ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – WINTER 2021

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Chairman's Introduction

Welcome to the Winter 2021 Edition of the ARDL Quarterly Bulletin.

As the content that immediately follows this Introduction, states "[T]he regulatory world lost one of its leading lights this summer, with the sad loss of John Witt." It is right that we should celebrate his life and his achievements; and I am pleased that we are able to do so with the fitting obituary penned by his colleagues, contained in this edition.

This edition contains two notable articles: the Marion Simmons QC Winning Essay Prize 2021 – "Self-Preferencing by Digital Platforms and the Google S Case: Implications for Regulatory Policy" by William Spence; and "The Meaning of Lack of Insight into Failings in the Context Fitness to Practise Proceedings" by Professor Timothy J David and Sarah Ellson. In addition, it contains a Legal Update, provided by Kenneth Hamer.

The substantial developments since the last edition worthy of record in this bulletin are these. ARDL's seminar programme made its first foray into the non-virtual world for some time, with what might properly be described as a 'big splash': the Inaugural ARDL Conference and drinks reception on 1 October 2021 at the Museum of London. It was, by common acclamation, a great success: so much so, that we are resolved to make it an annual event and have already begun the process of planning the next, which is scheduled for the 30 September 2022, again at the Museum of London. In another first, the conference coincided with the inaugural award to the first recipient of the Dutton Bursary, Jessica Davies, which we were delighted to make, with Tim's blessing, in the course of the conference. (Details of all of our "Building Careers" activities can be found in the section of the website

bearing that title.) In addition, our strong programme of virtual seminars has continued, complemented by a return to social events in London and Manchester in the 'late Summer' of September. In the months to come, we intend to return to some conventional seminars, without losing the substantial advantages of virtual seminars where they are appropriate. At long last, and after an absence of two years, we fired the starting gun to proceed with the ARDL Annual Dinner, which is set to take place on 11 March 2022 at the Guildhall. I am pleased to report that the enthusiastic response of the membership, with tickets immediately fully subscribed, vindicated our view that the time was ripe to do so. Our thanks go to those who contributed to making all of this happen by giving so generously of their time: my fellow Committee members, our speakers, mentors, authors, essay prize judges, those who participate in the sector practice groups and the wider membership. We look forward to seeing as many of you as possible at the dinner and at our other events in 2022.

Paul Ozin QC
23ES Chambers

John Witt – Obituary

The regulatory world lost one of its leading lights this summer, with the sad loss of John Witt. John was a well-known and highly regarded partner in the regulatory and disciplinary field.

John was born in September 1962 and grew up in Farnham, Surrey. He studied law at Durham University, before qualifying as a solicitor in 1988. He initially specialised in commercial dispute resolution at a leading City law firm, before joining Capsticks in 1997.

John led Capsticks' regulatory practice from its inception, and was responsible for the growth of a hugely successful practice in disciplinary work, taking it from a team of just a handful of individuals to a "regulatory powerhouse" with over ninety solicitors, barristers, trainees and paralegals. In leading the team for more than 20 years, John supported and mentored a large number of colleagues, with a professionalism, wisdom, kindness, humour, decency and patience for which they, together with clients and others who worked with him, all loved and respected him.

For many years John acted for a wide range of healthcare regulators, including the General Dental Council, Nursing & Midwifery Council, General Optical Council, Royal Pharmaceutical Council of Great Britain and the General Chiropractic Council. He also undertook work for the Professional Standards Authority. He was extremely popular with his clients, who appreciated his intelligent grasp of the principles of regulatory law, his ability to assimilate information swiftly and efficiently, and his quiet but authoritative command of individual cases. As one client recalls:

"*It is quite rare to meet someone who shoulders significant responsibility, and yet is always pleasant, thoughtful and good-humoured – but that will be my abiding memory of John. As much as I valued his legal expertise and his deep knowledge of regulatory work, on a human level I simply liked him enormously as a person, and I always looked forward to seeing him.*"

John was admired and liked by all he met as part of his work – whether colleagues, clients, or lawyers in competitor firms. He was a keenly intelligent and astute lawyer, who was also (sometimes disarmingly) kind, warm and witty. It was a combination which led to his enormous success and a well-deserved reputation. John's renown for intelligence, thoughtfulness and decency, together with his hard work, determination and formidable nature as an opponent, appealed to clients beyond the healthcare regulatory field,

and he led his team to win tenders and new work from the Solicitors Regulation Authority and the Teaching Regulation Agency, amongst others.

John's work encompassed an impressive breadth within the regulatory field. He assisted regulatory bodies with the reform of their fitness to practise procedures, rules and legislation, as well as handling hundreds of conduct, performance and health cases. He acted as advocate in many professional regulatory cases, and was awarded a National Institute for Trial Advocacy Certificate in 1995. He also dealt with numerous appeals by practitioners to the High Court and to the Privy Council. He had conduct of the first appeal in Scotland by the Council for Healthcare Regulatory Excellence (as it then was) against a decision of a GDC panel.

With the benefit of an unrivalled level of experience in the sector, John provided input into numerous consultation processes undertaken by regulators, and advised on the impact of the Government's consultations into the future of professional regulation. John also sat as legal adviser to regulatory Committees, provided popular training events to clients, spoke knowledgeably and engagingly at external conferences, and worked for regulators in relation to prosecutions for unlawful practice.

John was acknowledged as a leader in his field not only by his peers, but also by the legal directories. He was recognised as a leader in professional discipline by the Chambers Guide to the legal profession and the Legal 500 from the point when they started covering this sector, and was ranked in Tier 1 of both legal directories for more than 10 years. In 2017, John was the only solicitor in any firm recognised in the Legal 500's "Hall of Fame" for professional discipline, a distinction for those who have received consistent praise by their clients for a significant period of time.

John's knowledge in the field was also reflected in his numerous articles and publications, including *The Health and Social Care Bill*, (Solicitors Journal), *Probity and fraud: changing the NHS culture* (British Journal of Healthcare Management) and *Understanding the Health and Social Care Bill* (Health Service Journal).

John and his wife Libby were married in 1994 and they went on to have four children - Alice, Harry, Joe and Martha. He was deeply committed to his local community in the Surrey village where he lived with his family. For many years he worked voluntarily as a churchwarden at Holy Trinity Church, Westcott, and enjoyed weekends cycling with friends in the Surrey countryside.

John was a dearly loved and highly respected colleague, with an unmatched combination of knowledge, experience, wisdom, warmth, kindness, humour and decency. He is, and will continue to be, very sadly missed.

Should anyone wish to make a donation in memory of John, his family have chosen three charities that John actively supported: Papua Partners, the MS Society and Holy Trinity Church, Westcott.

James Penry-Davey
Nicole Curtis
Capsticks LLP

Marion Simmons QC Winning Essay Prize 2021 – Self-Preferencing by Digital Platforms and the Google Shopping Case: Implications for Regulatory Policy by William Spence

* Text in bold and underlined indicates amendments made after judging

I. Introduction

Alleged market abuse by "gatekeeper" platforms[1] has emerged as a central concern in recent regulatory investigations across Europe.[2] These investigations reflect a global trend towards greater antitrust scrutiny of major digital platforms, particularly Google, Amazon, Apple **and Facebook***, with calls for new regulation proposed in the

1 Gatekeeper platforms are digital firms with large customer bases that determine the manner in which third parties interact with those customers.

2 See, for instance, the Dutch Authority for Consumers and Markets' decision to investigate claims that Apple discriminates against third-party software developers in the App Store (2019): <https://www.acm.nl/en/ publications/acm-launches-investigation-abuse-dominance-apple-its-app-store> accessed 5 February 2021.

United Kingdom[3] and the United States.[4]

Focusing on the European Commission's decision to fine Google €2.4 billion for promoting its own comparison shopping service over those of rival services in its general search results pages,[5] this article considers whether new regulation is required to address anticompetitive "self-preferencing" conduct. It argues that significant consumer harm may arise from attempts by dominant digital platforms to extract revenue from their own installed customer bases at the expense of third-party competitors, and proposes a way forward for regulators seeking to address such behaviour.

II The notion of Self-prefacing

Self-preferencing is a form of leveraging conduct whereby digital companies favour their own products or services over those of competitors using their platform. It applies in situations that fulfil the following two conditions. First, the existence of two inter-related markets. Second, there must be a mechanism through which a company is able to favour its activities on one of those markets at the expense of its rivals. For example, a vertically integrated company such as Amazon may use competitively sensitive information it has gathered about independent sellers' transactions on its marketplace in order to increase the profitability of its own retail selling arm.[6] Similarly, an App Store - such as the Apple store - may charge third-party software developers exorbitant commission fees on in-app purchases in order to favour the distribution of their own applications.[7]

Some commentators have argued that no new regulation is required to tackle such behaviour, as existing competition law jurisprudence provides an adequate basis for intervention in the interests of consumers.[8] Indeed, it is well-established that a company which enjoys a dominant position in the provision of an "essential facility" and refuses others access to that facility without objective justification or only grants access on terms less favourable than those it grants its own services infringes competition law.[9] The problem, as demonstrated in the *Google Shopping* case, is that digital platforms may not satisfy the strict legal requirements imposed by "essential facilities" case-law.

III The Google Shopping case

On 27 June 2017, the European Commission fined Google €2.4 billion for "leverag(ing) its market dominance in general internet search into a separate market, comparison shopping" by positioning its own comparison shopping service more favourably in its general search results pages relative to competing services.[10] At first sight, the fact that Google promoted its own comparison shopping service may appear unproblematic. Indeed, the principle of contractual autonomy recognises that companies should be able to choose how and whether they supply the facilities they have developed.

Yet, by framing results in a manner unrelated to consumers' preferences, Google distorted purchasing decisions and restricted choice. It has been suggested that the third-party services which brought the complaint were effectively seeking to free-ride on traffic generated by Google.[11] In reality, however, they were simply seeking the opportunity to compete on a

3 Report of the UK Digital Competition Expert Panel, *Unlocking Digital Competition* (March 2019).
4 US House of Representatives' Report, *Investigation of Competition in Digital Markets* (October 2020).
5 Case AT.39740 *Google Search (Shopping)*, Commission Decision of 27 June 2017.
6 See European Commission, 'Antitrust: EC opens formal investigation against Amazon' IP/19/4291 (n 5).
7 For example, Spotify has complained that Apple charges its subscribers a 30% fee for purchases made on the App Store, while not subjecting Apple Music to an equivalent fee. See European Commission, 'Antitrust: EC opens investigations into Apple's App Store rules' AT.40437. **In the UK, the Competition and Markets Authority launched a separate investigation into the Apple App Store in March 2021.***

8 Pickford, Meredith: *In Defence of Competition Law: Addressing the European Commission's Proposals for Ex Ante Regulation of Online Platforms*, Monckton Chambers Working Paper (2020), page 4.
9 Commission Decision 94/19/EC of 21 December 1993 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689—Sea Containers v Stena Sealink—interim measures) [1994] OJ L15/8, at [66].
10 Case AT.39740, *Google Search (Shopping)*, June 27, 2017.
11 Akman, Punar: *The Theory of Abuse in Google Search: A Positive and Normative Assessment under EU Competition Law*, Journal of Law, Technology and Policy (2017), page 11.

platform where search results were determined by the relevance of the service, rather than whether it belonged to Google. The remedy ordered by the Commission that Google must subject its own services to "the same underlying processes" as competing services should therefore be welcomed.[12]

The key issue is whether the Commission's infringement decision was legally sound. As the law stands, companies are not required to create a level playing field. Preferring one's own services is only illegal if it can be shown, inter alia, that access to the platform is indispensable for competition.

In *Bronner*, the European Court of Justice clarified that a facility is not indispensable merely because it is superior to available market alternatives.[13] Rather, the relevant facility must be "indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence" ([41]). Hence, the fact that Google provides an advantage to its downstream affiliates in the market for comparison shopping services is technically insufficient, in and of itself, to trigger intervention, since there are less advantageous alternative search engines (such as Bing).

The European Commission bypassed the question of "indispensability" in its *Google Shopping* decision by characterising Google's behaviour as an independent form of leveraging abuse falling outside competition on the merits.[14] It implicitly lowered the burden of proof placed on regulators by stating that self-preferencing constitutes a novel category of abuse. The decision highlighted two issues with the current law. First, the traditional "indispensability" test applied in essential facility scenarios is not conducive to effective regulatory enforcement in the digital environment. The fact that rival comparison shopping services may survive without access to Google's search engine should not lead to the conclusion that the company's discriminatory conduct is unproblematic. [15]

Second, existing antitrust investigation procedures arguably take too long to secure a remedy against self-preferencing conduct. The *Google Shopping* decision was notably reached after 7 years of investigation and over 40 complaints. Such excessively long proceedings benefit no-one. Indeed, they generate uncertainty and legal costs for the parties involved, distract regulators' attention from other pressing matters, and increase the risk of irreversible harm to competition and consumers before the infringement by the dominant platform is sanctioned.

IV Reform

In order to address these issues, it is submitted that new regulation should be adopted lowering the threshold at which self-preferencing by dominant digital platforms may be considered abusive. Given the concentration tendencies of digital platforms, and the high barriers to entry in the markets they dominate, a preliminary finding that they restrict the ability of rivals to compete on their platform without objective justification should trigger a rebuttable presumption of illegality.

This would alleviate the burden of proof currently placed on regulators by requiring the *platform* to demonstrate that ostensibly harmful self-preferencing conduct is objectively justified or generates sufficient efficiency gains so as not to be anticompetitive. It would also facilitate speedier intervention in the interests of consumers. The application of this framework might be guided by existing jurisprudence regarding sporting associations which - in organising events - are required to avoid favouring their own members over those of third-party organisers.[16]

V Conclusion

As policy-makers consider the ideas discussed above, it is important not to lose sight of the fact that platforms

[12] *Google Shopping decision, recital 700.*
[13] *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG (C-7/97) EU:C:1998:569.*
[14] *Case AT.39740, Google Search (Shopping)*, at [649].

[15] **In Case T-612/17 (*Google Shopping*) the General Court endorsed this proposition***
[16] See Commission Decision in Case AT.40208 – *International Skating Union's Eligibility Rules*, at [137].

such as Google and Amazon have generated enormous consumer welfare by helping innumerable small businesses reach consumers. Calls for these companies to be broken up may therefore be thought disproportionate. It is equally important, however, to recognise that digital platforms' ability to both *control* and *participate* in markets creates potential for anticompetitive abuse. Given this, it does not make sense to argue that a continuation of the status quo is plausible. Such a "no regulation" approach runs the risk of imposing bad regulation.

William Spence

The Meaning of Lack of Insight into Failings in the Context Fitness to Practise Proceedings by Professor Timothy J David* and Sarah Ellson**

When the fitness to practise of a doctor is under consideration, the term insight encompasses the willingness and ability to (i) recognise and accept that what one has done is wrong, (ii) explore and understand why the adverse behaviours occurred, and (iii) comprehend the reasons why one needs to avoid repeating errors and identify steps that need to be taken to rectify the behaviours. Lack of insight points to a significant risk of repetition of adverse behaviours. The development of insight is not entirely one-sided, and friends and colleagues are often reluctant or unwilling to provide feedback, requiring an active feedback-seeking approach by individuals. Sceptics have argued that the demonstration of insight may in some individuals be a sham, the implication being that there is a need to provide evidence that an individual has developed genuine insight and that therefore there is a reduced risk of recurrence of adverse behaviours. Regulatory decision makers place considerable weight on a practitioner's insight. The word is used sometimes without those using it necessarily fully understanding what is meant by insight, and this paper aims to help readers explore the issue and develop this understanding.

INTRODUCTION

Extreme adverse behaviours by doctors can result in their fitness to practise being called into question. In the UK, following investigation by the General Medical Council (GMC), cases are selected for referral to a hearing of a Medical Practitioners Service (MPTS) tribunal. The tribunal has the power to end the career of the doctor. Finding evidence of a lack of insight is likely to have an adverse effect on the outcome, because it suggests a significant risk of repetition of adverse behaviours. The context of this paper is the regulation of doctors in the UK, where the concept of "fitness to practise" has arguably a more current and forward-looking focus than previous approaches and those taken elsewhere, where "serious professional misconduct" or "infamous conduct" was/is likely to be sanctioned without regard to insight. Where regimes expressly look at the risk of repetition, it is likely that considering the level of insight may be part of the assessment.

While the concept of lack of insight is likely to be familiar to those regulating the medical profession, the concept is less readily understood by doctors whose behaviour has been put under the microscope. The aim of this article is to draw attention to the importance of a lack of insight and explain its meaning in the context of medical regulation.

The word insight means the capacity to gain an accurate and deep understanding of someone or something. In the context of fitness to practise cases, insight has three components, the willingness and ability to recognise and accept that what one has done is wrong, to explore and understand why the error occurred, and to comprehend the reasons why there is a need to avoid repeating one's error or errors. There is a belief that the development of insight will reduce the risk of future recurrence of problem behaviours. The GMC/MPTS Sanctions Guidance for MPTS tribunals[17] advises that "A doctor is

* Emeritus Professor of Child Health and Paediatrics, University of Manchester. Academic Lead for Student Fitness to Practise and Chair, Fitness to Practise Committee, Faculty of Biology, Medicine and Health, University of Manchester, 2007 to 2018.
** UK Co-Head Regulatory, Fieldfisher. Lawfirm, Manchester.
[17] General Medical Council and Medical Practitioners Tribunal Service. Sanctions guidance for members of medical practitioners

likely to lack insight if they:

a. refuse to apologise or accept their mistakes;

b. promise to remediate, but fail to take appropriate steps, or only do so when prompted immediately before or during the hearing;

c. do not demonstrate the timely development of insight; or

d. fail to tell the truth during the hearing".

Published studies have shown the critical impact that a lack of insight can have on a future medical career. In a study of 119 doctors who were erased or suspended from the GMC Medical Register by the MPTS in 2014, only 24% were able to demonstrate insight[18]. In a study of 76 doctors whose names had been erased from the General Medical Council's Medical Register by a disciplinary tribunal, and who between 1 January 2012 and 30 June 2020 applied for restoration to the Register, 53 out of the 76 (69.7%) applications were refused[19]. Applications for restoration can be made after at least 5 years have elapsed. The most frequent reason for refusal of an application for restoration was a failure to demonstrate insight, which was found in 51 out of 53 (96.2%) of refusals. Another example of the importance of a lack of insight comes from the outcome of applications for provisional registration with the GMC by newly qualified doctors in the UK. In the years 2010-2019 there have been 49 refusals to grant provisional registration by the GMC[20]. In practice those who have been refused provisional registration are likely to face the loss of at least one year of their medical career[21]. Lack of insight into their misconduct was given as one of the reasons for refusal in all 49 graduates. Finally, a recently published study of character failings in surgeons whose cases were considered by the MPTS, concluded that surgeons who failed to demonstrate insight or remediation over prolonged periods were more likely to receive increasingly severe sanctions[22].

Outside the context of disciplinary matters, insight has a broader general meaning, such as the skill to recognise ones strengths and weaknesses, but this paper focuses on the relationship between a lack of insight and the correction of undesirable patterns of behaviour.

BEHAVIOURS THAT SUGGEST A LACK OF INSIGHT

Failure to take responsibility for one's actions

A basic requirement of insight is the need to take responsibility for one's own actions and to accept that they were wrong. An individual who readily and unreservedly accepts that they are at fault is taking a constructive first step in response to a problem behaviour. The opposite can be called distancing, which means placing the blame on anyone or anything other than oneself, which in turn is likely to be regarded as evidence of a lack of insight. In some cases, adverse circumstances may have contributed to a problem behaviour. However, it is important for an individual who has erred to recognise that they were nevertheless responsible for their own actions.

Minimising the seriousness of an adverse behaviour

Minimising the seriousness of an adverse behaviour suggests a lack of insight. An illustration of minimising behaviour is to describe repeated signature forgery or other serious dishonesty as a simple error. The demonstration of insight requires a real recognition of why the behaviour happened, the seriousness and

tribunals and for the General Medical Council council's decision makers. 16 November 2020.

[18] Harris R, Slater K. Analysis of cases resulting in doctors being erased or suspended from the medical register. London, General Medical Council, October 2015.

[19] Milroy BKP, David TJ, Ellson S. The outcome of applications for restoration to the Medical Register following disciplinary erasure. Medico-Legal Journal 2021; 89(1):13-18.

[20] General Medical Council (2020) Fitness to practise matters that UK medical graduates declared to the GMC in 2019. London, General Medical Council. Copies obtainable on request to ukmanager@gmc-uk.org

[21] David TJ, Ellson S. General Medical Council refusal to grant provisional registration - reasons, prevention and what to do if it happens. British Student Doctor, 2017; 1: 36-40.

[22] Elledge R, Jones J. Character failings in the surgeon fallen from grace: a thematic analysis of disciplinary hearings against surgeons 2016-2020. Journal of Medical Ethics 2021; doi:10.1136/medethics-2020-106809

implications of the conduct, the potential for harm, an acknowledgement that the behaviour was inconsistent with professional guidance or regulations, and the setting out of a strategy to prevent recurrences of the adverse behaviour.

Focussing on the negative effects on the doctor rather than on the harm to others

A common error is for a doctor to focus on the negative effects of a case upon the *doctor* rather than indicating a clear understanding of the harm or potential harm to *others*.

Failure to provide expressions of regret and apology

Timely steps to apologise and remediate at an early stage of investigation could help to provide evidence of insight. The greater the delay, the greater the risk of a perception that the changes that are claimed may not be regarded as genuine. While expressions of regret and offering an apology are an important component of demonstrating insight, half-hearted or seemingly insincere apologies may make matters worse

Failure to focus on the needs of the person or persons affected by adverse behaviours

Apologies that fail to focus on the needs of the person or persons affected by adverse behaviours are problematic, such as "I am sorry it happened" or, when confronting someone who is upset, saying "I am sorry you feel upset". People affected by adverse behaviours want apologies that indicate that the wrongdoer recognises the physical, psychological and social impact of their actions. Healthcare professionals are expected to comply with a duty of candour,[23] to inform and apologise to patients when things go wrong and harm has been caused[24]. There is also a statutory duty of candour, which comes from the Care Quality Commission (CGC) regulations which require CQC regulated institutions to be open and transparent with patients (or someone acting on their behalf) as soon as reasonably practicable after a notable safety incident[25]. There are requirements for prompt apologies and explanations in person and in writing. The CQC can take enforcement action or prosecute entities which do not comply with these regulations.

Delay in recognising and accepting error

A recognition and acceptance of error which only occurs after a very prolonged delay risks creating the impression that the acceptance of error is not genuine and is a final attempt to extricate oneself from a problem.

The need to recognise the potential implications and consequences of one's actions

The context of cases that consider an individual's fitness to practise is what is referred to as "the public interest" or "the statutory overarching objective", which is to protect, promote and maintain the health, safety and well-being of the public, to promote and maintain public confidence in the medical profession, and to promote and maintain proper professional standards and conduct for members of the profession.[26] The implication for those caught up in disciplinary proceedings is the need to demonstrate a clear understanding of how and why an individual's behaviour had the potential to harm that public interest. If one wishes to demonstrate that one has insight into a problem, it is necessary to show not just that one's actions have departed from professional guidance, but that one understands the effect that the problem behaviour (if continued or repeated) could have on others in the future. For example, a doctor who has shown a bad attitude to communication, repeatedly failing to respond to emails and ignoring necessary administrative tasks, needs to be able to explain the potential for harm (for example to patients, the public, running services) if this problem is not fully overcome.

Dishonesty, which breaches a fundamental requirement for doctors to act with honesty and integrity, is likely to cause particular concern. An individual who wishes to

[23] General Medical Council and Nursing and Midwifery Council. Openness and honesty when things go wrong: the professional duty of candour. London, General Medical Council, 2019.

[24] Gomez D. Duty of candour. The Regulation of Healthcare Professionals: Law, Principle and Process. Second edition. London, Sweet & Maxwell, 2019, pp.1791-1810.

[25] Health and Social Care Act 2008 (Regulated Activities) 2014 Regulation 20.

[26] UK Statutory Instrument: The General Medical Council (Fitness to Practise and Over-arching Objective) and the Professional Standards Authority for Health and Social Care (References to Court) Order 2015 No. 794.

demonstrate insight into the seriousness of dishonesty should explain in any written submission the reasons why dishonesty is so serious, a topic that is not always fully explained in professional guidance. The reality is that in clinical practice, dishonesty can kill. For example, in an unpublished case, a junior doctor one morning presented to the consultant on a post-intake ward round the case of a man who had been admitted to hospital the previous evening with a particularly severe headache. When asked about the patient's blood pressure, the junior doctor, in order to conceal that he had forgotten to measure the blood pressure, lied and reported a normal value. In fact, the patient had an extremely high blood pressure, and died shortly after with a cerebral haemorrhage.

The need to demonstrate adherence to advice given at previous disciplinary hearings

It is common for disciplinary processes to give directions as to expected future behaviours. For example, in preparation for a future consideration of a case by the MPTS, a doctor may be advised to provide evidence of reflection on their dishonest behaviour and accept the seriousness of their behaviour, or to co-operate with an assessment of their health. Failure to do these things might suggest a lack of insight.

Deep seated attitudinal problems

It is difficult if not impossible to convince a decision-making tribunal that one possesses insight while simultaneously displaying deep seated attitudinal problems. For example, expressing derogatory views about the decision makers is likely to be counter-productive. It is not unknown for doctors appearing at an MPTS tribunal to be openly critical of the GMC and the disciplinary processes, and in the absence of a valid basis for the criticisms this will be unhelpful[27].

Relevance of insight to future risk

It should be obvious that if one cannot recognise that what one has done is wrong, then self-correction becomes impossible. As pointed out by Mr Justice Collins "Insight is most material to ensure that the doctor has realised that he has indeed gone wrong and therefore will not do anything similar in the future. This is the purpose behind a need to recognise insight. Insight does not seem to me to be really an appropriate way of looking at a situation where there is no danger of any recurrence but there is a concern that there has not been necessarily a full acceptance of the facts which have been alleged against the doctor".[28]

The two points at which an assessment of insight can have an impact

At an MPTS tribunal there are two points at which an assessment of the level of insight can have an impact. The first is when considering whether the doctor's fitness to practise is currently impaired. The second is when considering the sanction[29].

IS IT POSSIBLE TO DEMONSTRATE INSIGHT WHILE CONTINUING TO DENY AN ALLEGATION?

In certain situations it can be very difficult to demonstrate insight while continuing to deny an allegation. In a case considered by the MPTS, a doctor had been sent to prison for 5 years after being convicted of multiple offences of sexual assault and indecent assault, these offences having spanned 14 years. The doctor continued to express a belief that he had not done anything wrong and that his conscience was clear. He appeared to have no understanding at all that his actions were wrong and harmful to his patients, indicating a lack of insight and suggesting a significant risk that he would repeat such behaviour.

The degree of insight is often an issue when a doctor has

[27] An illustration, taken from an MPTS 2010 decision, the determination included the following passage: "Finally, the Panel has considered your behaviour throughout this hearing. The Panel is most concerned that your conduct throughout has been rude, insulting, racist, abusive and, at times, bullying and intimidating. You have abused every witness who gave evidence on behalf of the GMC, the GMC legal team, the Panel Chairman, the Panel and the Legal Assessors who sat on the first half of the case. You have refused to acknowledge the impropriety of the wild, offensive and unsubstantiated allegations and insults which you have gratuitously levelled at participants in this hearing".

[28] The Queen (on the Application of Dr Keith Bevan) v The General Medical Council [2005] EWHC 174 (Admin), 4 February 2005.

[29] Paragraph 17(k) and (l) of Schedule 1 of the General Medical Council (Fitness to Practise) Rules 2004 (SI 2004/2608). The impairment stage is at (m) and (n) is the sanction stage

to attend a review hearing by the MPTS. When considering whether fitness to practise remains impaired, it is relevant for the tribunal to know whether or not the doctor now admits the misconduct. However, admitting the misconduct is not a condition precedent to establishing that the doctor understands the gravity of the offending behaviour and is unlikely to repeat it. The doctor may be able to demonstrate insight without accepting that the findings at the original hearing were true[30]. So, it would be wrong to automatically equate maintenance of innocence with a lack of insight.[31]

The question posed in the heading above is complex, and the degree of insight demonstrated is likely to be fact specific. Plainly it is unfair to automatically equate denial of a proven allegation with a lack of insight, and individuals have every right to deny an allegation. As put by Mostyn J "an accused professional has the right to advance any defence he or she wishes and is entitled to a fair trial of that defence without facing the jeopardy, if the defence is disbelieved, of further charges or enhanced sanctions"[32]. Even if a decision-making tribunal makes an adverse finding of fact, there will always be a right of appeal. This point was made in the case of a nurse Margaret Amao who at a Nursing and Midwifery Council [NMC] hearing had been cross-examined in a way which implied that she would be acting improperly is she did not accept the findings of fact. At her appeal this questioning was described in the judgement as inappropriate and "almost Kafkaesque". On the basis of a non-acceptance of the findings of fact, the NMC panel had decided that a lack of insight indicated a high risk of repetition of adverse behaviour. This was deemed unfair, and an appeal upheld. An error had been to fail to distinguish between insight into misconduct and insight into avoiding a recurrence in the future.[33]

INTRACTABLE LACK OF INSIGHT IS INCONSISTENT WITH A PROSPECT OF REMEDIATION

On multiple occasions, a doctor, in private practice as a GP despite having had no formal GP training, who had been issued with a GMC warning relating to his prescribing of benzodiazepines, prescribed to a patient, zolpidem (a sleeping tablet), co-proxamol (strong painkiller containing dextropropoxyphene, an opioid), dihydrocodeine (strong painkiller containing an opioid), mirtazapine (an antidepressant) and diazepam (a benzodiazepine tranquiliser). The patient had been diagnosed with prescription drug dependency, and the doctor accepted that the patient demonstrated the behaviour of an addict. At an MPTS tribunal it was proved that the doctor had (i) prescribed excessively a number of drugs to the patient, (ii) failed adequately to assess or appropriately refer the patient to mental health services, (iii) kept inadequate records, (iv) failed to inform the patient's GP that he had issued the patient with prescriptions, and (v) lacked adequate expertise to treat the patient. This poor practice had spanned a six-year period despite a GMC advice letter followed by a GMC warning. It was considered that a combination of lack of insight, unfocused training, lack of any apology and lack of reflective practice meant that the risk of repetition could not be regarded as low. The doctor admitted he had prescribed benzodiazepines on a long-term basis to 20 other patients.

The tribunal found that the doctor's misconduct had been deliberate, and he had prescribed drugs in excessive quantities in an area of medicine beyond his expertise, in the knowledge that the patient was an addict and vulnerable to accidental or deliberate overdose, placing the patient at risk of harm including death. Failure to inform the GP of these prescriptions meant there was no protection against the risk that the patient would seek the same medication from a second source as part of her addictive behaviour, and the doctor

[30] An example of how insight could be demonstrated when a doctor cannot accept they have done something was given in Blakely v General Medical Council [2019] EWHC 905 (Admin). "A doctor may accept that, with the benefit of hindsight, what he or she did was wrong (or dishonest) even though the doctor did not consider at the time consider that he or she was acting dishonestly. Alternatively, the doctor may accept that members of the public would view the conduct as dishonest and undermining their trust in the doctor even if the doctor considers that the conduct, viewed in context, was excusable or not dishonest".

[31] Yusuff v General Medical Council [2018] EWHC 13 (Admin).

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

[33] Amao v Nursing and Midwifery Council [2014] EWHC 147 (Admin).

had demonstrated a blatant disregard for safeguards and jeopardised the patient's well-being.

The doctor had shown no insight into his misconduct. He believed there had been no wrongdoing on his part, blaming the patient for what he regarded as her own manipulative behaviour. The doctor had indicated that he had been able to recognise through his experience "exceptional" patients who could handle long term benzodiazepines. He had indicated a sense of knowing better than the regulators, and his resistance to regulatory control was a facet of his "intractable" lack of insight. The tribunal had decided that the doctor's conduct was not fundamentally incompatible with his inclusion in the Medical Register, and imposed a suspension order. This decision was referred by the Professional Standards Authority to the High Court on the basis that it was not sufficient to protect the public.

The High Court concluded that intractability of the doctor's lack of insight was inconsistent with a prospect of remediation[34]. The doctor could not be trusted to practise as a doctor again, and erasure was therefore required.

CULTURAL AND LINGUISTIC FACTORS

Individuals from different backgrounds may express insight in different ways, which could lead to misinterpretation. Cross-cultural studies into the different ways people from different cultures acknowledge fault show that there are great variations in the way that individuals from different cultures and language groups use language to code and de-code messages. This is particularly the case when using a second language, when speakers may use the conventions of their first language to frame and structure sentences, often translating as they speak. This may be reflected in the intonation adopted. In addition, there may be differences in the way that individuals use non-verbal cues to convey a message, including eye contact, gestures, facial expressions, or both. People from different cultures may have different ways of interpreting and managing conflict, leading to different expectations of an apology.[35] Differences in conversational style have the potential for creating disharmony and misunderstanding.[36] Different cultures have different communication styles, and language and cultural barriers have been identified as critical barriers to people using courts and tribunals[37] .

A research review of GMC decision making by a team at Plymouth University[38] said, with regard to the place of Primary Medical Qualification "GMC Guidance for decision-makers on assessing insight when considering whether undertakings are appropriate contains several passages which address issues of cultural difference". These may be of particular relevance for those doctors who achieved their Primary Medical Qualification outside the UK. The guidance encourages decision-makers to recognise that attitudes towards apologising may differ between cultures, as there may be different understandings of the meaning or potential consequences of expressing fault. The guidance recognises that there may be communication issues relevant to such matters, particularly when a doctor is working and engaging in a second language. The guidance also acknowledges that non-verbal behaviours,

[34] Professional Standards Authority for Health and Social Care v General Medical Council and Dr David Henry Dighton [2020] EWHC 3122 (Admin), and Medical Practitioners Tribunal Service. Appeals Circular A01/21, 12 January 2021.

[35] Mir M. Do we all apologise the same? An empirical study on the act of apologizing by Spanish speakers learning English. Pragmat Lang Learn 1992; 3:1-19.
Maeshiba N, Yoshinaga N, Kasper G, Ross S. Transfer and proficiency in interlanguage apologizing. Chapter, pp.155-187 in Gass SM, Neu J. Speech Acts Across Cultures. Berlin, Mouton de Gruyter, 1996.
Wagatsuma H, Rosett A. The implications of apology: law and culture in Japan and the United States. Law Soc Rev 1986; 20:461-498.
Bergman ML, Kasper G. Perception and performance in native and nonnative apology. Ch 4, pp.82-107 in Kasper G, Blum-Kulka,S (eds) Interlanguage Pragmatics. New York, Oxford University Press, 1993.

[36] Garcia C. Apologising in English: politeness strategies used by native and non-native speakers. Multilingua 1989; 8:3-20.

[37] Equal Treatment. Bench Book. February 2021 edition. Chapter 8, page 207.
https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf

[38] De Bere SR, Bryce M, Archer J, Lynn N, Nunn S, Roberts M. Plymouth University Peninsula Schools of Medicine & Dentistry.

such as eye contact, facial expressions and physical gestures may also differ between cultures.

The intention of this guidance seems to be to encourage decision-makers to consider the possibility of cross-cultural differences, if there is no apology or acceptance of responsibility or blame present where they might expect it to be.

It is widely acknowledged that it is difficult to assess things like remorse and insight on paper. A written statement may reflect genuine sentiments or could be seen as perhaps containing stock phrases simply reciting that which others have indicated would assist. Decision makers are likely to want to ask questions of the individual to gain an understanding of their level of insight, which could be an important reason for ensuring that doctors attend tribunal hearings.

LACK OF INSIGHT CAN BE A SYMPTOM OF MENTAL ILLNESS

Lack of insight can be a symptom of severe mental illness. It impairs a person's ability to understand and perceive his or her illness. It is a common reason why patients with schizophrenia or bipolar disorder refuse medications or do not seek treatment. Without awareness of the illness, refusing treatment appears rational, however clear the need for treatment may be to others. Lack of insight is sometimes known as anosognosia, a complete or partial lack of awareness of neurological and/or cognitive dysfunctions.[39,40]Anosognosia is recognised as a symptom in stroke (usually involving the right side of the brain), and other neurological conditions, and it has been recognised in some forms of severe mental illness such as schizophrenia, bipolar disorder, Alzheimer's disease, and obsessive-compulsive disorder. The sort of behaviours that prompted this paper were not the result of mental illness, but for the sake of completeness readers should be aware that severe mental illness can impair a person's understanding of their adverse behaviours.

THE ROLE OF OTHERS IN HELPING INDIVIDUALS TO DEVELOP INSIGHT

Human beings are fallible, and all can experience the impulse to justify themselves and avoid taking responsibility for actions that are regarded as unacceptable and potentially harmful. When directly confronted with evidence that they were wrong, some do not accept their error and justify their actions tenaciously. In some situations this may not matter, but for doctors the ability to recognise and fully accept that one has done something wrong and to understand the reasons for the error is of great importance. Without insight, self-correction and improvement become impossible.

However, the development of insight is not entirely one-sided. Even friends and close colleagues are often reluctant or unwilling to provide negative feedback, and the reality is that we live in a world where people usually do not tell us the truth about ourselves. Dr Tasha Eurich has described the "ostrich trinity" as a barrier to self-awareness,[41] the components of this trinity being:

- a failure to recognise the need to ask for feedback
- a fear that requesting feedback will convey weakness
- an aversion to ask for feedback because feedback can be painful

It has been suggested that doctors with a low level of insight may have not had enough direct immediate feedback on their performance to become skilled in analysing their own capacities.[42] An additional factor is that individuals with behaviour that is deemed to be difficult are more likely to engender avoidance in others, reducing the potential for feedback leading to change

Review of decision-making in the General Medical Council's Fitness to Practise procedures. Final report. December 2014.

[39] Prigitano GP. The Study of Anosognosia. Oxford, Oxford University Press, 2010.

[40] Amador XF, David AS. Insight and Psychosis. Second edition. Oxford, Oxford University Press, 2004.

[41] Eurich T. Insight. How to Succeed by Seeing Yourself Clearly. London, Pan Macmillan, 2018.

[42] Hays RB, Jolly BC, Caldon LJM, et al. Is insight important? Measuring capacity to change. Medical Education, 36 (2002), pp.965-971.

and improvement, and also leading the individual to regard their behaviour as "normal".

It has been argued that the demonstration of insight and remediation may in some fitness to practise cases be no more than a sham.[43] The implication is that a doctor whose fitness to practise has been called into question needs to provide evidence that their apparent insight and remediation are genuine changes that have been achieved.

Reflection is an activity in which people recapture their experience, think about it, mull it over and evaluate it, helping to answer the central questions as to what went well, what went less well, and how one's performance could be improved in the future[44]. The UK health care regulators have indicated their expectations for all health care professionals to be reflective practitioners, and developing insight can be seen as a component of the reflective practice that is now encouraged.[45]

CONCLUSIONS

In the context of a fitness to practise hearing, there is an expectation that the doctor will be able to review their own performance or conduct, recognise that they should have behaved differently in the circumstances being considered, and identify and put in place measures that will prevent a recurrence of such circumstances[46]. Lack of insight is a feature common to many fitness to practise cases, which is unsurprising given that insight is needed to ensure that the individual doctor has realised that they have indeed gone wrong and therefore will not do anything similar in the future. Determining whether a professional's fitness to practise is currently impaired rests on whether there is thought to be a risk of repetition of the inappropriate conduct in the future. Demonstrating that one lacks insight is likely to have an adverse effect on the outcome of fitness to practise tribunals. The main behaviours that point to a lack of insight are:

- failing to take responsibility for one's actions, either blaming others or normalising the behaviour (by saying that everyone does it);
- minimising the seriousness of an adverse behaviour, for example by describing repeated signature forgery or other serious dishonesty as a simple error;
- failing to provide timely expressions of regret and apology, and failing to indicate that the wrongdoer recognises the physical, psychological and social impact of their actions;
- failing to act on advice given at a previous disciplinary tribunal.

Decision makers place considerable weight on a practitioner's insight. The word is used sometimes without those involved necessarily fully understanding what is meant by insight, and this paper is intended to help readers explore the issue and develop this understanding.

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Sarah Ellson**

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Legal Update

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

[43] Case, P. The good, the bad and the dishonest doctor: the General Medical Council and the 'redemption model' of fitness to practise. Legal Studies, 31 (2011), pp.591-614.

[44] Moon JA. Reflection in Learning & Professional Development. Theory & Practice. Abingdon, Routledge, 1999.
Boud D, Keogh R, Walker D (eds). Reflection: Turning Experience into Learning. London, RoutledgeFalmer, 1994.

[45] General Medical Council. Benefits of becoming a reflective practitioner. London, General Medical Council, 2021. Academy of Medical Royal Colleges, UK Conference of Postgraduate Medical Deans, the General Medical Council, the Medical Schools Council. The Reflective Practitioner. Guidance for Doctors and Medical Students. London, General Medical Council, 2010.

[46] Hamer K. Professional Conduct Casebook. Third edition. Oxford, Oxford University Press, 2019. Ch.40. Insight, pp.555-570.

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

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

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

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

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

The claimants challenged the decision of the FCA's Regulatory Decisions Committee to refuse to stay disciplinary proceedings pending the outcome of proceedings in the Commercial Court brought by the Danish Customs and Tax Administration that raised the same issues as the FCA proceedings. The disciplinary proceedings rested on allegations arising out of the first claimant's involvement when chief executive of the second claimant in a scheme for rebates of tax under Danish tax law. In the Commercial Court proceedings, the Danish tax authority contended that the tax rebate

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

***Rayner v. Barnet, Enfield and Haringey Mental Health Trust* [2021] EWHC 1263 (QB)**

Psychotherapist registered with UKCP – NHS disciplinary proceedings – whether conduct in breach of professional standards under regulator's Code – no contractual bar preventing NHS employer holding disciplinary hearing prior to regulator – injunction to restrain employer's proceedings dismissed

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

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

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

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

Following a lengthy hearing the tribunal found that the appellant had behaved in an inappropriate and sexually motivated way towards three female members of staff (Miss A, Miss C and Miss D) at Barnsley Hospital NHS Foundation Trust, where he worked as a consultant orthopaedic surgeon. The tribunal determined that the appellant's name should be erased from the medical register. In allowing the appeal and quashing the sanction of erasure, Julian Knowles J said that he found the tribunal's determination was based on a fundamentally flawed approach. At [99] – [136], the learned judge analysed the tribunal's findings. Right at the start of the section of the determination dealing with Miss C's complaints, and before it had considered any of the evidence in detail, the tribunal said that it had 'first considered Miss C's credibility' and, having made an 'assessment of her demeanour', it found her to have given a 'genuine, sincere and credible account' in relation to matters other than one matter, namely, the authorship of an anonymous letter. However, by then the tribunal's conclusions were foregone because it had already decided that she was 'genuine' and 'credible'. By beginning with the question of credibility generally and without reference to the specific allegations she had made, the tribunal was, in effect, beginning its analysis by asking 'Do we believe her?', which is the very thing which Warby J said in *Dutta v. GMC* [2020] EWHC 1974 (Admin), at para 42, should not be done. True it was that the tribunal then went on to consider Miss C's lies about the authorship of the letter. However, the tribunal's analysis was flawed because in deciding she was telling the truth about everything other than the letter it based its conclusion on her 'demeanour' and its assessment that she was 'genuine' and 'sincere'. This begged the question which the tribunal had to decide, namely: had the GMC proved each of the allegations made by Miss C on the balance of probabilities? Moreover, given Miss C's willingness to lie, the most careful and accurate scrutiny of her evidence was called for, adopting proper fact-finding methodology. In the case of Miss A, the tribunal made, at the outset, a global assessment that she was telling the truth based impermissibly on her demeanour. In the second paragraph of its discussion, it described Miss A as 'confident, credible' and 'sincere and consistent'. In the case of Miss A, there was also a direct conflict in evidence between her and two of the GMC's witnesses which had a direct bearing on her credibility

which the tribunal needed to confront and resolve as part of its assessment of Miss A's credibility. In the case of Miss D, the tribunal said she was 'credible' again before it had considered any of the evidence relating to the allegations and how they had emerged, and the evidence which tended to undermine her credibility. Again, there was a conflict between Miss D's evidence and other evidence called by the GMC which had a direct bearing on Miss D's credibility. It was not open to the tribunal baldly to declare at the outset that Miss D was 'credible'. The tribunal was given a cross-admissibility direction, i.e., a direction that if it found the allegations of one complainant proved, and was satisfied that that established a propensity on the registrant's part to engage in unwanted sexual touching, then that propensity could be taken into account in determining whether the other complainants' allegations were proved; see *R v. Chopra* [2007] 1 Cr App R 16. However, the tribunal's approach to the evidence of all three complainants was erroneous and the determination could not stand and must be quashed.

***Forsyth v. Financial Conduct Authority and Prudential Regulation Authority* [2021] UKUT 162 (TCC)**
Lack of contemporary documentary evidence – whether appropriate to draw adverse inference from absence of relevant witness

F, the chief executive of a small mutual insurance firm, referred decision notices issued by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) to the Upper Tribunal. The FCA and the PRA contended that F's conduct in relation to his remuneration and salary and bonus arrangements with the firm demonstrated a serious lack of integrity in breach of the FCA's and the PRA's Conduct Standards. Holding that the regulators had not make out their case that F failed to act with integrity, the Upper Tribunal found F to be an honest and credible witness in respect of all disputed matters and allowed both references. In relation to how much work was actually done by F and his wife as opposed by the firm's accountants, the Tribunal said that much of the work was not supported by documentary evidence because much of the time was spent in Mr and Mrs F's home in producing revised drafts of documents of which there was no longer a record and the Tribunal heard no evidence from the accountants as to their work. In *NatWest Markets PLC and others v. Bilta (UK) Limited (In Liquidation) and others* [2021] EWCA Civ 680, the Court of Appeal, at [50], referred to the situation where there may simply be no, or no relevant, contemporaneous documents, and, even if there are, the documents themselves may be ambivalent or otherwise insufficiently helpful. Even in cases which are fairly document-heavy, there may be critical events or conversations which are completely undocumented. The Court of Appeal said:

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

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

drawn. If the court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, produced by the party who might reasonably have been expected to call the witness.

Kenneth Hamer
Henderson Chambers

Essay competition - Marion Simmons QC Prize 2022

ARDL is delighted to announce that the annual Marion Simmons QC prize is now open to entrants:

You are invited to submit an essay or article on a regulatory law or disciplinary law topic of your choice.

The first prize is £2,000, the second £1,000 and the third £500.

The 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.

Competition Terms and Conditions:

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 1,500 words (word count includes footnotes but excludes bibliography) and should be type-written in the English language. The judges' decision will be final. Entries must be submitted so as to be received by 5pm on Friday 29 April 2022 by email to: Nicole Curtis c/o ARDL@blakemorgan.co.uk

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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