

ARDL

ASSOCIATION OF REGULATORY & DISCIPLINARY LAWYERS

QUARTERLY BULLETIN – Spring 2022



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Chair's Introduction

Welcome to ARDL's Spring Bulletin. This is my first Chair's Introduction as the new Chair of ARDL. I would like to begin by expressing thanks to our outgoing Chair, Paul Ozin QC, on behalf of ARDL's members and the Committee. Paul has been Chair of ARDL for the last two years, possibly the two most challenging years in the history of the Association. He has admirably steered ARDL through this period, ensuring that the Association stays relevant to our membership, despite the significant changes that our members have made to the ways in which they work. I am very grateful that ARDL will continue to benefit from Paul's wisdom and experience, as he continues as an ARDL Committee member.

Committee structure

The ARDL Committee has also recently seen a number of other changes in membership. Joanna Shaw has now

stepped down from the Committee and I would like to thank her for her contribution in the time that she has been on the Committee. I am delighted that Rosemary Rollason, Clare Chapman, Kate Steele, Fiona Muirs and Sam Thomas have been re-elected and co-opted back on to the Committee to continue the great work that they do on the main committee, seminar sub-committee and dinner committee. ARDL welcomes new Committee members Duncan Toole and Laura Hoiles. We also welcome back Richard Coleman QC who, after a couple of year's absence from the Committee, has agreed to return bringing his wealth of experience.

Webinars and seminars

We adapted quickly at the start of the pandemic to ensure that we could hold Zoom webinars, the first of which took place in May 2020. Since then we have held 24 Zoom webinars and they have proved very popular. We have regularly had between 100-200 attendees and hosting webinars has certainly made our educational provision

accessible to more of our members. We plan to continue running Zoom webinars but, in response to feedback from our members, will also be holding a number of in-person events. The first of these is at Manchester Art Gallery on Thursday 5 May. The topic of the seminar is '*Cops, Courts and Coroners. When the Regulator is Waiting in the Wings*' and our speakers are Fiona Horlick QC and Fraser Livesey. Keep an eye out on ARDL's website for confirmed dates for further events including in-person seminars in London and Edinburgh. If your firm or chambers would like to host a seminar please contact ARDL: ardl@blakemorgan.co.uk.

Annual Conference 2022

After the success of the Inaugural ARDL Conference in 2021, it is officially now an annual event! It will take place on Friday 30 September 2022 at the Museum of London. Tickets will go on sale by the end of June.

Social events

We are planning a number of social events over the summer kicking off with a Summer BBQ at Dukes 92 in Manchester on Wednesday 15 June (tickets now on sale), and a Summer Drinks Reception at Haberdashers' Hall in London on Tuesday 28 June (tickets to go on sale shortly). A social event is also being planned for Edinburgh.

ARDL Dinner

ARDL looks forward to welcoming members and their guests back to The Guildhall in London for the ARDL Dinner for the first time since 2019. The Dinner takes place on Friday 2 September and is sold out.

Junior ARDL – Building Careers

I would encourage all members of ARDL who are less than 10 years call/PQE to take a look at the *Building Careers* section of ARDL's website. Entries have now closed for the annual Marion Simmons QC Essay Prize, but we will shortly be opening applications for the Dutton Bursary 2022. The Dutton Bursary is named after a former Chair of ARDL and one of the leading practitioners in the field. Applicants can apply for financial support from ARDL for a wide range of educational, training and work experience activities that will help them build their career. Awards are made of amounts of up to £5,000, and ARDL has discretion as to how many Dutton Bursary awards it makes within a given

year and the amount of each award. Junior members can also apply to ARDL to take part in the ARDL mentoring scheme. An in-person Junior ARDL event is being planned for later in the year.

Rachel Birks

Ward Hadaway LLP

Corruption from a Regulatory Perspective - Book Review by David Gomez

Author: Maria De Benedetto

Publisher: Hart Publishing

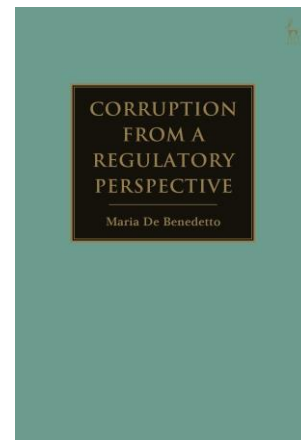
Date of Publication: 2021

Pages: 202 including tables and index

“...Corruption is a chronic disease which manifests itself virulently and persistently in today's over-regulated society.”¹

Transparency International UK publishes a Corruptions Perceptions Index which ranks countries worldwide by their perceived level of public sector corruption. In 2021, the UK failed to make the top ten list of those countries perceived to be least corrupt.² In 2019, the UK Fraud Advisory Panel noted that some 24% of UK businesses had been asked to pay a bribe in the two preceding years.³ The role of the City of London in handling the proceeds of corruption remains a crimson stain on the UK's international reputation and is currently under renewed scrutiny, following the invasion of Ukraine. This book is therefore timely for legislators and for those working in the UK's regulatory sectors.

The author is professor of Administrative Law at Roma Tre University in Italy. The central thesis of this book is that, contrary to current orthodoxy, the imposition of sanctions regimes may in fact actually *increase* corruption⁴, and that



¹ Pg 167.

² www.transparency.org

³ Pg 14, *Hidden in Plain Sight*, Fraud Advisory Panel, available at www.fraudadvisorypanel.org.

⁴ Defined by the World Bank as “abuse of public power for private benefit...” -see for example Anti-corruption Fact Sheet 19 February 2020, available at worldbank.org. Professor De Benedetto would add to this definition “...made

the most effective response to the problem of corruption is “better regulation and responsive enforcement”. The stated aim of the work is to “provide a model for tackling corrupt practices.”

There are five extensively researched chapters.

An initial chapter surveys comparative anglophone and European academic perspectives on the quality and effectiveness of law making and regulation. The author examines the drivers for individual compliance with regulation. These include personal ethics; response to economic incentives; persuasion and “nudging”; the scale of interaction with regulatory authorities; and fear of sanction. The author notes the shift in models of enforcement: from exclusive enforcement by public sector bodies, via the development of the sprawling private sector compliance industry, to the more recent development of public/private partnerships, which seek to combine management principles and regulatory instruments to produce a “compliant organisational culture geared to co-operate with public authorities in achieving regulatory objectives.” At the same time, the author traces the move away from compliance models which are focussed solely on deterrence, to models which seek to integrate broader behavioural patterns and psychological and social drivers.

Chapter two charts the development of administrative strategies for tackling corruption (as distinct from criminal prosecution) in the latter part of the twentieth century. This may be due, in part, to an increased awareness of the pervasiveness of corruption linked to globalisation, and a greater awareness of the hidden costs to society caused by corruption. The author notes the key global developments in this field (the work of Transparency International, recommendations made by the OECD and various International Conventions against corruption, including that adopted by the UN in 2003). However, the author considers that such international conventions have constrained the domestic options available for national states; for they impose obligations that the signatory states must fulfil in relation to the nature of the anti-corruption regulation to be implemented, and specifications for anti-corruption bodies and officers that must be established.

Conventional anti-corruption strategy utilises the traditional framework of economic incentives and

disincentives in relation to specified regulated activity. This can be contrasted with behavioural anti-corruption strategy, which seeks to orient regulation in line with human behavioural and cognitive criteria. Building on these established models, the author proposes a “Regulatory Anti-corruption Strategy”, which focusses on **rules** rather than regulated or administrative activities; and which aims to “prevent infringements and corruption *not only before they occur, but even before they can be conceived of.*”⁵ Essentially, this is to be done by scrutinising the design of rules during the legislative process, and weeding out the opportunities such rules might create for corruption to occur. This strategy is to be characterised by an inter-disciplinary approach, including insights derived from human behavioural science, psychology and anthropology.

In chapter three, the author examines corruption through the triangular **State-Agent-Client** prism: in which the Agents are civil servants and regulatory bodies; and the Client is the tax payer. For the author, corruption is inextricably linked to regulatory structures, regulatory procedures and bad regulatory enforcement; the more regulation, the more opportunities there will be for contact (and illicit transactions) between the Agent and the Client; and therefore the more possibilities for corruption to flourish. Where there has been legislative capture and law makers have been lobbied or bribed to favour certain interests, the resulting legislation is *itself* corrupt.

The author argues that corruption requires its own specialised impact assessment; a sort of “corruption proofing” exercise. This involves an initial general assessment of the risk of corruption; a targeted assessment of whether or not the draft law *promotes* corruption; and an analysis of potential corrupt practices that might arise during the enforcement of the law. Reference is made to model guidelines published by the OECD and World Bank for the conduct of this sort of assessment.

However, the author goes further. She argues that a “regulatory approach to corruption” requires a heightened form of corruption proofing exercise. One in which the law is assessed against the potential risk of not being complied with in the first place, as well as whether the proposed law can be leveraged for the purpose of rent seeking and creation by unscrupulous agents, and whether the law may have other unintended consequences.

possible by bad functioning or bad quality rules which establish and regulate the public power” at pg 36.

⁵ Pg 76.

The proposed solution is to keep the “regulatory stock” under constant review; reducing the number of rules, and simplifying the remainder, thereby reducing the associated costs of compliance (including time). In addition, the author argues that “structured advocacy” and the tracing of interests should be undertaken, to form an over-all anticorruption strategy. This would decrease the potential to create monopolies and opportunities for extortion. Simplification promotes understanding of, and compliance with, rules. This reduces the bureaucratic power of the Agent. For the author, “Less legislation ...implies less enforcement, fewer compliance costs, fewer sanctions, less litigation.”⁶

“Structured advocacy” is a term used to mean the opportunity to comment on draft legislation, and to establish dialogue and information pathways to monitor the effectiveness of legislation and compliance with it; and the opportunity to make recommendations on how to compensate for any unintended distortions created by the legislation,.

The author then examines the role of private interests in the lobbying process and the potential for legislative capture. She contrasts this with the value of genuine consultation as a tool to improve the quality of legislation, improve the likelihood of compliance and head off potential judicial review. The author compares and contrasts lobbying approaches (recording subjects and recording objects) which create a legislative footprint of when and how lobbying has taken place, and which is then published as an annex to legislative reports. However, the costs of administering and enforcing such approaches (recording evidence and updating registers etc) can be prohibitive; and this process may be itself corrupted. The author argues instead that in a *regulatory* approach, the most relevant thing is actually not who was lobbied, nor how and when the lobbying took place. Rather, what *is* important, is whose interests are favoured by the draft legislation-*who pays and who benefits*. This can only be done by analysing the rule itself. From this perspective, lobbying is not in itself a “good” or “bad” activity.

Chapter 4 focuses on regulatory controls. The author traces the theory and practice of regulatory control: from the panopticism (all monitoring) design of Victorian prisons, to the present day use of computer algorithms. However, the

author notes the importance of the human factor; how a resentment of the system of control may in fact lead to rebellion rather than compliance.

Controls provide information about compliance and regulatory decision making, and are therefore tools for making rules *effective*. The author examines the established pyramid of modern compliance and enforcement policies (with cease and desist letters at one end and sanctions at the top) and the current approach of “regulatory delivery”. This is a risk based system designed to promote and support compliance, by considering the regulatory experience of the business as a whole: the day to day on-going relationships and transactions that occur within the framework of the rules.

Controls can detect and deter. However, the author notes that, *like rules*, controls may also become points for concluding corrupt transactions. The inspection process may be leveraged by a Client to bribe an inspector to look the other way, and thus to allow him or her to carry on breaking the rules for benefit. Equally, it may allow an unscrupulous Agent to extort rents from his or her position as an inspector.

This is particularly the case where there is a culture of “administrative tolerance”; one in which the controls established by the rules are only *selectively* enforced. The author considers it important to analyse the reasons behind this: is it because there are too many controls and/or a lack of capacity in the enforcers? Is it the fear of riling the citizenry and stirring up unrest? Is it because it is simply too expensive to enforce or no longer proportionate; leading inspectors to behave as policy makers on the ground.

Sanctions are the other leg of enforcement. The use of fines is a well-established economic tool to secure compliance with rules. However, the author queries the effectiveness of sanctions per se, and notes that the size of a fine is not, on its own, a sufficient deterrent. Rational decision makers undertake a cost-benefit analysis before deciding whether or not to comply with rules; the likelihood of being sanctioned is a key component of this analysis.

The author argues that sanctions should be well designed; flexible; adjusted to the elasticity of potential human behaviour; and appropriately calibrated, so as not to merely become the “cost of doing business by way of infringements”. The author notes that in some cases,

⁶ Pg. 99

economic incentives might achieve a better regulatory result than the use of sanctions.

Chapter 5 concludes with a suggested “Regulatory Anti-Corruption toolkit”. This includes suggested queries to address to legislative and criminal databases, to establish whether in all the circumstances, legislation is actually the most appropriate tool to achieve the desired regulatory objectives. The toolkit also includes a table to assist persons undertaking a “corruptibility assessment” in relation to any new proposed legislation. The idea being that corruption may be detected early as a measurable risk which is more likely to occur in certain situations: in the presence of a given regulatory framework; during specific administrative procedures; or when people come into contact with certain types of public administration.

Why should this book be of interest to regulatory lawyers? According to the author, “Corruption is a regulatory issue because it is always (in one way or another) connected with rules.”⁷ Indeed, the existence of administrative corruption “...presupposes both the existence and the *ineffectiveness* of rules.”⁸

The author stresses the need to adopt an inter-disciplinary and whole system approach to combatting corruption, leveraging existing research into rules and controls as well as data on the incidence of corruption in particular sectors. Instead of focussing on the symptom (corruption)-and therefore the imposition of sanctions as the treatment-Professor De Benedetto argues that the focus should be on the cause; poor and ineffective rules and processes, which allow corruption to flourish. Professor De Benedetto argues that by understanding these causes, corruption can be “designed out” of the administrative environment *before* it obtains a foothold. For the author, systemic corruption flourishes where there is a “perfect storm”- of “...standing distrust in institutions, wide presence of criminal organisations, legislative inflation, bad quality regulation which is too rigid and controlling, administrative tolerance and a tendency to overwhelming bureaucracy.”⁹ Back in 2004, the House of Lords Select Committee on the Constitution suggested that one of the three requisite pillars for effective regulation was “good regulatory

design.”¹⁰ Those who work in healthcare regulation will be familiar with the concept of “right-touch regulation” developed by the Professional Standards Authority for Health and Social Care in the UK. One of the essential steps in that approach is to “check for unintended consequences.”¹¹ For Professor De Benedetto, corruption is one unintended consequence of (bad) regulation. There are of course, others.

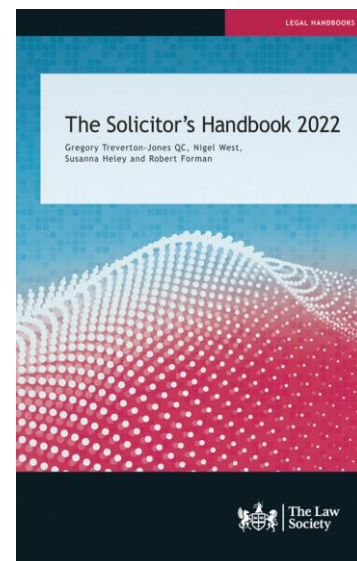
And it is for this reason that the upstream approach to regulatory design suggested by De Benedetto, with its emphasis on the use of heightened impact assessments and intensive scrutiny during the design and legislative process, may be of potential application to regulatory effectiveness as a whole.

A welcome addition to the growing body of academic research in this area.

David Gomez

The Solicitors Handbook 2022 - Book Review by Paul Ozin QC

"The Solicitors Handbook 2022", Gregory Trevorton-Jones QC, Nigel West, Susanna Heley and Robert Forman, The Law Society



The antecedents of this now venerable and indispensable handbook are happily, for the purposes of any book reviewer, made manifest in the current 2022 edition. It contains both the Foreword and the Preface to the original 2008 edition. The Foreword was penned by Sir Anthony Clarke, Master of the Rolls (as he then was). Capturing the flavour of the time of its genesis, he said

¹⁰ *The Regulatory State: Ensuring its Accountability*, House of Lords Select Committee on the Constitution, 6th Report of Session 2003-04; HL Paper68-I, available at www.publications.parliament.uk. See page 23.

¹¹ *Right Touch Regulation Revised*, 2015, available at www.professionalstandards.org.uk. See page 7.

⁷ Pg 36.

⁸ Pg 167.

⁹ Pg.5

then: *"Although I quite understand it may be necessary to use the Internet in order for practitioners to be fully up to date at any given moment, many people (and not only the very old like me) like to have a book which sets out the basic principles on which they can readily consult. The Solicitors Handbook is precisely that. It concisely sets out the relevant position under a number of different headings and is very user friendly."*

The 2008 Preface, for its part, explains how the first edition was intended to fill the gap left by the demise of the Law Society's hard copy publication, *'The Guide to the Professional Conduct of Solicitors'*, first published in 1960, and always provided free of charge, but last seen in 1999, as the world shifted into the paperless age. With the canniness of seasoned regulatory lawyers, the then authors noted that *"the paperless age and rapidly changing regulatory rules carry with them real dangers for practitioners who may find it difficult or impossible to discover what rules were in force when they did things which later become the subject of regulatory concern."* They obligingly added: *"This Handbook, which will be updated annually, seeks to remove those problems."* Taking that hint, no doubt, the prudent amongst the profession have since lined their shelves with iterations of the Handbook whose spines have scaled the colour spectrum over the ensuing years.

The 2008 Preface noted the extraordinary contrast between the practice rules of yesteryear and those to be found in 2008: The Solicitors Practice Rules 1936 comprised 7 rules (in reality only four) and could be printed on one page, whereas the then latest code occupied 190 pages of that edition. In contrast, in the current 2022 edition, the SRA Principles and Codes of Conduct occupy a mere 17 pages, although an extensive set of appendices, comprising a wide range of relevant rules, guidance and extracts from legislation, occupy, in total, 295 pages.

The Preface to the 2022 edition makes sobering reading, noting the profound effect of Brexit and the coronavirus pandemic on the solicitors' profession. In particular, it anticipates that the months and years ahead will slowly reveal any non-compliant behaviour by solicitors during the years of isolated homeworking, without face-to-face

supervision. It draws attention to, amongst other things, the important recent case law which is considered or – where it is in the pipeline – anticipated in the commentary chapters of the book. As the Preface notes, the amount of commentary has grown somewhat since the last edition of 2019. The authors state that this is largely because the SRA has issued a great deal of guidance in the meantime, the most important examples of which have been summarised in those chapters.

The commentary chapters take a familiar form, which is worth summarising, to give an indication of the breadth of topics covered by the Handbook. They are helpfully divided up into numbered parts: overview; the SRA Principles and Codes; other rules (including such matters as the Accounts Rules); the regulatory system in practice (including such matters as the Legal Ombudsman, SRA investigations and intervention); the disciplinary system in practice (including such matters as a discussion of professional misconduct and proceedings before the SDT, including pre-trial matters, costs and appeals); the regulation of alternative business structures; and fraud and money laundering. The commentary chapters occupy 511 pages in this edition.

The list of persons to whom the authors express gratitude in the current Preface has shrunk somewhat from the extensive list of the great and good contained in the 2008 Preface. No doubt, that reflects, in part, that the current edition rests upon the firm foundations established all those years ago. In addition, it no doubt reflects the weight lifted unassisted by the current list of authors (who are the same as those named in the 2019 edition). With commendable modesty, the information about those authors is confined to a few lines on the back cover. Robert Forman is a senior consultant at Murdoch's solicitors. Nigel West and Susanna Heley are partners in RadcliffeleBrasseur and co-authors of the complementary publication by the Law Society, *'The Solicitors Disciplinary Tribunal: Law and Practice'* (first edition, 2016). Gregory Treverton-Jones QC, the lead author, co-authored the early editions of the Handbook with the late Andrew Hopper QC. *"GT-J QC"* (as he signs off the Preface to the 2022 edition) is, of course, well known to the membership of the Association of Regulatory and Disciplinary Lawyers, as a speaker on topics of regulatory law and, in particular, on matters of importance relating to

legal services regulation, an area of specialisation at the Bar in which he has occupied the doyen slot for a generation or two.

The question addressed at the time of the publication of the first edition of the Handbook back in 2008, on what paper copy legal books are needed in the digital age, remains in 2022 an acute one for practitioners and legal publishers alike. The assessment made then by Baron Clarke of Stone-cum-Ebony (as he now is) remains spot-on now. There is a premium place in the market for comparatively affordable one-stop shop repositories of the essential legislative and regulatory material, coupled with concise authoritative commentary by those who know their stuff. This edition, like its predecessors, does just that. The colour spectrum of the spines of The Solicitors Handbook of recent years radiates from my bookshelf and I was pleased to add to it the red spine of this addition.

Paul Ozin QC
23ES Chambers

Legal Update

***Greene v. Davies* [2022] EWCA Civ 414**

Abuse of process – allegation that solicitor misled court – allegation dismissed by court – complaint filed by unsuccessful party with SDT – whether complaint abuse of process – whether breach of SRA Principles

On 16 March 2019, D filed a complaint with the SDT against G, the senior partner in a firm of solicitors. In December 2012, following a trial in the county court, the firm obtained judgment against D on the grounds that he was liable for unpaid fees owing to the firm in the sum of £7,218.74, with interest and costs. In 2015, D commended proceedings to set aside the judgment on the grounds that G had misled the court as evidenced by certain emails that had not been before the court in 2012. In 2016, the court dismissed the claim explicitly rejecting the suggestion that G had been untruthful in his evidence in 2012, and holding that the emails would not have made any difference. By his complaint to the SDT, amended on 19 June 2019, D alleged

that G had (1) provided the court with misleading information in 2012 in breach of Principles 1, 2 and 6 of the SRA Principles 2011, and (2) acted dishonestly or recklessly in misleading the court. The SRA Principles to which D referred were that you ‘must uphold the rule of law and the proper administration of justice’ (Principle 1), ‘act with integrity’ (Principle 2) and ‘behave in a way that maintains the trust the public places in you and in the provision of legal services’ (Principle 6).

In September 2019, a division of the SDT struck out the complaint on the grounds it lacked merit and was an abusive collateral attack on the 2012 and 2016 judgments. The Divisional Court allowed an appeal by D: *sub nom Davies v. Greene* [2021] EWHC 38 (Admin). The Court of Appeal (Dame Victoria Sharp P, Thirlwall and Newey LJ) allowed an appeal by G to the limited extent of agreeing with the SDT that D could not re-litigate the question whether the emails would have altered the judge’s decision in 2012 had they been before the court. However, the court held that the complaint should otherwise not be struck out as an abuse of process. In *Conlon v. Simms* [2006] EWCA Civ 1749, [2008] 1 WLR 484, the court observed that the issues in the action were different from those that had been before the SDT. In the instant case, the questions arising from D’s complaint related to the SRA Principles and were not identical to those before the court in 2016. The complaint raises the question whether G gave incorrect evidence honestly but nevertheless in breach of the SRA Principles. It is not necessarily an abuse of process to invite a court or tribunal to make a finding inconsistent with one made in earlier proceedings; see *Secretary of State for Trade and Industry v. Birstow* [2004] Ch 1 at [38], *R v. L* [2006] 1 WLR 3092, and *Ashraf v. GDC* [2014] EWHC 2618 (Admin). A determination by a civil court cannot necessarily preclude disciplinary proceedings based on allegations which the civil court had rejected. Disciplinary proceedings have a different function from civil litigation and have a public interest element which a civil claim lacks.

***Bibi v. Bar Standards Board* [2022] EWHC 921 (Admin)**

Adjournment of disciplinary proceedings - application pending before Criminal Cases Review Committee

At the start of B's disciplinary hearing before the Bar Tribunal and Adjudication Service, B renewed an application for an adjournment on the ground that counsel had drafted an application to the Criminal Cases Review Commission arising out of her conviction. In giving the tribunal's decision dismissing the application, the chair noted that it was likely to take some time before the CCRC process concluded; that the disciplinary proceedings were about protecting the public and public interest demanded that they were done without delay; that if B succeeded in overturning the conviction, she could return to the tribunal and the matter would be looked at in a more favourable light; and that several of the charges did not depend on the conviction. Dismissing B's appeal from the tribunal's decision to disbar her, Hill J said that (1) case management cases are inherently fact sensitive and appeal courts will therefore rarely intervene with such decisions; see *Razaq v. Zafar* [2020] EWHC 1236 (QB) at para 3; (2) the case of *Shrimpton v. Bar Standards Board* [2019] EWHC 677 (Admin) on which the appellant relied did not establish any wider point of principle staying tribunal proceedings pending CCPR applications but was a case on its own facts; and (3) the tribunal took the merits of the CCRC application into account and accepted that 'there may be substance in some of it'. The tribunal was entitled to reach the decision it did.

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

Review hearing – original panel finding fitness to practise not impaired on public protection grounds but impaired on public interest grounds – review panel finding current impairment on public protection and public interest grounds – review panel entitled to reassess the risk posed to the public at date of review

The appellant appealed against the decision of a review panel to extend by six months an earlier 12 months' suspension order with a review imposed by the NMC's Fitness to Practise Committee. The original committee found that the appellant's actions towards a student nurse were sexually motivated and concluded that while there

was some risk of repetition, in the light of the appellant developing insight, his behaviour was unlikely to be repeated. The original committee found that the appellant's fitness to practise was not currently impaired on public protection grounds but was impaired on public interest grounds. It said that any future panel may be assisted by a personal reflective statement on the learning the appellant had undertaken around professional boundaries. The appellant did not attend the review hearing but submitted certain documentation including a reflective statement entitled "Professional Boundaries: A Nurse's Reflective Report through Experienced Learning". The review panel said that the reflective piece did not demonstrate insight into the impact of the misconduct found proved by the substantive panel and read like an academic essay and that the only part written in the first person concerned the impact of the suspension on him personally. The review panel considered that such was the appellant's current lack of insight that there was now a risk that he could repeat the misconduct, and therefore he posed a risk to the public. The review panel concluded that the appellant's fitness to practise was currently impairment on the ground of public protection as well as on wider public interest grounds.

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

material before it, the review panel was entitled to find that it could not be reassured as to the possibility of repetition.

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

Sanction - finding that doctor lied in evidence to tribunal – effect on sanction - insight

The appellant appealed against the sanction of erasure on the ground that the tribunal gave undue weight to the fact that his evidence was disbelieved at the fact-finding stage. The tribunal found that the appellant (a) dishonestly used on-call rooms and surgical day facilities at the Countess of Chester Hospital, which he knew he was not entitled to use as he was no longer employed at the hospital, and (b) dishonestly failed to notify the Royal Liverpool & Broadgreen University Hospital NHS Trust of salary payments made to him over 27 months totalling £41,266.16 following the conclusion of his employment at that hospital, and which he knew had been made in error. In its determination on sanction, the tribunal said that the appellant had not given a true account on five occasions in the course of his evidence, and that he had not developed any insight into his actions in not telling the truth, particularly to the tribunal.

In his dismissing the appellant's appeal, Julian Knowles J, at paragraphs 103-125 under the heading 'Untrue evidence given to the Tribunal', said that the question of whether being found by a tribunal to have given untrue evidence at the fact-finding stage can properly be used at the impairment or sanction stages was considered by Mostyn J in *Towuaghantse v. GMC [2021] EWHC 681 (Admin)*, [58]-[77], where earlier authorities were considered. In the instant case, Julian Knowles J said that although the tribunal did not use the phrase 'blatantly dishonest' to describe the appellant's evidence before it, it could aptly be so described. The appellant knowingly advanced a false case before the tribunal both in respect of his use of the on-call rooms at Chester Hospital and his belief that he was entitled to the salary payments made in error after he left Royal Liverpool Hospital. At paragraph 123, Julian Knowles J said that he regarded the appellant's case before the tribunal about the salary payments as having involved especially egregious untruthfulness and dishonesty. The judge continued:

'124. It follows that I do not consider the Tribunal was at fault in having regard to this dishonesty when it came to assess the Appellant's level of insight. Its approach was in line with what Mostyn J said in *Towuaghantse*, supra, [72], that dishonesty in knowingly advancing a case of false primary fact certainly 'say[s] something about impairment and fitness to practise in the future'. And there is the point that in this case nine months passed between the facts/impairment stage and the sanctions stage, in which the Appellant had still not developed full insight into his dishonesty.

125. Taking a step back and looking at the Tribunal's reasons as a whole, this was not a case where the Appellant was being punished for daring to contest the GMC's case against him. The Tribunal found that in March 2020 he had advanced a case as to his states (sic) of mind at the time of the alleged misconduct which he knew to be untrue. By December 2020 the Tribunal was not satisfied that he had full insight into that dishonesty. This was a relevant factor for it to take into account in deciding whether his dishonest misconduct was fundamentally incompatible with his continued registration.'

General Medical Council v. Ahmed [2022] EWHC 403 (Admin)

Sanction – effect of interim order on sanction

The allegations against the doctor concerned two patients, Patient A and Patient B. In relation to Patient B, the tribunal found proved that the doctor had used her medical records to obtain her full name; had sent a friend request on Facebook, and had contacted her using WhatsApp messages; and that his conduct was sexually motivated. The tribunal found the doctor's fitness to practise was impaired by reason of misconduct, and determined that the appropriate sanction was suspension for a period of two months. In reaching its decision on sanction, the tribunal took into account, amongst other things, that the doctor had been subject to an interim order of suspension for four months. It did not direct a review as it considered that a review would serve no useful purpose.

Murray J dismissed the GMC's appeal under section 40A of the Medical Act 1983 against the sanction of two months' suspension imposed on the doctor. At para 81, the judge said that while the tribunal quite rightly found that the doctor had committed serious professional misconduct in relation to Patient B, which was sexually motivated, on the spectrum of sexual misconduct, it fell towards the less serious end. The judgment of Kerr J in *Arunachalam v. GMC* [2018] EWHC 758 (Admin) underlines the importance of considering the scale of the offending behaviour, even in a case of sexual misconduct, and appropriately evaluating it by reference to the relevant aggravating and mitigating factors. Erasure is not an automatic consequence in a case involving sexual misconduct. It all depends on the relevant facts. In relation to the interim suspension order, the court considered *Ujam v. GMC* [2012] EWHC 683 at [5] (Eady J), *Abdul-Razzak v. General Pharmaceutical Council* [2016] EWHC 1204 (Admin) at [85] (Sir Stephen Silber), *Akhtar v. General Dental Council* [2017] EWHC 1986 at [18], and *Kamberova v. NMC* [2016] EWHC 2955 (Admin) at [4] and [40] (Dingemans J). After saying that it was unfortunate that, in the instant case, the tribunal referred to its imposition of a suspension of two months as the imposition of a "further" suspension, given, as the Sanctions Guidance makes clear, that an interim suspension order and suspension as a sanction have different purposes, Murray J said:

91. Nonetheless, it is clear that the fact that a doctor has been subject to an interim suspension order is a factor that the MPT is permitted to take into account when making its multi-factorial decision as to the appropriate sanction. It is also correct as a matter of language, albeit infelicitous in this context, that the imposition of the sanction of suspension would involve for Dr Ahmed a "further" period of suspension from his practice.

At [94], Murray J said that it was relevant, when considering *Ujam v. GMC* and *Abdul-Razzak v. GPhC*, to bear in mind that each was an appeal by a doctor on whom a sanction of suspension was imposed and who argued on appeal that the period he had spent subject to an interim suspension order should be deducted from the period of his suspension. Undue weight should not be

given to the fact that a doctor has been subject to an interim suspension order when imposing suspension as a sanction, but *Kamberova v. NMC* makes clear that it is a factor that should, in fairness, nonetheless be taken into account, at least where the sanction is a short period of suspension. It is therefore a matter of judgment for the MPT as part of its multi-factorial decision on sanction.

Kenneth Hamer
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Notices

We have a range of educational and social events planned for the year, including:

5 May 2022 Seminar: Cops, Courts, and Coroners: when is the regulator waiting in the wings?

Manchester Art Gallery
17:30 - 20:00

9 May 2022 Recent trends in regulating work place culture
Online Webinar

18:00 - 19:30

9 June 2022 Webinar: Interviewing vulnerable and child witnesses.

18:00 - 19:30 on-line

15 June 2022 Manchester BBQ

Gallery Bar and Balcony, Dukes 92, Castlefield, Manchester
17:30 - 22:00

28 June 2022 Summer Drinks Reception

Haberdashers Hall, London
18:00 – 21:00

2 September 2022 ARDL annual dinner

The Guildhall, London

30 September 2022 ARDL one day conference

Museum of London

Please visit the ARDL website for more details:

<https://www.ardl.org.uk/event/ardl-one-day-conference-2022/>

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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