ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – WINTER 2018

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Introduction

This is our first ARDL Quarterly Bulletin of 2018 and the Committee wishes all our members a Happy New Year. We are looking forward to a busy year with membership renewal underway, our 2018 Seminar Programme being launched and June's Annual Dinner.

Membership renewal opens on 31 January and can be completed online at the ARDL website: http://www.ardl.org.uk/membership/. Our membership renewal notice with all the information about the cost and the benefits of membership is in the Bulletin. Membership is required for table bookings for the Annual Dinner and seminar attendance.

Our seminar programme is also published in this edition of the Bulletin. We have 15 seminars scheduled to take place across London, Manchester and Edinburgh and it also incorporates our Junior ARDL events. One of the main purposes of ARDL is to promote best practice and education in professional regulation and our seminar programme is at the forefront of that. This year's programme ensures that events and seminars take place around the UK and for our Junior ARDL members (less than 10 years qualified) we offer and share the expertise of more senior practitioners. Seminar speakers and chairs across the year will come from across the solicitor group, the Bar and the judiciary. The topics cover the many current areas of interest and also

those suggested by the membership. ARDL's seminars are free and open to all ARDL members.

The bookings for the Annual Dinner taking place at The Guildhall in London on 29th June 2018 will open on 2 March 2018 and the full terms and conditions will be sent out in advance of that. Early booking is highly recommended to secure tickets and tables.

The AGM of ARDL is on Wednesday 18 April and full information on the AGM and elections to the committee available will be sent out no later than 28 days before the AGM.

This edition of the Bulletin sees Sam Thomas and Natalie Bird consider the Employment Tribunal's jurisdiction in regulatory cases, as well as including the essential Legal Update by Kenneth Hamer. I wish you good reading.

Catriona Watt
Anderson Strathern

ARDL Membership Renewal 2018

The ARDL annual membership renewal date is 31st January 2018. Current members and those wishing to join ARDL can do so by clicking on this link: http://www.ardl.org.uk/membership/.

ARDL Membership benefits

- Free access to our 2018 Seminar Programme taking place throughout London, Manchester and Edinburgh. The programme includes Junior ARDL seminars, tailored for those less than 10 years qualified.

- Booking tickets and tables for the ARDL Annual Dinner taking place on Friday 29th June at the Guildhall in London.

- The ARDL Quarterly Bulletin with essential legal updates, regulatory news, articles and book reviews.

Membership is only £35 per year. We look forward to you renewing your membership. Please pass on to any colleagues who you consider may wish to join us.

Seminar Programme 2018

Date	Location	Topic
15 Feb	Manchester	Public Interest
March	London	Mediation/Conciliation & ADR in regulatory proceedings
March	Edinburgh	Dishonesty post-Ivey
April	London	Junior ARDL Networking event
April	London	Fairness and Disclosure
May	London	Non-co-operation and regulatory action
17 May	Manchester	Dishonesty post-Ivey
14 June	London	Criminal/Civil & Regulatory Proceedings
21 June	Edinburgh	Public Interest
6 Sept	Manchester	Regulatory case law update
Sept	London	Admissibility of findings of internal investigations
October	Edinburgh	Evidential issues/parallel civil, criminal & regulatory proceedings
October	London	Junior ARDL Round-Table Experts event
Nov	London	Social Media/Data Protection in regulatory proceedings
29 Nov	Manchester	Legal Services – Standard of proof

The Supreme Court confirms Employment Tribunal's jurisdiction for regulatory appeals

In *Michalak v General Medical Council [2016] EWCA Civ 172* (reported in the ARDL Summer 2016 bulletin), the Court of Appeal endorsed an alternative route of appeal to the Employment Tribunal (ET) for claims of discrimination, harassment, or victimisation by a '*qualifications body*,' under section 53 of the Equality Act 2010. This decision has now been upheld by the *Supreme Court in Michalak v General Medical Council* [2017] UKSC 71.

In both the Court of Appeal and the Supreme Court, the General Medical Council (GMC) contended that section 120(7) of the Equality Act 2010 prohibited the jurisdiction of the ET over the decisions of a qualifications body '*so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal.*' The GMC submitted that, because fitness to practise decisions could be judicially reviewed, this satisfied section 120(7) as a route available to claimants as a proceeding in the nature of an appeal by virtue of an enactment. The Court of Appeal, however, found in favour of the Registrant, deciding that judicial review did not constitute '*proceedings in the nature of an appeal*.' As there was no statutory route of appeal for complaints of discrimination, harassment, or victimisation by a qualifications body, the ET accordingly had jurisdiction to hear the claimant's complaint.

The Supreme Court affirmed this decision in Lord Kerr's judgment, handed down on 1st November 2017, with which Lady Hale, Lord Mance, Lord Wilson, and Lord Hughes agreed. The judgment focused on the single issue of whether or not the availability of judicial review proceedings in respect of decisions or actions of the qualifications body excluded the ET's jurisdiction by virtue of section 120(7) [7].

The Supreme Court held, per Lord Kerr, at [21]-[22]:

> *'[21] Judicial review, even on the basis of proportionality, cannot partake of the nature of an appeal, in my view. A complaint of discrimination illustrates the point well. The task of any tribunal, charged with examining whether discrimination took place, must be to conduct an open-ended inquiry into that issue. Whether discrimination is in fact found to have occurred must depend on the judgment of the body conducting that inquiry. It cannot be answered by studying the reasons the alleged discriminator acted in the way that she or he did and deciding whether that lay within the range of reasonable responses which a person or body in the position of the alleged discriminator might have had. The latter approach is the classic judicial review investigation.*
>
> *[22] On a successful judicial review, the High Court merely either declares the decision to be unlawful or quashes it. It does not substitute its own decision for that of the decision-maker. In that sense, a claim for judicial review does not allow the decision of the GMC to be reversed. It would be anomalous for an appeal or proceedings in the nature of an appeal to operate under those constraints. An appeal in a discrimination case must confront directly the question whether discrimination has taken place, not whether the GMC had taken a decision which was legally open to it.'*

Thus, the Supreme Court ruled that judicial review is an inadequate method of tackling the issues raised in a complaint of discrimination, harassment, or victimisation. In such claims, the tribunal needs to explore whether or not the treatment complained of did in fact occur and did in fact constitute discrimination, harassment, or victimisation. In contrast, judicial review is designed to scrutinise the lawfulness of the qualifications body's decisions in respect of the claimant.

In making this ruling, the Supreme Court has definitively overturned the Employment Appeal Tribunal (EAT)'s decision in *Jooste v General Medical Council* [2012]

EQLR 1048, in which it was held that the ET did not have jurisdiction to hear a claim of discrimination against the GMC as judicial review constituted an alternative statutory remedy under section 120(7). Lord Kerr disagreed with Judge McMullen's remarks that: *'an appeal simply is the opportunity to have a decision considered again by a different body of people with power to overturn it'; instead, Lord Kerr observed that 'An appeal is different from a review of the legal entitlement to make a decision; it involves an examination of what decision should be taken in the dispute between the parties.'*

Furthermore, Lord Kerr took issue with the GMC's contention that judicial review is a procedure which arises by virtue of any statutory source, and he explained that its origins lie in the common law, quoting Lady Hale's dictum in *R (Cart) v The Upper Tribunal [2011] UKSC 28: '…the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise [37].'* Lord Kerr rejected the GMC's reliance on section 31 of the Senior Courts Act 1981 in support of the notion that judicial review existed by virtue of an enactment by explaining that *'Section 31 of the Senior Courts Act did not establish judicial review as a procedure, but rather regulated it.…All that section 31 does is to require that applications for judicial review be brought by way of a new procedure under the rules of court.'*

The Supreme Court has made it clear that the ET is the more appropriate route for claims of discrimination, harassment, or victimisation against qualifications bodies under section 53 of the Equality Act 2010. It remains to be seen how frequently Registrants will choose this route, and the approach the ET (and in due course the EAT) will take when hearing such claims. As was observed in ARDL's Summer 2016 bulletin, qualifications bodies must be alive to potential challenges not only to their decisions, but also their processes, with protected characteristics in mind. A common example might be a Registrant suffering from stress (potentially constituting the protected characteristic of disability) complaining about an unnecessarily taxing investigation into their affairs by their qualifications body. Such challenges can now indisputably be heard in the ET, which has the ability to call witnesses, hear evidence, and award damages for findings of discrimination, harassment, or victimisation.

Sam Thomas and Natalie Bird, 2 Bedford Row

LEGAL UPDATE

***R (Pitt and Tyas) v. General Pharmaceutical Council [2017]* EWHC 809 (Admin)**

Singh J dismissed the application of the claimants, two pharmacists and members of the Pharmacists' Defence Association, seeking permission to challenge the Standards for Pharmacy Professionals, which had been adopted by the General Pharmaceutical Council. The new Standards were not ultra vires and did not give rise to violations of Articles 8 and 10 of ECHR. Standard 6 provides that pharmacy professionals must behave in a professional manner, that behaving professionally is not limited to the working day, or face-to-face interactions, and that maintaining confidence in the professions call for appropriate behaviour at all times. The learned judge said that there may be occasions which occur outside normal working hours and perhaps in a context which is completely unrelated to the professional work of a pharmacist which may be relevant to the safe and effective care which will be provided to patients. For example, if a pharmacy professional engages in a racist tirade on Twitter, that may well shed light on how he or she might provide professional services to a person from an ethnic minority. Article 51(4) of the Pharmacy Order 2010 expressly states that fitness to practise may be impaired as a result of matters arising 'at any time'. The new Standards do not purport to extend the definition of 'misconduct' as it has been understood by all concerned on the basis of well-established authority.

***Ivey v. Genting Casinos (UK) Limited t/a Crockfords [2017]* UKSC 67**

In this important case the Supreme Court has departed from the long-established test for dishonesty in R v. Ghosh [1982] QB 1053 and applied to professional conduct proceedings in *Twinsecta Ltd v. Yardley* [2002] 2 AC 164, namely: (1) Was what the defendant did dishonest by the ordinary standards of reasonable and honest people (the objective test to be judged by the fact-finder); and (2) must the defendant himself/herself have realised that what he/she was doing would be regarded as dishonest by those standards (the subjective test). The new test propounded by the Supreme Court (Lord Neuberger, Lady Hale, Lord Kerr, Lord Hughes and Lord Thomas) is as follows:

> "74. These several considerations provide convincing grounds for holding that the second leg of the test propounded in Ghosh does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v. Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate what he has done is, by those standards, dishonest."

At [60], Lord Hughes said that "dishonesty" is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts. At [66], Lord Hughes drew the analogy with self-defence and said:

"A not dissimilar two-stage test is routinely applied by juries where self-defence is in issue. The first stage is to ask what the facts were, as the defendant "subjectively" believed them to be. The second stage is, assuming such facts, to judge whether the response of the defendant was "objectively" reasonable. See *R v. Gladstone Williams* [1987] 3 All ER 411 and section 76 of the Criminal Justice and Immigration Act 2008."

***Doherty v. Nursing and Midwifery Council [2017]* EWCA Civ 1344**

In February 2013 the appellant, a registered nurse, was convicted of a drink-driving offence (her second in five years). She was due to renew her registration in the autumn of 2013. Nurses are required to renew their registration every three years, at which point they must satisfy the Registrar that they continue to meet the prescribed requirements to be entitled to practise as a nurse. Among those requirements is that they are of good character. When the appellant applied to renew her registration she disclosed the February 2013 offence. The Registrar decided that because of her conviction she did not satisfy the good character requirements and refused her registration. The appellant appealed to the Registration Appeal Panel, which upheld the decision of the Registrar. She pursued a further appeal to the County Court which dismissed her appeal. On appeal to the Court of Appeal (Sir

Terence Etherton MR, Davis and Underhill LJJ) the appellant contended, first, that the Registration Appeal Panel took the wrong approach. It should have applied the same standard as if her conviction had come before a fitness to practise panel as a disciplinary matter, and it should only have refused renewal if such a panel would have decided that she should be struck off. Secondly, the appellant said that in any event, whatever approach was or should have been taken, her conviction did not justify refusing to renew her registration. In dismissing the appeal, the court recognised an essential difference between a registration decision and a disciplinary decision. In the disciplinary context the panel has available to it a range of sanctions – ranging from striking off, suspension and the imposition of conditions to a caution – whereas the decision on a registration application is binary. An application for registration (or renewal) must either by admitted or refused: there is no such thing as suspended or conditional admission. Moreover, the Registrar and the Registration Appeal Panel should follow their own specified criteria. No doubt those criteria overlap with those in the Indicative Sanctions Guidance, but the difference in the options as regards the less serious cases means that the overlap cannot be total. And, that being so, cross-referring to the Indicative Sanctions Guidance is more likely to create confusion than illumination of particular concern for the panel was the fact that this was a second, very serious offence. It concluded that the appellant's conduct did pose a risk to both patients and service users. The appellant drove her car into a hospital car park whilst three times over the legal limit for alcohol, and in doing so was involved in an accident, however minor. The decision of the panel was not wrong.

***Clarke v. General Optical Council [2017]* EWHC 521 (Admin)**

Allowing C's appeal against the decision of the committee erasing him from the register, Fraser J said that the case raised an interesting issue of wider application, which is the approach taken by a fitness to practise committee when a registrant becomes the subject of disciplinary proceedings at a time when retirement is contemplated, or when during a period of suspension retirement becomes the option chosen by the registrant. C was registered as an optometrist in 1982 and was the sole optometrist at his practice. Disciplinary proceedings arose from C's treatment of a patient who he did not refer for further investigation despite worsening visual field examinations. The patient had a tumour which remained undiagnosed and eventually lost his sight when it could have been saved. Liability was admitted in proceedings instituted for negligence against C and the health authority in respect of the failure of other ophthalmologists to whom the patient was subsequently referred. In July 2014 an interim suspension order for 18 months was made against C, and thereafter he sold his optometric business and retired from practising as an optometrist. He fully accepted that he was at fault in failing to refer the patient to his GP much earlier. He never contested the substance of the allegations against him. At the Substantive Hearing in June 2015 the committee imposed a sanction of 12 months' suspension, 'which would give the registrant a period of reflection and the opportunity to consider whether he still wished to cease practise and if not to complete the necessary Compulsory Education and Training'. The committee stated that it considered erasure to be 'disproportionate to the impairment identified, which, although serious, related to a narrow area of practise'. At the review hearing in June 2016 C made clear in a witness statement that he had not practised since the interim suspension order against him in July 2014, and went on to state that he did not intend to work again as an optometrist or indeed in the health care sector. He was now doing some paid part-time gardening. He asked to be allowed to escape erasure as the ultimate sanction, and proffered signed undertakings to the Council not to practise again. He sought removal from the register and undertook to remove himself within 14 days. The review committee noted that there was no evidence to show that C had undertaken any Compulsory Education and Training, and decided that his fitness to practise was still impaired and that his registration should be erased. On appeal, Fraser J said that the review committee failed to have regard to the statement made by the first committee which only required or expected C to complete the necessary

Compulsory Education and Training *if* his decision was to resume practice. The decision by the review committee to take into account C's failure to undertake any training was contrary to the first decision, and the Council's published statement that CET was only required for optometrists to stay on the register. The review committee entirely ignored the likelihood of repetition, and that there was simply no likelihood of repetition as C had sold his practice, had retired and wished to remove himself from the register. The likelihood of repetition was not considered by the review committee at all. The learned judge added that his judgment should not be interpreted as authority for the proposition that someone in the position of C can avoid disciplinary proceedings running their proper course by taking a decision to retire. The central point of this appeal was that, in assessing risk to the public, the fitness to practise committee must take account of all material and relevant factors. It was a highly material and relevant factor in undertaking the exercise in this case that the registrant had in fact retired and sold his practice. When retirement was accompanied, as it was here, by signed undertakings in the comprehensive form adopted in this case, this does not lessen the materiality of retirement as a factor.

***Chiesa v. Financial Conduct Authority [2017]* UKUT 0275 (TCC)**

The applicants, Mr and Mrs C, sought disclosure of material within the possession of the Authority evidencing the internal decision-making of the Enforcement Division of the FCA in commencing and then pursuing regulatory investigations and, thereafter, regulatory proceedings against the applicants. Mr and Mrs C contended that there were reasonable grounds to believe that the investigations underlying the proceedings may have been instituted and pursued in bad faith. The application was made pursuant to rule 5(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The FCA did not contend that the tribunal did not have power to make an order for disclosure but submitted that the tribunal should not do so. In dismissing the application for disclosure, Judge Greg Sinfield said that the proper approach to the application was that adopted by Judge Berner in *Ford & Ors v. Financial Conduct Authority* [2016] UKUT 41 (TCC). In that case, the applicants sought specific disclosure relating to alleged misconduct by the FCA and had also brought separate misfeasance proceedings against the FCA. Judge Berner said that any application for specific disclosure must be tested by reference to relevance and proportionality. Relevance must be considered in the context of the matters which are within the jurisdiction of the tribunal to determine. That jurisdiction is a statutory one contained in section 133 of the Financial Services and Markets Act 2000. A reference is not an appeal from any decision of the Authority or the Regulatory Decisions Committee. The tribunal has a first instance jurisdiction, and considers the subject matter of the reference afresh by way of complete rehearing. The subject matter of the references before Judge Berner was the conduct of the applicants and the decision-making processes of the FCA were not relevant to the conduct of the applicants. Judge Herrington adopted a similar approach in *Arif Hussein v. Financial Conduct Authority* [2006] UKUT 0549 (TCC) at [106]-[109]. In the opinion of Judge Sinfield, the tribunal does not have jurisdiction to deal with complaints about the FCA's conduct of investigations or proceedings. The issue for the tribunal at the substantive hearing of the references is whether Mr and Mrs C lack fitness and proprietary and, if so, what (if any) is the appropriate action for the FCA to take. The criticisms of the FCA's conduct do not address those issues and, even if those criticisms are valid, they would not be grounds for allowing the references and instructing the FCA to withdraw the Decision Notices although they might form the basis of a complaint to the Complaints Commissioner. In any event having read the witness statements in support of the application, Judge Sinfield said that he was not satisfied that the evidence showed that the FCA instituted the investigations and pursued the disciplinary proceedings against Mr and Mrs C in bad faith or that the FCA acted from an improper motive.

ZAI Corporation Finance Limited v. AIM Disciplinary

***Committee of the London Stock Exchange Plc* [2017] EWCA Civ 1294**

In disciplinary proceedings before the AIM (Alternative Investment Market) Disciplinary Committee of the London Stock Exchange (the committee) brought against ZAI Corporation Finance Limited (ZAI) for breaches of the AIM rules, ZAI contended that the hearing before the committee should be held in public. The AIM's Handbook provided that the committee would usually conduct hearings in private, although an AIM company or nominated adviser which was subject to proceedings had the right to ask for such hearing to be conducted in public. The committee held that there would be a serious, detrimental and irreparable impact on a number of individuals and companies, some of which were still active in the market, if unproven allegations against them were circulated in the public domain. The committee considered that holding the hearing in public would be unduly prejudicial to their rights, particularly given that they had no notice of the proceedings and therefore no right of reply. Upholding the decision of the committee, the Court of Appeal (Sir James Mumby P, Lewison and Lindblom LJJ) said that rule C22.1 of the Handbook did not entitle a party to demand a public hearing; the committee had a discretion whether or not to direct one. In the particular context with which the present proceedings were concerned, namely the regulation of a financial and commercial market, a public hearing might have the reputational and other adverse consequences on third parties identified by the committee. There was force in the point that the position in relation to court proceedings is that a hearing should be in public but there is a discretion under CPR 39.2 to hear a matter in private. One of the exceptions is where the case involves confidential information and publicity would damage that confidentiality. In *B v. United Kingdom, P v. United Kingdom* (2001) 34 EHRR 529, the Strasbourg court said that while article 6(1) states a general rule that civil proceedings should take place in public, it is not inconsistent with this provision for a State to designate an entire class of case as an exception to the general rule where considered necessary, although the need for such a measure must always be subject to the court's control.

Kenneth Hamer
Henderson Chambers

ARDL Essay Prize

By way of a reminder, ARDL's annual Marion Simmons QC essay prize is open to entrants, with the following title:

The purpose of regulation is the protection of the public, not to act in the public interest: discuss.

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.

To be eligible, an entrant must fall into at least one of the following categories (subject to the discretion of the competition organisers to extend eligibility on a case by case basis as they see fit):

- undergraduates or postgraduates in study at a recognised educational establishment in the United Kingdom;
- trainee solicitors in the UK;
- pupil barristers in the UK;
- those training in the UK as part of a Chartered Institute of Legal Executives' approved training programme;
- solicitors who qualified in the UK and who have been so qualified for fewer than three years;

- barristers called in the UK fewer than three years ago;
- those who qualified with Cilex in the UK and who have been so qualified for fewer than three years;
- those who are taking a period of up to sixteen months as a sabbatical or "gap year" within their undergraduate or postgraduate study or after such study and before starting a confirmed place as a pupil barrister in the UK, trainee solicitor in the UK or Cilex training in the UK.

Entries must be no longer than 3,000 words (word count includes footnotes but excludes bibliography) 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 20 April 2018 by post or email to Nicole Curtis:
nicole.curtis@penningtons.co.uk
Penningtons Manches LLP, 125 Wood Street, London EC2V 7AW

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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