application in the High Court challenged both the decision of the PCC not to discharge themselves and their decision to refuse an adjournment. Both grounds were rejected and permission to appeal was given.

In the Court of Appeal, the submissions on behalf of the doctor were:

(i) that in the circumstances a fair-minded and informed observer would have perceived a real possibility of bias;

(ii) that in deciding otherwise, the PCC had misdirected itself by failing to consider unconscious bias; and

(iii) that a fair-minded and informed observer would think there was a real possibility that the PCC had failed to consider unconscious bias (i.e. had given the appearance of so doing).

Carnwath L J, delivering the judgment of the court, found the only question for the court was the first. Where it was alleged that a lower Tribunal had acted in breach of the rules of fairness or natural justice, the court was not confined to reviewing the reasoning of the Tribunal on *Wednesbury* principles, but must make its own, independent judgment. The question was not how the matter was presented to the Tribunal or how they responded. It was whether the Tribunal had reached the right result.

Prejudicial Publicity

Carnwath L J said that there was no absolute rule that knowledge of prejudicial publicity would be fatal to the fairness of proceedings. In *Montgomery -v- H M Advocate [2003] 1 AC 641*, Lord Hope said the common law test was *"whether the risk of prejudice is so grave that no direction by a trial judge however careful could reasonably be expected to remove it"*.

The principle safeguards of objective impartiality lay in the trial process itself and the conduct by the trial judge. The actions of seeing and hearing witnesses could be expected to have a far greater impact on the jury's minds than residual recollections from reports about the case in the press. This impact could be reinforced by appropriate warnings and directions from the trial judge.

In this case, Carnwath L J contrasted the experience of the PCC, which in this case included two professionals and three lay members selected from a panel of persons with experience in public life, with that of a jury.

The *Subramanian* case put emphasis on the particular features of GMC procedures and illustrated the factors which could be relevant in considering whether PCC proceedings were "irretrievably poisoned" by disclosure of previous decisions. Of particular importance were the experience of the Committee and the availability of independent legal advice to ensure that irrelevant matters did not play any part in its deliberations. Other factors of importance referred to by the Committee were the length of time since the previous finding, the different nature of the previous case and the impact of seeing and hearing witnesses in relation to the current charges. When these factors were taken together, his Lordship saw no grounds for questioning the PCC's ability to decide the case fairly on the evidence before it. He concluded that on this issue, the PCC came to the right conclusion and the appeal on the first ground was therefore disposed of.

His Lordship questioned the use of the term "bias", with its overtones of possible impropriety, in a case such as this where the actual impartiality of the tribunal had not been brought into question. The issue was not one of bias in the normal sense but of the prejudicial effect of inadmissible material on an otherwise impartial tribunal.

Adjournment of the disciplinary proceedings

The Court's view was that on the particular facts of his case, there should have been an adjournment to allow Dr Mahfouz to pursue his application to the High Court.

Whilst the PCC's reasoning that refusal of the adjournment would not affect Dr Mahfouz's right to pursue his application for judicial review was correct, in the Court's view it gave insufficient weight to the practicalities of the matter. It was vital that the application to stay proceedings should be made as soon as possible and that could most effectively be achieved by the involvement of Dr Mahfouz's Counsel. There was no practical possibility of anybody else being instructed to represent Dr Mahfouz in the GMC proceedings in sufficient time. The appearance of fairness was also important and this required that the PCC should have granted the limited adjournment requested.

Carnwath LJ said that although there was a general need for GMC proceedings to be decided as quickly as possible, the need for speed was relative. To leave Dr Mahfouz to his remedy of an appeal following a determination against him disregarded the serious prejudice which could result in the meantime by a finding of serious professional misconduct. His Lordship said that in general it was preferable for proceedings to be allowed to take their course and any challenge to be made by way of appeal. Consideration should be given to the difficulty of organising such proceedings in a complex case and the potential inconvenience to witnesses who may have had to make special arrangements to attend. There was no inflexible rule, but in his Lordship's view, there should, on the particular facts of Dr Mahfouz's case, have been an adjournment to allow the application to be made.

The Legal Assessor's Role

The judgment refers to the role of the legal assessor to the PCC which, under the GMC's procedural rules, is expressed as follows:

"It shall be the duty of the legal assessor to inform the Committee forthwith of any irregularity in the conduct of proceedings before that Committee which may come to his knowledge and advise them of his own motion where it appears to him that, but for such advice, there is a possibility of a mistake in law being made".

Subject to certain qualifications, such advice is required to be given in the presence of the parties and a record made where the Committee rejects the advice.

His Lordship considered the nature of the advice which the legal assessor should give. It was in his view a mistake to present the advice to the Committee simply in terms of questions to be answered by them, as had happened in this case. A possible breach of the rules of natural justice was a matter of law, as well as being a potential "irregularity" within the rules. In his Lordship's view, the legal assessor was better placed than the Committee to express the objective view of the "fair-minded observer" as that was precisely what he should be.

Accordingly, where such an issue as this arises, his Lordship saw it as the duty of the legal assessor *"not simply to pose questions, but to provide answers – or at least "advice" as to the answers (since under the Rules the ultimate decision is that of the Committee). In doing so, there is no reason why he should not look at the matter in the same way as would a Judge directing a jury, while taking account of the special characteristics of the Committee which he is advising".*

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LEGAL UPDATE

R (Green) v. Police Complaints Authority [2004] 1 WLR 725

The appellant lodged a complaint alleging that a police officer had deliberately driven a police car at him intending to kill or seriously injure him. The matter was referred for investigation to the Police Complaints Authority, who in the course of its investigation obtained witness statements and documents from the police force. The appellant commenced proceedings for judicial review claiming that the Police Complaints Authority was under a general duty to disclose information to claimants unless there was good reason not to disclose, and that lack of disclosure was contrary to the appellant's rights under articles 1, 2 and 3 of the European Convention on Human Rights ("ECHR"). The Police Complaints Authority refused disclosure to the appellant on the grounds that section 80 of the Police Act 1996 prevented disclosure of any information received in connection with an investigation.

In dismissing the appellant's appeal, the House of Lords held that section 80 contained a general ban on disclosing information received by the Authority; that the aim of the Authority in carrying out its functions was to satisfy the legitimate interests of both claimants and the wider public that the investigation of complaints against police officers should be, and should be seen to be, independent and thorough; and that the purposes of the legislation would not be served by disclosure. As to the alleged breaches of articles 2 and 3 of ECHR were concerned, the House of Lords held that the procedures adopted by the Police Complaints Authority were such as to satisfy the requirements of an effective investigation for the purposes of the Convention. Without seeing the witness statements the appellant was nonetheless in a position to make an effective contribution to the process of reaching a final decision on the complaint, and the involvement of the appellant at the start of the investigation through to the invitation to comment on the proposed decision on disciplinary proceedings showed that his legitimate interests as a complainant were recognised and safeguarded.

R (Thompson) v. Law Society The Times, 20th February 2004

The Court of Appeal held that neither a reprimand nor the imposition of a fine on a solicitor for misconduct involved his civil rights and obligations. The fair trial provisions of article 6.1 of the ECHR were not engaged when a domestic tribunal of the Law Society held a disciplinary hearing in private. If the Law Society imposed an unacceptable condition the solicitor's rights could be adequately protected by means of an appeal to the Master of the Rolls, which would be heard in public in conformity with the appellant's Convention rights.

Three Rivers District Council v. Bank of England (No 6) [2004] 2 WLR 1065

After the collapse of Bank of Credit and Commerce International SA ("BCCI") the government and the Bank of England appointed Bingham LJ to investigate the reasons for the collapse. In proceedings brought by the liquidators and creditors against the Bank of England for failure to properly regulate BCCI, the Bank claimed privilege in respect of numerous documents passing between itself and the Bingham Inquiry, including communications passing between the inquiry unit and its solicitors.

The Court of Appeal, (Lord Phillips of Worth Maltravers MR, Longmore LJ, Thomas LJ) in defining the limits of legal advice privilege, held that the provision of advice by the Bank's solicitors in relation to the Inquiry did not involve the type of professional relationship between solicitor and client that attracted legal advice privilege regardless of whether any legal rights or liabilities were an issue. The Court of Appeal held that only communications seeking specific legal advice between the Bank's solicitors and the Inquiry unit would be privileged. The judge below was right that the documents had to be examined to see if any had come into existence for the purpose of giving specific legal advice, and that if not, they should be disclosed to the liquidators in the action alleging failure by the Bank properly to regulate BCCI.

Council for the Regulation of Health Care Professionals v. General Medical Council; Council for the Regulation of Health Care Professionals v. Nursing & Midwifery Council The Times, 8th April 2004

These two important cases concerning the powers of the Council for the Regulation of Healthcare Professionals, decided respectively by Leveson J on 29th March 2004, and Collins J on 31st March 2004, were reported in the same edition of *The Times*.

The Council was set up under the NHS Reform and Health Care Professions Act 2002 as the overarching body for the medical profession. In the *GMC* case, Leveson J held that the Council had the power to refer to the court the case of a doctor who had been acquitted of serious professional misconduct by the Professional Conduct Committee of the General Medical Council. The judge said that it was clear that the intention of Parliament was to provide the Council with the widest powers to oversee the activities of each of the regulatory bodies brought under its umbrella. Whilst the Council did not have the power to run a parallel investigation into a specific allegation, it had the statutory power and right to refer the case of a healthcare practitioner to the court after a relevant disciplinary decision had been taken by the healthcare practitioner's professional body.

In the *NMC* case, Collins J held that where a nurse was found guilty of misconduct, the Council had power to go to court to appeal the penalty of the professional tribunal if the Council thought it was unduly lenient. The Professional Conduct Committee of the Nursing & Midwifery Council had imposed a caution, which would remain on the healthcare practitioner's file for five years. The Council argued that the penalty was unduly lenient in the circumstances of the instant case.

Collins J held that the Council's power to refer an unduly lenient sentence to the court was a power which needed to be most carefully and sparingly exercised. The burden rested on the Council to establish that the sentence in question was unduly lenient, and on the facts of the instant case, while there was no doubt that the penalty was lenient, undue leniency had not been established.

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REQUEST FOR COMMENTS AND CONTRIBUTORS

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