

# ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – WINTER 2016/2017



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### Introduction

2017 is already well underway and the annual membership year for ARDL begins on 31st January 2017. Membership can be renewed via our website (<http://www.ardl.org.uk/membership/>). We know that some members experienced technical difficulties with making payment for membership through the website last year but this has been rectified and we look forward to existing and new members joining.

ARDL membership gives free access to a wide range of seminars on important topical regulatory issues and to the quarterly ARDL Bulletin. Membership also allows for the purchase of tickets for the highlight of the ARDL year, the Annual Dinner.

Our Seminar Programme for 2017 will be issued separately, providing a range of seminars across the UK on important regulatory topics.

## Annual Dinner – Friday 30th June 2017

The Annual Dinner in 2017 is on 30th June and is being held at the Guildhall in London (<http://www.guildhall.cityoflondon.gov.uk/>), a larger venue to allow for more members and guests to attend. Membership feedback was that the dinner was always sold out and more people than could be accommodated actually wanted to attend. The evening will begin with arrival drinks in the Old Library. Music will be provided by Jazzbomb - <http://jazzbomb.com/>. We are pleased to be able to extend the numbers attending from 360 to 540 and we look forward to welcoming more ARDL members to this year's event. The ticket price of £150 includes the cost of alcohol (as there is no cash bar at The Guildhall).

We are delighted to have Dominic Grieve QC, MP as our after dinner speaker. After the speeches have concluded, the Old Library will once again be available for an after dinner bar and drinks. Please see the Terms and Conditions on the ARDL website for further information.

With best wishes for 2017

Catriona Watt  
Chair

## Marion Simmons QC Essay Prize

ARDL is delighted to announce that the annual Marion Simmons QC essay prize is now open to entrants, with the following title:

### **What effect would the UK's exit from the European Union have on the law of regulation in the UK?**

Entrants are free to choose whether to focus on one particular area of regulation, or to adopt a wider approach and address a range of regulatory areas.

The first prize is £2,000, the second £1,000 and the third £500. The judges will include leading academics in the field of regulation and members the ARDL Committee.

The essay competition was set up in memory of the late Marion Simmons QC, who sadly died on May 2, 2008, aged 59. Marion was a barrister, recorder, arbitrator and, latterly, chairman of the Competition Appeal Tribunal. Her areas of practice covered a wide range of financial and commercial law, including competition and regulation. Marion served on ARDL's Committee for two years and was committed in her support of young lawyers.

Entries must be no longer than 3,000 words and should be type-written in the English language. The judges' decision will be final. Essays must be submitted so as to be received by 5pm on Friday 28 April 2017 by post or email to: Nicole Curtis Penningtons Manches LLP, 125 Wood Street, London EC2V 7AW; [nicole.curtis@penningtons.co.uk](mailto:nicole.curtis@penningtons.co.uk).

Full Terms and Conditions (including eligibility) can be found on ARDL's website.

Nicole Curtis  
Penningtons Manches LLP

## Habib Khan (Respondent) v. General Pharmaceutical Council (Appellant) (Scotland): [2016] UKSC 64

On 14 December 2016, the Supreme Court gave judgment in this important case reversing the decision of the Scottish Court of Session and allowing the appeal of the General Pharmaceutical Council.

1. What is the significance of this case for practitioners?

The case focused upon the limitations of the sanction and powers available to the Fitness to Practise Committee of the General Pharmaceutical Council under the Pharmacy Order 2010, and similar legislation of other health care regulators, in relation to the significant difference between removal or erasure from the register and suspension which is limited to a maximum period of 12 months. The appeal to the Supreme Court was from the Inner Court of Session which had held that there was an intermediate sanction or middle way between 12 months' suspension and the

period of 5 years which must elapse before an application for restoration to the register; and that a principal hearing committee (i.e. the original committee dealing with the case) could direct 12 months' suspension with a review at which it would be appropriate for the review committee to extend the suspension by a further 12 months, and possibly further periods of 12 months thereafter, and that the review committee would be expected to follow this or give a good reason why they did not do so.

## 2. What was the background to the case?

In March 2011 and May 2012, Mr Khan, a registered pharmacist, received convictions at Glasgow Sheriff Court of assault to cause injury, behaving in a threatening abusive manner, and wilfully or recklessly damaging property belonging to another. He was sentenced to pay a fine and costs, and to undertake 180 hours of unpaid work with a supervision order for 18 months. The offences were all of a domestic nature and involved assaults upon his wife and criminal damage to her property.

On 27 June 2013, Mr Khan appeared before the Council's Fitness to Practise Committee. In directing that his name be removed from the register of pharmacists the committee said:

"The Committee has considered whether a period of suspension would be appropriate and sufficient to restore or maintain public confidence in the profession. The Committee considers, however, that repeated domestic violence is a crime striking at the core of professional health care. Pharmacists, in common with other health care professionals, have to be understanding, sympathetic for all patients, men, women and children, and must be publicly and privately trustworthy. Domestic violence is unfortunately all too common, in all walks of life. [Mr Khan's] offending has not been shown to have affected his professional practice in any way. However, the public has higher expectations of members of the health care professions as to the standards of conduct they must show. The Committee considers the public will be shocked by [Mr

Khan's] behaviour and will expect it to be condemned by the profession in the strongest terms."

The committee noted the limit of its power of sanction was a period of 12 months and considered that suspension for that period would be insufficient to mark the degree of seriousness of Mr Khan's conduct. The committee said that it considered Mr Khan's conduct to be fundamentally incompatible with continued registration as a pharmacist, and that public confidence in the profession demands no lesser sanction than removal from the register. The committee concluded that no sanction short of removal from the register would be proportionate or sufficient to protect the public interest, including public confidence in the profession.

## 3. What issues arose for the Supreme Court's consideration?

The principal issue for determination by the Supreme Court was whether an intermediate power was available to the original committee along the lines envisaged by the Inner House. That court had held that the original committee's power to suspend a registrant's registration for 12 months with a recommendation that a review committee extend the period of suspension for a further period or periods was "reasonably incidental" to the original committee's powers, adding that:

"If an indication as (sic) given by the earlier Committee that the suspension should be extended beyond the initial 12 months, for say an additional 12 or 24 months, that will not bind the later Committee, but the later Committee will be obliged to respect the indication and if it departs from it will be expected to give reasons for doing so. In our view this provides an intermediate sanction but at the same time respects the freedom of the later Committee to deal with changing circumstances, if that is apparent".

The issues before the Supreme Court were simply:

i) what are the limits of the sanction available to the original committee in relation to suspension? and

ii) can the original committee give a direction/advice to the review committee as to what further sanction to impose?

#### 4. What did the Supreme Court decide, and why?

The Supreme Court held that there was no middle way and that the approach of the Court of Session was inconsistent with the decision of the Privy Council in *Taylor v. General Medical Council* [1990] 2 AC 539, which had not been cited to it. In that case the Judicial Committee held that under earlier but similar legislation under the Medical Act 1983 it would be an improper exercise of the powers of the Professional Conduct Committee of the General Medical Council (as it was then called) to extend a period of suspension merely because they regarded the original period of suspension as having been too lenient. The opinion of the Court of Session was also inconsistent with the Sanctions Guidance provided to the committee of the General Pharmaceutical Council and the guidance provided by a number of other regulatory bodies for original and review committees.

The Supreme Court held that the focus at any review must be upon the issue of current impairment of the registrant, and that the purpose of ordering a review and providing guidance at the original committee stage is not primarily to provide guidance to the review committee as to sanction at the review stage but to provide guidance to the registrant as to what the review committee will be looking for when then assessing the question of his or her current impairment. In giving the judgment of the Supreme Court, Lord Wilson said that the review committee will note the particular concerns articulated by the original committee and seek to discern what steps, if any, the registrant has taken to allay them during the period of his suspension. The original committee will have found that his fitness to practise was impaired at the time of the hearing. The review committee asks: does his fitness to practise remain impaired?

The Supreme Court said it was also worthwhile to note that the rules limiting suspension initially to 12 months and requiring the review committee to focus upon current impairment is reflected in the April 2014 report of the Law Commissioners into the health care sector across the UK entitled *Regulation of Health Care Professionals: Regulation of Social Care Professionals in England and draft Bill*. Under clause 161 of the draft Bill if the review committee determines that the registered professional's fitness to practise is no longer impaired, the review committee must revoke any suspension order made by the original committee.

Finally the Supreme Court allowed a cross-appeal by Mr Khan and replaced the order for removal with a suspension order of four months. Mr Khan's registration had been suspended by the original committee as an interim measure pending any appeal, and in allowing the cross-appeal against sanction the Supreme Court appear to have taken into account that he had already been the subject of an interim suspension order for over three years leading up to the appeal.

#### 5. What should lawyers take away from the judgment?

First and foremost, ensure you have checked for and cited relevant authorities when you appeal. Had Taylor been cited it is unlikely the Inner House would have made the error it did.

Secondly, remember that now all Fitness to Practise Committees whether at the original hearing or at the review hearing must focus on the issue of current impairment taking fully into account the background

facts of the case which brought the registrant before the committee in the first place.

Tom Kark QC  
QEB Hollis Whiteman Chambers

Kenneth Hamer  
Henderson Chambers

## When duplicative regulatory proceedings are abusive and unfair

### Professional membership bodies seeking to exercise disciplinary functions over the same profession, seeking to adjudicate upon identical complaints and vindicating the same public interest, may be acting unlawfully

It is not uncommon for regulatory bodies to bring an allegation of impaired fitness to practise against professionals where the underlying concern arises out of other litigation or proceedings already brought against them. Criminal convictions for example, often form the basis of an allegation brought by professional regulatory bodies, as many treat them as a discrete ground of impairment. It is settled law that, even where a professional is acquitted in a criminal court, it is not automatically, inherently unfair for a regulator to pursue a misconduct allegation arising from the same conduct.<sup>1</sup> Many regulators also treat findings of another regulatory body as separate ground of impaired fitness to practise.

What happens when a professional is a member of more than one membership body, regulating the same aspect of their professional work and both bodies receive a virtually identical complaint about a member concerning a breach of their rules, code or principles? Are they both entitled to pursue separate regulatory investigations, to adjudicate upon the allegations and take separate action against a professional's membership?

Until recently, there was no binding legal authority dealing with the scenario. This article will consider the recent decision of the High Court *The Queen on the application of Vesna Mandic-Bozic v British Association for Counselling and Psychotherapy (BACP)* [2016] EWHC 3134 (Admin) in which these questions were answered.

### Facts

The Claimant is a counselling psychotherapist and was a member of the British Association for Counselling and Psychotherapy (BACP) as well as the United Kingdom Council for Psychotherapy (UKCP). Both professional

organisations maintain registers that are accredited with the Professional Standards Authority (PSA) but are not enshrined in statute. The regime is thus one of voluntary regulation; it is not a requirement that practitioners be registered, but in reality, membership of at least one is required to practise.

In July 2016 the UKCP heard a complaint of impaired fitness to practise, raised by Patient A under its Complaints and Conduct Process, against the Claimant. The UKCP Adjudication Panel ultimately concluded that the Claimant's fitness to practise was not currently impaired and therefore imposed no sanction. A matter of weeks after making the complaint to the UKCP, Patient A had made the same complaint, in virtually identical terms, to the BACP. After the UKCP proceedings had concluded, the BACP sought to adjudicate upon the complaint under its own process, in accordance with its Professional Conduct Procedure (PCP), justifying its actions by arguing that the allegations were crafted differently and were designed to uphold a qualitatively different set of ethical and professional standards. The court disagreed.

The Claimant sought to challenge the BACP's decision to proceed by way of Judicial Review on the basis that it amounted to abusive duplicative action. The Claimant relied on the doctrines of res judicata and cause of action estoppel, as well as arguing the doctrine of collateral attack.

### Res judicata

Mostyn J referred to the case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] 1 AC 160, in which Lord Sumption sets out the legal principles of res judicata. In that case Lord Sumption sets out a hierarchy of different types of duplicative cases and held that the higher up in the hierarchy the case is, the harder it will be to open the door to a second hearing. They can be summarised as follows:

1. Cause of action estoppel
2. Issue estoppel (not deployed in these proceedings and therefore not considered in this article)
3. Collateral attack doctrine

<sup>1</sup> *R (Redgrave) v Commissioner of Police of the Metropolis* [2003] EWCA Civ. 4 and regarding the potential for unfairness see *Ashraf v General Dental Council* [2014] EWHC 2618 (Admin)

## Cause of action estoppel

This was described by Mostyn J as follows:

“where both the parties and the subject matter of the litigation are the same in both the first action and the prospective second action. Here, there is a near absolute bar on litigating the matter twice. The only exceptions are where fraud or collusion can be proved. A party cannot get round the bar by putting up a front-man to litigate anew. Whether the parties are the same has to be judged realistically not literally. Further, a party cannot get round the bar by seeking to argue new points which were not argued first time round. The subject matter of the original litigation extends to “every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” (*Henderson v Henderson* (1843) 3 Hare 100 at 115 per Sir James Wigram V-C).”

The elements of cause of action estoppel are:<sup>2</sup>

- (1) The decision was judicial in the relevant sense;
- (2) The decision was pronounced;
- (3) The tribunal had jurisdiction over the parties and the subject matter;
- (4) The decision was final and on the merits;
- (5) It determined a question raised in the later litigation; and
- (6) The parties are the same or their privies.

The Claimant argued that 1-4 of the above were satisfied by virtue of the UKCP decision. In respect of the final two, it was argued that the complaint pursued by BACP had been dealt with adequately by the UKCP, and although the complainant in the UKCP proceedings was a witness, UKCP had represented her interests and was therefore the UKCP’s privy. The BACP resisted all of these arguments and in particular suggested that although there were some similarities, the UKCP proceedings and standards were distinct from the BACP’s and the parties were not the same or their privies.

## Collateral attack

Referring to Lord Sumption again, Mostyn, J stated that when a court deploys collateral attack it is to prevent abusive conduct rather than applying rules of substantive law. Mostyn, J. then went on to say:

“The entire jurisprudence was summarised in a definitive judgment of Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Birstow* [2004] Ch 1, CA. At [38] he formulated four principles, of which of which I need only cite the first and fourth:

- (1) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court.
- (4) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or (ii) to permit such re-litigation would bring the administration of justice into disrepute.”

The Claimant argued that the BACP proceedings should be stayed for abuse of process because they amounted to a collateral attack on the UKCP decision. The Claimant argued that the case was analogous to the case of *The Secretary of State for Business, Innovation and Skills v Weston* [2014] EWHC 2933 (Ch). In that case, a criminal court had refused to disqualify a director under section 2 of the Company Directors Disqualification Act 1986. The Secretary of State subsequently attempted to have the director disqualified during the course of insolvency proceedings. The High Court refused on the basis that it was being asked to exercise exactly the same jurisdiction and to disqualify would amount to a collateral attack. The court held that:

“this claim was no more than an attempt by the Secretary of State to obtain a different decision from the High Court than had been given on

<sup>2</sup> *R (Coke Wallis) v ICAEW* [2011] 2 AC 146

identical issues by the criminal court, which had had the issues before it and which had made a positive decision to refuse an order. It was unfair that the defendants should be exposed to the same claim on two occasions. That unfairness was not relieved by the claim having been brought by a different entity, although there did not seem to be a complete separation between the entities as the Insolvency Service had liaised with the prosecutor when he made his application for the disqualification. There was a general point that where the basis of the claim and the relief sought was essentially identical it was just as much unfair to the defendant to have to face it twice at the hands of two applicants as it would be if there were only one.”

In these proceedings, the complainant had not pursued the avenues of challenge to the UKCP decision which were available to her (including under the complaints policy), yet the BACP was facilitating her to pursue the same complaint, including through the raising again of allegations that had been rejected by the UKCP. It was argued that this was unfair because there had already been lengthy consideration of oral and documentary evidence. In addition, it was argued that the BACP proceedings were unlikely to improve upon the UKCP investigation given that the rules only permitted 60 minutes of questions for each witness through the Panel Chair. The Claimant argued that it was unlikely that the complainant (who was required to present her own case) and who had severe mental health problems, would be able to present her complaint as effectively as was done by UKCP Counsel. In addition to the stress of another hearing for the Claimant, there was a real danger that the complainant would tailor her evidence in the BACP’s proceedings having had sight of the UKCP’s reasons for not believing her evidence the first time.

BACP argued that the UKCP determination was not admissible as evidence in its proceedings and that it was obliged to consider the complaint under its own process. It asserted that it would not bring the administration of justice into disrepute nor was it manifestly unfair to the Claimant for its proceedings to continue. BACP also maintained that the complainant was engaging in its process, there was no evidence of a lack of capacity, that she would be supported by case managers if necessary and that the Panel would assess her credibility on hearing her evidence. It was

submitted that by joining two regulatory bodies, the Claimant had submitted herself to BACP’s jurisdiction and that it was in the public interest to continue.

### **The Court’s decision**

The court concluded that the allegations made by the complainant to the UKCP and the BACP were the same. The court determined that although the UKCP and the BACP have differently worded ethical standards, they cover the same ground, even if the language used to express them is different.

A full quasi-judicial determination of the complaint had been undertaken by the UKCP and Patient A’s complaint had been adjudicated upon. The UKCP adjudication of the complaint involved an eight day hearing, where both parties were represented and during which six witnesses gave oral evidence.

In granting the Claimant’s application on this ground of review, Mostyn, J. held that the doctrine of cause of action estoppel applied and the BACP was barred from commencing proceedings to adjudicate upon the complaint.

Mostyn, J. accepted the Claimant’s alternative argument that for BACP to re-hear the complaint would amount to a collateral attack on the UKCP decision. Mostyn J. concluded that even if he was wrong about the principle of action estoppel applying, then under the collateral attack doctrine, it would be manifestly unfair for the BACP to allow the complaint to proceed. Mostyn, J. held that:

“If I am wrong in my determination that a cause of action estoppel operates then I find that under the collateral attack doctrine it would be manifestly unfair to the defendant to allow this complaint to proceed. In my judgment this case is indistinguishable (in terms of principle) from *The Secretary of State for Business, Innovation and Skills v Weston* [2014] EWHC 2933 (Ch). There two separate organs of the state attempted in separate courts in separate proceedings to obtain a disqualification order against two company directors. The first attempt, at the suit of the CPS, failed in the Crown Court. A repeat application by the Secretary of State in the High Court was refused, the court holding at [52] that it would be unfair to the defendants to be exposed to

the same claim on two occasions. In that case it was said that the second claim was for the public good, but that cut no ice with the court.”

Mostyn, J. decided the case in December 2016 and it has since been confirmed that no appeal against the High Court decision will be issued.

### Commentary

The issues raised in this case are novel; it is likely to set a precedent for cases in which professionals are members or registrants of more than one professional body or regulator and one body of the same profession seek to adjudicate upon an identical complaint against a member or registrant.

The decision is also likely to attract the attention of members who wish to challenge the BACP’s PCP. The BACP undertook a consultation last year to revise its PCP but the fruits of that consultation are yet to be seen. Although the PCP was not under detailed consideration in these proceedings, Mostyn, J was critical of certain aspects of the disciplinary scheme, comparing parts of it to the Star Chamber.

The judgement, whilst of particular relevance to the talking professions (psychotherapists, counsellors, psychoanalysts and the like) as they are often members of multiple organisations performing regulatory functions, will also impact members of other professions, particularly those voluntarily registered, for example interpreters (who may be members of the National Register for Public Sector Interpreters (NRPSI) and the National Register for Communication Professionals for Deaf and Deafblind (NRCPD)) and hypnotherapists (who may be members of the Complementary and Natural Healthcare Council (CNHC) as well as the National Hypnotherapy Society). Indeed, the reach may be even wider, potentially affecting the accounting and legal professions as well, members of which are, on occasion, registered with multiple organisations, each with their own disciplinary schemes. Those private client lawyers who advise clients on wealth preservation for example, may choose to be a member of the Society of Trust and Estate Practitioners (STEP) in addition to maintaining their mandatory Solicitors Regulation Authority (SRA) registration.

Kingsley Napley LLP acted for the Claimant.

*This is an extended version of a blog that first appeared on [the Kingsley Napley website](#) and in the Law Society Gazette.*

**Julie Norris**  
**Sian Jones**

**Kingsley Napley LLP**

## The Judgement of others – how should a disciplinary panel deal with the findings of another Professional Disciplinary Tribunal’s decision: analysis and comment on *Peckitt v GDC* [2016] EWHC 1803 (Admin)

### Introduction

What happens if a registrant is registered with two or more professional bodies and is then disciplined by one and is later disciplined by his or her other professional body? I recently appeared for the NMC, in the case of *NMC v Benyu*, where this situation arose. Ms Benyu was both a practising solicitor and nurse. She was struck off by the Solicitors Disciplinary Tribunal (SDT) for the mishandling of client funds. The client had mental health issues and originally was referred to her through her work as a nurse. Following the decision of the SDT, Ms Benyu was referred to the NMC.

Usefully the recent decision of Mr Justice Kerr in *Peckitt* gives clear guidance to disciplinary panels where they are considering the factual findings of another professional regulatory body, as the substantive charges against a registrant. Prior to the decision there was an outstanding question: could one panel use the findings of another or did the panel have to have a rehearing and consider the evidence separately? The former approach is obviously more elegant to regulators, and would stop panel shopping where a registrant was regulated by a number of bodies until they received a favourable result. In some regulatory frameworks this is not an issue, as there are provisions which allow the findings and decision of one regulatory body to be

considered by another regulatory body. This is usually the case in similar areas such as health care.

*Peckitt* is significant as it provides guidance on when the panel of one body can rely on the findings of the panel of another body as findings of facts. Below I discuss the potential ramifications of the judgment, and the way the panel applied the law in *Benyu*.

Professor Peckitt – the facts and analysis

Professor Peckitt was a surgeon of considerable experience, who was regulated both by the GMC and the GDC. He was initially charged in front of the MTPS for misconduct arising from allegedly punching a patient. The MTPS found the charge proved and owing to his ‘complete lack of insight’ decided to erase him from the register. During that investigation the registrant made a number of statements, in which he stated the GDC had told him certain facts, when they had not. The GDC investigated these as potentially dishonest conduct, and these were part of the GDC charges against him. The GDC charges were based on two limbs. First, the original findings of the MTPS and its decision to erase him (in relation to which the GDC relied upon the factual finding of the MTPS). Second, the question of dishonesty arising from the statements Professor Peckitt had made about the GDC. The facts were found proved in relation to both parts and he was erased from the GDC register.

The registrant appealed on a number of grounds, although only one is relevant for this discussion. The relevant ground was that the GDC should not have accepted as fact the findings of the MTPS. Professor Peckitt submitted that by doing so, the process was deeply flawed and unfair.

Mr Justice Kerr, noting that section 27(2)(g) of the Dentists Act 1984 provided for a finding of impairment by reason of the determination of another regulatory body, rejected this argument and stated at paragraphs 37 and 38 of his judgment:

*37..... I think [counsel for the GDC] is right that it is not, at least other than in exceptional cases,*

*for the second disciplinary panel to revisit the factual territory of the first. That seems to me to be the position, other than in rare and exceptional cases.*

*38. There could, at least in theory, be a case in which the first body's decision was so manifestly flawed or perverse that it would be wrong for the second body to blind itself to that fact. I note that the opening words of section 27(2) are "[a] person's fitness to practice as a dentist shall be regarded as 'impaired'...". I do not think the word "shall" requires a second disciplinary body in a case falling under (g) uncritically to adopt a determination of the first body in a rare case where the second is presented with stark evidence that the decision of the first must be plainly wrong.*

This seems to be a straightforward and sensible judgment in the circumstances. It does, however, raise the issue of what is an exceptional case. In my view, an exceptional situation might include the overturning on appeal of the original findings, a serious procedural irregularity in the earlier proceedings, or something which throws the fairness of the earlier proceedings into question.

### **Impact of the Judgment**

The judgment of Mr Justice Kerr has provided clarity in this area. Apart from what might amount to exceptional circumstances, it will be important to put the decisions of the panel of another regulatory body in context. So, although there has been a decision by another panel, it will not by any means mean that a decision by one panel will mean disciplinary action by another. Context will be key.

One key area may be the common or shared values of the two professions concerned. Similar practice provisions are largely covered by regulators, as in the case of the NMC with other health care regulators. Furthermore, technical deficiencies will rarely be the cause for cross regulator sanction. Integrity and honesty

are key parts of all professions, and findings against these fundamental tenets of the profession of one panel will doubtless be treated harshly by another regulatory body.

In *Benyu v NMC*, the panel accepted the decision of the SDT as a finding of fact. It was not disputed by the registrant. They then went on to consider impairment. They found that the conduct found by the SDT amounted to misconduct, and that the registrant's fitness to practise was currently impaired. On the facts alone it would seem very hard for a panel not to find that it was in the public interest to find impairment. When it came to sanction, the panel decided that removal from the register was appropriate. In circumstances where the SDT had found dishonesty, which was centred on the abuse of a mental health patient, it would be very hard for the panel not to strike off the registrant.

#### **Does it affect how panels treat panel decisions in other situations?**

Though Mr Justice Kerr focused on the way in which a panel of one regulatory body should deal with the findings of fact of a panel of another regulatory body, where they have carried out disciplinary action, it does open the question of how panels deal with the decisions of other panels in non-fact finding situations.

If a panel makes a decision on one set of facts or on a particular type of evidence, is a similar panel bound by the same decision? Or at the very least, is the decision persuasive? For example, say a hospital medication report formed the basis for a prosecution by the NMC, and was found by a panel at a substantive hearing to be wholly inaccurate and flawed. On that basis, the NMC panel may decide to make a decision to dismiss the charges at half time. What if the same report is later used in disciplinary proceedings commenced by the GMC. Is the decision and findings of the NMC binding on the GMC/MPTS panel?

In my view the decision in *Peckitt* would not make the NMC decision binding, but would make it persuasive.

Though there is nothing to bind other panels' hands, as long as the decision is not exceptional, and there are no differentiating circumstances, it could be argued strongly that the decision was at the least persuasive. There is also the issue of time wasting. If there has been a decision of one properly constituted panel, why should another panel take the time to make a fresh finding on the facts?

#### **Final thoughts**

Though the key findings seem straightforward, it will be interesting to see how the decision in *Peckitt* is interpreted in other cases. We will probably have to wait for some time for the case law to develop, as the limited number of dually qualified professionals means that the development of case law will be relatively slow.

Barnaby Hone  
Drystone Chambers

### **Letters from regulators should clearly warn registrants of potential outcomes**

The Inner House of the Court of Session in Scotland has upheld the appeal of a nurse, LM, against a decision of the Nursing and Midwifery Council's Conduct and Competence Committee to remove her name from the NMC register in her absence, saying that the powers of the committee had been 'buried in the text' of the Notice of Hearing letter.

#### **Background**

The original substantive hearing before the NMC's Conduct and Competence Committee (the Committee) took place in July 2015. The case related to allegations against LM, that she had stolen Tramadol from her workplace for her own personal use. LM had provided the NMC with information that she had suffered from a history of anxiety and depression. She had advised the NMC in advance of the substantive hearing that she had given birth shortly before the hearing in July 2015 and

would not be attending. She was not represented at the substantive hearing.

At the substantive hearing the Committee concluded on the facts found proved that her actions amounted to misconduct and that the misconduct amounted to current impairment of her fitness to practise. In considering sanction and all information known to it, the Committee decided that a striking off order would be disproportionate and that a six month suspension order was sufficient to maintain public confidence in the profession and to allow LM sufficient time to reflect on her misconduct and engage with the review process.

A Notice of Review Hearing letter was sent to LM on 17 December 2015. It ran to eight pages and included a summary of the findings by the Committee at the substantive hearing. No reference was made to the possibility of a striking off order being imposed until page six and when it was mentioned, it was in a list of five possible outcomes.

The review hearing in relation to the original suspension took place on 21 January 2016. LM was not in attendance and not represented at the hearing, as had been the case previously. The Committee proceeded in the absence of LM and made an order to strike off her name from the NMC register.

### **Submissions**

The decision of the NMC's Committee was appealed on the basis that the Committee had erred in law by proceeding to determine the issue of sanction in her absence.

Counsel for LM was critical of the form and content of the correspondence sent to her about the review hearing. He submitted that there was a failure to highlight to a nurse who had been ill and was unrepresented that the review hearing might result in the very serious decision to remove her from the register.

He relied on the seriousness of the sanction; the committee's knowledge that the appellant had mental health and addiction difficulties; the lack of clarity in the correspondence; and the fact that at the substantive hearing the committee had accepted that there were strong mitigating factors in her favour.

### **Decision**

Delivering the Opinion of the Inner House, Lady Clark of Calton stated that, while the court understood the difficulties which the Committee had faced in light of the lack of engagement by LM, they ought to have been aware that she was unrepresented, that the proceedings were potentially very serious for her and that she had a history of illness and personal circumstances which might have had a bearing on her ability to understand and deal with the review hearing. It was held that the Committee had not taken these factors into account when proceeding to strike her off in her absence at the review hearing in January 2016.

The court was critical of the notice of review letter dated 17 December 2015. It was stated that it was significant that there was no warning in the text of the letter that the review hearing may impose a more serious sanction than had been imposed at the substantive hearing, namely a striking off order. The court said that the form and content of the information was ineffective in explaining to an unrepresented registrant the nature of the review hearing and that she was potentially at risk of being struck off the register. This was the case, not least because the Committee at the substantive hearing had concluded that a striking off order would be disproportionate. The court said that the powers of the Committee were "buried in the text".

It was therefore held that there was merit in LM's complaint of procedural unfairness. The court quashed the decision to make a striking off order and remitted the case to a differently constituted Committee to reconsider what sanction, if any, should be imposed on LM and directed the Committee to provide LM with an opportunity to make submissions in mitigation prior to any decision about sanction

## Commentary

The Opinion of the court will be of significance to regulators throughout the UK in relation to the way in which they correspond with their registrants, particularly where they are unrepresented. Consideration may now have to be given to what appears to be pro forma templates used by some regulators in order to ensure that the content of the correspondence is effective and properly informs the reader of the potential outcome of proceedings.

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=369124a7-8980-69d2-b500-ff0000d74aa7>

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## Legal Update

### **Dr DB v. General Medical Council [2016] EWHC 2331 (QB)**

Dr DB sought declaratory relief, using the CPR Part 8 procedure, against the General Medical Council to prevent it from disclosing to his former patient (P), pursuant to his request under the Data Protection Act 1998, an expert report obtained by the GMC for the purposes of investigating P's complaint concerning the claimant's professional competence. In September 2013 P was diagnosed as suffering from cancer of the bladder. He complained to the GMC about his treatment by Dr DB in 2012. He contended that Dr DB had examined and dealt with him incompetently, with the consequence that there had been an avoidable delay of one year in the diagnosis. In 2014 the GMC obtained a report from an expert who concluded that most reasonably competent general practitioners would not have suspected bladder cancer but the expert was critical of the care provided by Dr DB in a number of respects. The expert concluded that Dr DB did not fall seriously below the standards expected and the GMC decided to conclude the case against Dr DB with no further action. Dr DB objected to the report being disclosed to P. In allowing Dr DB's claim, Soole J said that at the heart of the case were the competing privacy rights of P and Dr DB in the personal data contained in the report. The GMC fell into error and got

the balance wrong. In the absence of consent from Dr DB, the GMC should have started with a presumption against disclosure; see *Durant v. Financial Services Authority* [2003] EWCA Civ 1747. Although the decision letter took specific account of that decision, there was nothing to show that the exercise had this starting point. The GMC gave no adequate weight to Dr DB's status as a data subject or the privacy right which he had in the expert report, whose real focus was on Dr DB's professional competence. The GMC showed no real consideration of his privacy right. Dr DB had a reasonable expectation that if a request was made by P for a copy of the report under section 7 of the Data Protection Act 1998, the GMC would carry out a lawful balancing exercise. Instead the GMC focused on P's rights and the issue of transparency/equality. The GMC's decision also took no account of the fact that, having concluded the case against Dr DB, P's purpose for requesting the report was to use its information in intended litigation against DB. The information was not being sought for the purpose contemplated by the EU Directive, namely to protect P's privacy by ensuring the accuracy of the personal data. As to transparency and equality of treatment, the learned judge said that nothing in his judgment should be taken to question the general importance of those concepts. If the GMC had considered that the principles of transparency and equality required a supply of the full report to a complainant (such as P) in circumstances where no further action was taken, its policy and practice would doubtless have reflected this. If so, P's entitlement would not be dependent on making a request under section 7 of the Data Protection Act or otherwise.

### **Anwar v. National College of Teaching and Leadership; Ahmed v. National College for Teaching and Leadership [2016] EWHC 2507 (Admin)**

The National College for Teaching and Leadership ("the NCTL") brought proceedings against the appellants alleging they had agreed with others to the inclusion of an undue amount of religious influence in the education of pupils at a school in Birmingham. Separate proceedings were brought by the NCTL alleging unacceptable professional conduct against other members of the senior leadership team at the school concerned with the introduction of an overly Islamic agenda at the school. In the proceedings against the senior leadership team witness statements and expert reports were served but none of this material was disclosed by the NCTL to the appellants in the present proceedings. The NCTL formed the view that

one set of proceedings against all of the teachers would have been unwieldy. In allowing the appellants' appeals against findings of unacceptable professional conduct, Phillips J said that even though the NCTL was alleging an overarching conspiracy or agreement, it was not obliged to include all the teachers alleged to have been involved in one joint hearing. However, having chosen to pursue the appellants separately and before any hearing against the senior leadership team, the NCTL was obliged to disclose material from the senior leadership team proceedings which might assist the appellants' case or damage its own and that, in the absence of voluntary disclosure, the panel should have been directed that it be given. The witness statements served by the senior leadership team cannot, on any basis, be regarded as mere denials and they were seemingly crucial background in a proper understanding of the approach of the senior leadership team and the teachers reporting to them. The very fact that each member of the senior leadership team denied the same allegations as made against the appellants was highly relevant information for the appellants and the panel to receive. For similar reasons, the expert reports served in the senior leadership team proceedings should have been disclosed. The failure to give (and the panel to order) disclosure was a sufficiently serious procedural irregularity to render the proceedings against the appellants unjust.

**Dryburgh v. NHS Fife and General Dental Council (intervening party) [2016] CSOH 116**

The Court of Session refused judicial review in a case where the registered dental care professional was not allowed representation at an NHS Trust disciplinary hearing. The decision was taken in the context of an employment dispute. The dispute between the parties was essentially a contractual one in which the petitioner was seeking to defend her right to work in the face of allegations of misconduct. If there was any unfairness in the manner in which the proceedings were conducted, the petitioner could advance a claim for breach of her article 6 rights. To deny her legal representation may raise an issue of natural justice but it did not elevate the contract into one within the domain of public administrative law. Moreover, the petitioner's legal right to continue to exercise as a dental nurse had not been "determined" by the decision of the respondents to dismiss her. While it may be that it would be difficult for the petitioner to obtain employment, there were examples of employees having been dismissed for gross misconduct who had

been successful in applying for a job with health boards. The majority of dental nurses registered with the GDC in Scotland were not employed by NHS Trusts and were employed by private organisations and NHS dental practices. The dismissal of the petitioner for gross misconduct would not determine her right to continue to exercise her profession. Nor would the findings of the Trust's disciplinary panel have a decisive influence on the decision-making process of the GDC, or cause any irreversible prejudice in such proceedings.

**Stevens v. University of Birmingham [2015] EWHC 2300 (QB); [2016] 4 All ER 258**

The claimant, Professor Stevens, was a highly distinguished clinical academic appointed to the Chair of Medicine (Diabetes and Metabolism) at Birmingham University and undertook clinical duties as a consultant with the Heart of England NHS Foundation Trust. The allegations of misconduct largely related to an alleged lack of oversight of his team at the Trust, inappropriate delegation, a failure to keep proper records or samples of tests, and other matters pertaining to the way in which trials were conducted or documented. The University was responsible for any investigation from a disciplinary prospective. Professor Stevens wished to be accompanied to an investigation meeting with a representative from the Medical Protection Society who had been supporting him ever since the initial allegations were made. In allowing Professor Stevens' claim, Andrews J said she had no hesitation in finding that the University's behaviour in refusing his request to be accompanied by an MPS representative was such as to seriously damage the relationship of trust and confidence between the University and Professor Stevens. It would be patently unfair not to allow the representative to attend, and the suggestion made at one point that he might sit quietly outside so that Professor Stevens could leave the room to consult him from time to time was obviously unworkable. Indeed that suggestion serves to illustrate just how unattractive the University's stance is. The investigatory interview was a crucial stage in the process. Both parties must be assumed to be aiming to get to the truth and to put the investigator in the best possible position to provide a comprehensive and balanced report to the decision-maker. The University had enlisted the support of an external HR consultant, who would attend, and it had provided the investigator with technical assistance of a senior member of staff, chosen by the University. The allegations being investigated were extremely serious, and they potentially had serious ramifications for

Professor Stevens personally and professionally. The person best placed to provide the evidence in support of the employee's case is usually the employee himself, but he may not always appreciate the significance of a particular piece of information. A union representative is likely to be experienced in safeguarding the interests of members in these circumstances, and should be able to help the employee to identify the significant features, and ensure that they are mentioned. Professor Stevens could not avail himself of such assistance because he was not a member of a union, and even if he were a member of the BMA, he would be no better off. Professional defence organisations serve a similar function to unions in this particular situation, and have similar know-how and experience, which explains the agreed division of responsibilities between the BMA and the MPS. The chosen MPS representative was previously employed as a Fellow of the Medical Research Council, and had considerable familiarity with clinical trials. He had an LLM degree in Medical Law and Ethics, but no professional legal qualification. His position was equivalent to, and he would be fulfilling the same role as, a trade union representative.

#### **O'Connor v. Bar Standards Board [2016] EWCA Civ 775**

The appellant, a practising barrister, claimed damages from the BSB in respect of disciplinary proceedings that were brought against her which ended in her acquittal on appeal in August 2012. She alleged that the BSB infringed her right to a fair trial in breach of Article 14 (read in conjunction with Article 6) of the European Convention on Human Rights. On 9 June 2010, the BSB Complaints Committee decided to bring six disciplinary charges against the appellant. On 23 May 2011, a disciplinary tribunal found five of the charges proved. She appealed to the Visitors who, on 17 August 2012, allowed her appeal and found that none of the conduct alleged against the appellant involved any breach of the Code. The appellant issued the present proceedings against the BSB on 21 February 2013. Dismissing the appellant's appeal, the Master of the Rolls said that the claim was statute barred under section 7(5) of the Human Rights Act 1998 which required proceedings to be brought before the end of one year beginning with the date on which the act complained of took place, or such longer period as the court considered equitable having regard to all the circumstances. There was force in the argument that normally the institution and conduct of a prosecution up to conviction or acquittal should be regarded as a single continuing act for the purposes of Section 7(5)(a). However, the prosecution

comes to an end with the verdict when the prosecution has run its course. In opposing an appeal by a convicted defendant, the prosecutor is not continuing the prosecution. He is seeking to uphold the decision of the court or tribunal that has convicted the defendant. That is a categorically different act from the act of prosecuting. Therefore, the one year period in the present case started to run from 23 May 2011 when the disciplinary tribunal found five of the charges proved. The appellant's application for an extension of the period under Section 7(5)(b) would be rejected. The appellant had not sought an extension of time before the deputy master, and the judge gave cogent reasons for holding that the reasons advanced before him were in any event insufficient to persuade him that he should grant an extension of time. There was no error of principle in the judge's reasoning.

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#### **Request for Comments and Contributions**

We would welcome any comments on the Quarterly Bulletin and would also appreciate any contributions for inclusion in future editions. Please contact either of the joint editors with your suggestions. The joint editors are:

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