ARDL

Association of Regulatory and Disciplinary Lawyers

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Contents

Chair's Introduction

ARDL has been very busy during the Autumn and I am very grateful to the Committee for all of the hard work that has gone into the events that have taken place. Thanks to all of the members who have turned out in great numbers, showing a wonderful enthusiasm for attending both our online and in-person events.

ARDL held a "late summer" social in Manchester in September at the Beeswing. With over 50 guests in attendance there was plenty of opportunity for informal drinks, food and chat. At the end of September there was also a very well-attended seminar at the Picture House in Edinburgh. Rosemary Rollason interviewed Kenneth Hamer who looked at the past, present and future of regulation while picking his eight Desert Island Cases. You can read more about Kenneth's interview later in the bulletin.

We moved on into October with a busy schedule of Zoom webinars. These included "Racist or Racially Motivated/The Limits of Free Speech for Regulated Professionals", "Workplace culture and wellbeing: what the SRA expects and implications for firms" and "Rewriting the rule-book: what the NMC and GMC are learning from redrafting their regulatory rules".

November saw the 3rd ARDL Conference take place at Museum of London, now an annual event. A record 190 people signed up. Delegates heard from Martin Forde KC giving the key note speech.

Conference topics included "Legal Ethics, Shifting Frontiers" and "Sexual Misconduct in Policing: Building Back Public Trust and Confidence". A "Healthcare Regulatory Reform update" was also included. ARDL welcomed academics to the conference to present information about research being carried out in the session titled "Witness to Harm/ Holding to Account: Improving patient, family and colleague witnesses' experiences of fitness to practise proceedings". With the usual hugely popular case law update from Kenneth Hamer and sessions taking a closer look at the case law on obtaining records from family court proceedings for use by a regulator, and hearsay in regulatory proceedings, the day was varied and packed. As ever I extend ARDL's thanks to the various speakers and chairs of sessions, along with the team from ARDL who worked hard alongside their day jobs to put on a great event.

Hot on the heels of the conference ARDL hosted another webinar with four regulatory/disciplinary lawyers talking about additional roles that they hold including a legal adviser to a panel, a deputy coroner, an employment tribunal judge, a legally qualified chair and a first-tier tribunal judge.

2023 has drawn to an end with another ARDL event in Scotland. The ARDL Scotland Winter Supper was as well attended as ever, in the beautiful location of the Scotsman Hotel. ARDL was delighted that Suzie Lyons was in attendance to receive her "Mentor of the Year" award. Our mentoring programme has been very popular and I therefore extend a plea to all those of you who are over 10 years call/PQE and who are not part of the mentoring scheme to consider volunteering to be a mentor. It is very rewarding and we would love to match up more mentees with mentors.

You will be pleased to hear that the planning for 2024 is well underway. The following dates are already confirmed:

24 January 2024 – Bite size Zoom Webinar: "Transgender pupils: navigating the current regulatory landscape" with Alice de Coverley, 3 Paper Buildings. Chaired by Duncan Toole, Office for Students.

29 February 2024 – Zoom Webinar: "Lucy Letby Inquiry and the need to bolster accountability" with Kevin Dent KC and Alecsandra Manning -Rees, 5 St Andrews Hill. Chaired by Lauren Griffiths, MDDUS.

20 March 2024 – Seminar and Supper at the Art Gallery, Manchester: "Dealing with Regulator and Registrant Submissions in Interim Order Hearings" with Iain Simkin KC, Deans Court and Michael Rawlinson, 2 Hare Court. Chaired by Sarah Ellson, Fieldfisher LLP.

10 May 2024 – ARDL Dinner at the Guildhall, London.

8 November 2024 – 4th Annual ARDL Conference at the Museum of London.

Our ability to put on a high quality and varied educational programme is assisted by people volunteering to speak and members suggesting topics they would like to see covered. If you are involved in a case which raises interesting issues that could form the basis of a talk, have written an article that you would like to expand upon in on of our bite size webinars, or would be happy to share practical career or skills advice at one of our Junior ARDL events we would love to hear from you.

Membership renewals will take place in January. After many years without an increase, the annual fees will rise to £50 to reflect the increased activity of ARDL across its building careers and educational and networking activities.

Finally, please can I encourage all members to visit the ARDL website. We post regulatory and disciplinary vacancies and tender opportunities on the website, and there are regular updates. There are materials from webinars, seminars and previous conferences. As soon as we have a date confirmed for an event it is posted, even if bookings have not yet opened.

I hope that you all manage to take a break from busy schedules and take advantage of the forthcoming bank holidays for some rest and relaxation. We look forward to seeing you all in 2024.

Rachel Birks
Ward Hadaway LLP

"O, reason not the need!"[1] – Why King Lear was wrong or: The Importance of Reasons in Disciplinary Proceedings by Jeremy Phillips KC and Mark O'Brien O'Reilly

Introduction

The general importance of the duty to give reasons at common law is well known to disciplinary practitioners. The recent debate generated by the comments made by the Commissioner of the Metropolitan Police, Sir Mark Rowley, in the context of police misconduct further highlights the importance of all disciplinary panels arriving at decisions which are robust and sustainable against legal challenge.

It has, of course, always been necessary for decisions to be clearly and cogently expressed. As Lord Brown explained, for example, in the seminal *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, the reasons for a decision must, inter alia, "be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved".

In R (on the application of CPRE Kent) v Dover District Council and another [2018] 2 All ER 121, when reviewing Porter (No 2), Lord Carnwath noted that in the course of Lord Brown's review of the authorities "he had referred with approval to the 'felicitous' observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263 at 271–272, identifying the central issue in the case as: '… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without

[1] King Lear: Act 2 Scene 4

excessive legalism or exegetical sophistication.'"

These were planning cases. The practical importance of that duty, and the need for sufficient and adequate reasons, is, perhaps, even more stark in the context of disciplinary proceedings. The importance of ensuring that the decision maker approaches their task in the correct way, and applies, for example, the correct standard of proof, cannot be overstated. In such a forum, an individual will often face not only a catastrophic economic loss of livelihood, but may also be obliged to forego their profession as well as all personal standing within their community. Furthermore, human error being such, there will be instances where such consequences will be visited upon an (occasionally) blameless individual by a lay panel supported only by legal advice of an (inevitably) variable quality, rather than by an experienced and highly-qualified judge. The stakes could not be higher.

A series of recent cases in the context of disciplinary proceedings have brought the importance of the duty of such panels to give reasons - and the standard required of those reasons - into sharp focus. Whilst it is certainly not intended here to suggest that in any of the particular cases considered the legal input was inadequate, this article explores the broader implications for all those involved, including the advocates, in disciplinary decisions, which are challenged on such grounds.

The *Andrew* case

In *Andrew v Solicitors Regulation Authority Limited* (Case No. 12430-2023, 14 June 2023), a recent appeal against the decision of a SRA Adjudication Panel, the Solicitors Disciplinary Tribunal ("SDT") reviewed the reasons given by the SRA panel. The SDT found, inter alia, that the "reasons given were inadequate" and that this "represented a serious procedural irregularity" (see paragraph 59 of the decision). Amongst the criticisms made by the Tribunal was the fact that, inter alia, the panel had described the solicitor's explanation as "unattractive" but failed to "explain why" and also failed to "give a reason as to why they did not accept" his explanation. The decision demonstrates, in our view, the need for such bodies to explain very clearly and in terms how they have grappled with the competing cases advanced by the respective parties, and then to set out in their reasons why they have preferred one explanation, for example, to another.

High Court decision in *Professional Standards*

Turning to the medical profession (although the general legal principles are applicable, of course, to all disciplinary proceedings), in *Professional Standards Authority for Health and Social Care v General Medical Council* [2023] EWHC 967 (Admin) ("*Professional Standards*"), the High Court was recently concerned with an appeal against the decision of the Panel of the Medical Practitioners Tribunal of the GMC. Mrs Justice Foster, at paragraph 17, noted that although normally "deference is afforded to the expert Panel", "this respect is more limited, or absent, in circumstances where a serious procedural or other irregularity is apprehended". The Judge then cited, as authority for the proposition that there is a duty to give cogent reasons, the earlier decision of the court in *PSA and GOC v Rose* [2021] EWHC 2888 (Admin) where it was held that "the duties that expert tribunals have to the public – to ensure that the public can understand why certain decisions have been reached in its name…has a secure foundation".

Whilst we have already referred to the life-changing impact such proceedings may have upon the affected individual, Professional Standards highlights the extremely important element of the wider public interest inherent in disciplinary proceedings, particularly where the individual is employed in a profession such as the medical profession which is responsible for providing services to the public. This means that the reasons must be intelligible not only to the parties, who will of course be aware of the issues, but also to the public (and, indeed, to any court which may be invited to review the outcome, or to apply it for consistency in subsequent proceedings).

In *Professional Standards*, the High Court also held, at paragraph 71, that it had come to "the clear conclusion that the decision of the Panel must be quashed and remitted to them for reconsideration on the basis of a serious procedural error in the form of inadequate and unclear reasoning as to sanction". Specifically, "[T]he reasoning process is inadequate for the Court to determine whether or not certain important issues were appreciated, and if so, how they were reasoned through. It is therefore not possible to determine whether the sanction imposed was "wrong" in the statutory sense. There has been a serious procedural error engaging the Court's appellate jurisdiction". In reaching that finding, the High Court, inter alia, described the treatment of certain evidence as "opaque", said it was not clear "what analysis the Panel engaged in upon" certain matters and found that certain matters were not mentioned even where they were "opened" or "canvassed in evidence" and were matters "which they must have formed a view on" (see paragraph 73). The Court also found that in determining proportionality, "the reasoning is inadequate to demonstrate the particular factors that impressed the Panel and to help the public understand what it was that drove the MPT to the conclusion it reached on a conditions of practice order". All in all, "the reasoning does not allow of an informed decision" (see paragraph 73).

The High Court noted that it was mindful that the "Panel saw the Professor give evidence and [was] therefore in a good position to make judgements that are central to the seriousness of the events in question and as to genuine understanding and insight" but due to what it regarded as the "clear failure of reasoning, possibly concealing failures of analysis", the Court nonetheless quashed the "decision on the basis only of procedural error, for a reconsideration and revisiting of the decision on sanction" (see paragraph 75). The Court, at paragraph 81, noted that a Panel "in the reasoning they set out" must "expose the relevant analysis so the reader understands what the principal issues were, and what the Panel made of them. This is part and parcel of their function in protecting the public interest". This analysis highlights, again, that even where there may have been a good basis on the merits of the case for the decision which was reached, a decision can be set aside. *Professional Standards* reflects once more the importance attached to the need for reasons which are (at the very least) 'adequate'.

The *Bennett* case

Another recent and very clear illustration of the issue may be found in the case of Ms Bennett, a social worker, who was initially charged with holding data of service users on her personal computer (of which she was cleared), together with acts of dishonesty following her conviction and imprisonment for immigration offences. Following a hearing before a Fitness to Practice Committee Ms Bennett's fitness to practise was initially found to be impaired. She was suspended for 12 months. The Professional Standards Authority for Health and Social Care subsequently appealed to the High Court against that decision on the basis that there had been serious procedural irregularities in respect of the decision on sanction and/or that it was wrong – see *The Professional Standards Authority for Health and Social Care v Social Work England* [2021] EWHC 3593 (Admin). Social Work England (as the decision-making body) accepted, albeit Ms Bennett did not, that there were serious procedural irregularities in its own decision on sanction. The High Court, at paragraph 59, noted that "A failure to give adequate reasons may constitute a serious procedural irregularity, which renders the tribunal's decision unjust". The High Court also noted that "The adequacy of the reasons will depend on the nature of the case".

In *Bennett* the High Court concluded that the Committee had failed to give adequate reasons. At paragraph 73, the Court held that due to the "series of findings" which had been made, there was a need for "a clear, reasoned explanation as to why removal was not considered to be the appropriate sanction". Further, at paragraph 78, the High Court found that the Committee had made brief reference to the "wider public interest" but held that "it was

incumbent on the Committee, particularly in a case where there was serious, persistent dishonesty and a lack of insight, to address how its role in upholding public trust applied to the imposition of a sanction". The Court went on to say that the Committee had failed to do so, and that its "reasons did not have to be over-elaborate. This could have been explained in a few sentences, or perhaps less". The High Court concluded that, overall, "The absence of reasoning in…various respects meant that the parties, the appellant, the appeal court and members of the public are not able to understand sufficiently, if at all, why this Committee decided that a 12-month suspension was the appropriate sanction in circumstances where its own findings appeared to point towards removal" (see paragraph 97). The High Court held that this meant that the decision was tainted by a serious procedural irregularity. The decision was, therefore, remitted.

The *Wallace* case

The approach taken by the High Court in the decisions just discussed is reflective of the earlier decision of Holgate J in *Wallace v Secretary of State for Education* [2017] EWHC 109 (Admin) where the High Court was concerned with an appeal against a decision to impose a prohibition order on a teacher. One of the grounds of appeal was that the Respondent had failed to give adequate reasons for the decision. The Appellant succeeded on two other grounds such that the Court did not consider it necessary to consider the reasons ground in detail (see paragraph 94). The High Court did, however, say that it would "nevertheless consider that the reasoning given by the Respondent is legally inadequate because (a) there is at least a "substantial doubt" as to whether she took…matters into account…and (b) the Appellant has not been given a reasoned decision which applies those factors [alternative sanction and the correct proportionality test] to his case". Once more such decisions reflect the overriding need for adequate reasons so that the individual professional can themselves understand the decision which has been reached.

Police Misconduct

Misconduct hearings occur in any case involving an indication of gross misconduct, or where there is an indication of misconduct involving police officers on their final warning. They are typically held in public (unless there is good reason not to) and are chaired by a legally qualified person (LQC) chosen from a force-wide pool. Available sanctions are a written warning, a final warning, a reduction in rank, or dismissal. Two cases from the bank of decisions in such cases illustrate the particular issues that can arise, however, in this particular regime.

In the recent case of *R (Chief Constable of West Midlands Police) v Police Misconduct Panel* [2022] EWHC 3076 (Admin), the High Court was concerned with a judicial review of the decision of the Police Misconduct Panel which, having found that a police officer had breached three standards of professional behaviour and was guilty of gross misconduct, concluded that the appropriate sanction was a final written warning. Amongst the grounds of review was a suggestion that "the Panel's decision as to outcome had constituted an error of law and/or been irrational" (see paragraph 22). The High Court noted, at paragraph 42, that "the sanction imposed by the Panel can only be interfered with on Wednesbury grounds" and found that the Panel, "Having assessed the seriousness of the Officer's misconduct and addressed the purpose of imposing sanctions", had "chose the sanction which, in its considered and explained view, most appropriately fulfilled that purpose for the seriousness of the conduct in question". Mrs Justice Ellenbogen noted that the Panel had "cogently explained its views" and that its approach was consistent with the Guidance. The decision highlights, therefore, the necessity of a Panel adequately explaining the reasons why, for example, dismissal would not be the appropriate sanction.

In the earlier case of *R (Independent Police Complaints Commission) v Assistant Commissioner Hayman* [2008] EWHC 2191 (Admin), which pre-dated the replacement of police chiefs as chairs of police misconduct hearings by LQCs (although it is

understood that the Home Office has now proposed reversing that change), the High Court was concerned when reviewing a decision of a panel of three senior officers with the question of the correctness of the standard of proof applied. The case arose out of a complaint following an incident in which an off-duty police officer became involved in a fracas. The panel had found that the Officer had "wrongly and unnecessarily arrested the two complainants" and had kicked one. It concluded that he should resign. The decision was quashed on review by an Assistant Commissioner who directed himself that there was, in the circumstances, a heightened burden (i.e. "the criminal burden of 'beyond reasonable doubt'" - see paragraphs 13 and 14). The IPCC, on judicial review, contended that this was an error of law.

Reviewing that decision, in turn, the High Court concluded, at paragraph 20, that "Of course in disciplinary proceedings the tribunal must look with the greatest care at accusations which potentially give rise to serious consequences. But in determining whether or not they occurred, it applies a single unvarying standard, the balance of probabilities. If satisfied it is more likely than not that the facts occurred, then it must find them proved and draw appropriate conclusions as to sanction". This meant, therefore, that the Assistant Commissioner had misdirected himself in law (see paragraph 21) and his decision was therefore quashed and remitted.

In this context we note, as an aside, the recent decision of the Supreme Court in *Jones v Birmingham City Council* [2023] UKSC 27 in which, at paragraph 51, it was held that "there is only one civil standard of proof at common law and that is proof on the balance of probabilities" and that "the seriousness of an allegation, or of the consequences which would follow for a defendant if an allegation is proved, does not necessarily affect the likelihood of its being true. As a result, there cannot be a general rule that the seriousness of an allegation or of the consequences of upholding an allegation justifies a requirement of more cogent evidence where the civil standard is applied".

In the specific context of disciplinary proceedings, and the public, it is noteworthy that the High Court commented, at paragraph 24, that "disciplinary findings potentially have a consequence not just for the individual officer concerned but also for the public and for members of the public who may come into contact with him" and that "There is also a public interest in the upholding of proper findings of disciplinary offences by police officers".

Although Sir Mark Rowley, Commissioner of Police of the Metropolis, has suggested that officer-chaired panels would have dismissed officers in many circumstances where panels with a LQC have not followed such a course, it might be thought that that suggestion overlooks the fact that under the existing regime each panel of three currently includes a police officer (who will be at least the rank of Superintendent where the case involves a non-senior Officer), present no doubt to advance the unique police perspective, as well as an independent panel member. In all cases under the existing regime it is clearly intended that the LQC will guide and promote discussion on the evidence that is relevant to the issues, although they should not dictate the outcome, which will be the result of a simple majority decision. Consequently, it is arguable that the appointment of an LQC sitting alongside a senior police officer and an independent panel member at least ensures that any decision to dismiss is both properly and robustly considered, applying the circumstances of each case as well as all relevant law and guidance.

<u>Sporting Disciplinary Proceedings</u>

To complete the picture we would comment that sporting professionals may also, of course, find themselves to be the subject of disciplinary proceedings. Illustrating the point, in a November 2022 case involving the FA Appeal Board (*The FA v Imran Louza*) the Board confirmed that, in line with existing case law, the standard of proof to be applied

in proceedings before the Appeal Board was the civil standard and that there was no "higher standard of proof other than the balance of probabilities" or a requirement for "some particular cogency of evidence…because of the seriousness of the allegations" (see paragraph 31).

What can be done?

In each of the cases mentioned where the decision was quashed and remitted, this must have come as an extremely unwelcome surprise to the respondent professional, particularly so when the shortcoming which led to such an outcome did not relate directly to their conduct, but rather to a procedural failure on the part of the tribunal determining their case. Anyone representing such a party might also be somewhat frustrated to find that their earlier victory had proved to be merely Pyrrhic.

Is there anything that a practitioner appearing before such bodies can do to avert such an outcome? Strictly speaking, 'no'. By definition, the making and the formulation of any panel decision lies beyond their control. However, it is certainly possible, in our view, by the very careful formulation of written submissions, properly identifying the legal issues which the panel needs to address - and the particular facts upon which findings are required - that any tribunal can be directed to the critical issues and the findings required, so that ultimately the likelihood of any such unsatisfactory outcome can be very significantly reduced.

Conclusion

It is clear from the above that the Courts have unsurprisingly (and entirely reasonably) placed great weight on the importance of, and the need for, adequate and sufficient reasons which explain the decision which it has reached, including how it has resolved any important issues of fact or law, in the context of disciplinary proceedings. The failure by a decision maker, such as a committee or a disciplinary panel, to give adequate reasons for its decision, or to apply the correct standard of proof, irrespective of the underlying merits of that decision, can lead to the decision being set aside on the basis of a 'serious procedural error or irregularity'. The disadvantages of such an outcome are numerous (e.g. undue delay in bringing about a final conclusion to disciplinary proceedings, unsatisfactory public resolution, increased costs for all involved, etc.).

Whilst it has always been necessary for disciplinary bodies to pay close regard to the need for sufficient and adequate reasons, practitioners would be well advised to do all within their power to help them achieve that end…

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The Construction of Written Determinations in UK Medical Student Fitness to Practise Cases – The Need for Guidance by Professor Timothy J David and Sarah Ellson

Introduction

In the UK, written determinations in fitness to practise (FTP) tribunals considering doctors involve all tribunal members, and are finalised and handed down before the tribunal concludes its hearing. In contrast, in medical student FTP cases determination construction only takes place in the days, weeks or even months after the FTP committee met to consider the case. This approach to determination construction is haphazard and varies between universities. The involvement of individual FTP committee members in the creation of the written determination is variable and may be non-existent. In some cases students have to wait for a prolonged period before they receive a written decision, if one is provided at all.

Background

Medical students who have exhibited problems with their behaviour that are sufficiently serious as to

raise questions about their suitability for a medical career are required to attend a student FTP committee organised by their university[2,3,4,5,6]. Each UK university has its own regulations and procedures concerning student discipline and FTP. In addition to university regulations, there is guidance from the UK General Medical Council (GMC), which sets out a framework for managing problem students[7]. This reminds universities that by graduating a student with a recognised primary medical qualification they must not graduate students where there are unresolved concerns about a student's FTP. In addition, newly qualified medical graduates who wish to work in the UK must apply to the GMC for provisional registration, and the GMC have made it plain that if there have been any concerns about the individual's FTP, the GMC will not automatically accept an FTP decision made by another authority (such as a university) and it will assess the concerns and make its own decision as to whether or not to grant provisional registration[8]. The present paper is based on TD's experience of serving on approximately 400 student FTP committees between 2007 and 2023, as chair (at the University of Manchester 2007-2018) and external panel member at 14 other universities.

Necessary ingredients of determinations regarding the decision on sanctions

The GMC guidance on student FTP, and university student FTP regulations and procedures, covers a number of aspects. However, university FTP regulations are usually silent on the construction and drafting of the determination (often referred to as the "outcome letter" or "decision letter"). In contrast, the GMC guidance on student FTP:

- states the need to set out in writing the outcome of the hearing (referred to as the determination);
- mentions the need to give "detailed reasons" about why the committee came to its decisions;
- specifies the need to consider sanctions in a stepwise order, starting with the least severe sanction first, and progressing to the next if a lesser sanction is not appropriate in relation to the circumstances of the case;
- sets out the need to make clear that all the available sanction options have been considered, accompanied by clear reasons for imposing a particular sanction, including any mitigating or aggravating factors which were taken into account when making a decision;
- states the need to include details of any sanctions imposed and explain the intended purpose of the sanction, accompanied by an explanation if a particular length of sanction was considered appropriate including the date from which it is effective;
- explains that the purpose of sanctions is not intended as a punishment for the student, but is to protect patients and the public, to maintain trust in the profession, and to make sure that a student whose FTP is impaired is dealt with effectively (which may include being removed from the medical course).

Varying approach to determination construction

Regarding the involvement of the student FTP Committee members, the approach to the

[2] Aldridge J, Bray SA, David TJ. Medical student fitness to practise committees at UK medical schools. BMC Research Notes 2009, 2:97.
[3] David TJ, Bray SA, Farrell AM, Allen N, Ellson S. Fitness to practise procedures for undergraduate healthcare students. Education Law Journal 2009; 10:102-112.
[4] David TJ, Bray SA. Healthcare student fitness to practise cases: reasons for referral and outcomes. Education Law Journal 2009, 10(3):196-203.
[5] David TJ, Ellson S. Fitness to practise procedures for medical students. British Journal of Hospital Medicine 2015; 76(7):405-408.
[6] David TJ, Ellson S. Fitness to practise procedures for medical, dental, pharmacy, nursing and other health and social care students. Irish Law Times 2019; 37(18):257-272.
[7] General Medical Council. Professional behaviour and fitness to practise: guidance for medical schools and their students. London: General Medical Council, 2016.
[8] David TJ, Ellson S. Refusal to grant provisional General Medical Council registration to UK medical graduates. Medico-Legal Journal 2015; 83(3): 142-146.

construction of the determination differs very widely between universities. The following lists the methods that have been encountered:

1. Following the conclusion of the meeting, after the committee members have departed, the chair or the secretary to the committee write a determination, without **any** involvement of the committee members in the writing. This is taken as the formal record of the meeting and its outcome.

2. After the chair or secretary have drafted a determination, this is then sent to the committee members and their comments requested. In some cases the replies go only to the secretary or chair, whereas in other cases the replies go to all committee members, often resulting in further comments. After this iterative process a final version with either a majority view or a unanimous view emerges.

3. In some cases no written determination is prepared at all. Explanations for this omission that have been offered are (i) that the student was given a very brief verbal summary of the outcome at the end of the meeting, so the secretary and/or the chair decided that there was no need to prepare a written document; (ii) that a further hearing was needed to review the student's progress, so there was no need to prepare a written document at this stage; (iii) further investigation was required, such as obtaining a report from an independent psychiatrist, so a written determination would only be supplied after additional information had been obtained; (iv) because the student had not been expelled no determination was needed.

4. In some universities the FTP determination is signed by the committee secretary, whereas in others the determination bears the signature of the chair. Both will have been present throughout the meeting. In some universities the final version of the FTP outcome letter is sent to a very senior university figure, who has had no involvement in, or knowledge of, the student or the FTP committee meeting, to give final approval. The name of that figurehead appears as the signatory to the letter.

Comments on the above

Given that the potential impact on the student's future career, we would suggest that the meeting and its determination need to be documented in every case, regardless of the explanations stated in the scenarios above. The FTP regulations should stipulate that a written determination must be supplied within a reasonably short period such as 1-2 weeks. There is a pressing need to avoid prolonged anxiety, and delay providing a determination is likely to impede the student's ability to obtain advice (including legal advice) on how best to respond and proceed. FTP committee determinations have to be disclosed by graduates applying for GMC provisional registration, and unavailability of a determination may hamper the GMC in its task of deciding whether or not to grant provisional registration.

The GMC/MPTS approach to determination construction

Concerning the determinations in new cases, MPTS hearings and determinations have three separate key stages:

1. Determination of facts.
2. Determination of FTP impairment.
3. Determination of sanction.

Every member of the panel is involved in writing each section, and approving the final version which is then given to both parties (the doctor and the GMC) in writing. The chair is legally qualified advises the tribunal members on the relevant law.

Discussion

The major differences between student and registrant FTP cases are:

1. A single set of rules and formal written guidance applies to each registrant FTP case[9], and these set out in considerable detail all aspects of the process of decision making. In contrast, for student FTP cases there is considerable variation in the FTP regulations and procedures of the 44 medical schools in the UK each of which has its own medical education programme rules, regulations and FTP procedures.

2. Registrant FTP hearings follow a clear progressive structure (determination of facts, determination of impairment of FTP, and determination on sanction). This structure is not usually a feature in student cases.

3. In registrant cases the members of the tribunal **always** have an input to the assembly and content of the written determination, and **always approve the final version**. The written determination is promptly given to both parties. In contrast the level of input to the written determination in student cases (if there is one at all) is highly variable, and in some cases there is no input at all to the written determination from anyone other than the chair. In student FTP cases the written determination is not provided at the conclusion of the hearing, and availability may be delayed by days, weeks or longer.

4. In some student cases the chair provides a very short extempore verbal outcome at the conclusion of the hearing, but there is no guarantee that the content will be representative to the written determination that follows.

5. In registrant FTP cases the determination solely reflects the decisions of the committee. In some student FTP cases the determination is signed off by a very senior member of staff (e.g. Faculty Dean) unconnected with the case and who has no involvement in the student's case or the hearing. It is unclear what function is served by having a decision being signed off by a remote figurehead unless this is part of a scheme of delegations within the university about who can sign documents.

6. Student FTP cases (including appeals to a university FTP appeal committee) are treated by universities as being strictly confidential matters, whereas most registrant FTP hearings are heard in the public, with the written determination being freely available to be downloaded for 12 months.

Regarding student FTP cases, a key point is that the written determination must capture the opinions of all the members of the FTP committee, and a very brief verbal summary cannot be regarded as a proper substitute for a fully reasoned decision, a decision that may have to withstand a legal challenge. The very act of writing a determination is a vital part of the overall process because it can have a significant impact on the final analysis. Being required to carefully articulate one's reasoning is a robust way of Committee members checking and challenging the reasons and potentially the ultimate decision, as has been repeatedly demonstrated by the comments made on draft determinations made by FTP committee members.

MPTS tribunals have greater time allocated for cases, and this will always recognise the time needed to prepare an agreed determination to which all tribunal members have contributed. In contrast, student FTP committees have significant constraints and competing time pressures, and are often allocated no more than a morning or afternoon, or less, meaning that the task of writing the determination must of necessity take place in the days that follow, depending upon the time and availability of the relevant members of staff.

Legal constraints

Those involved in all student FTP matters need to be aware of the potential for legal scrutiny and challenge, and a number of cases have reached the

[9] General Medical Council (Fitness to Practise) Rules Order of Council 2004. This incorporates the 2004 Rules and amendments made to those rules in 2009, 2013, 2014, 2015 and 2017.

High Court and the Court of Appeal[10], which is one reason why student FTP cases need to be carefully documented.

A student leaves the university before a conclusion has been reached regarding FTP concerns

The GMC has recommended that university FTP procedures include measures to address situations where a student with a FTP concern leaves the university before a conclusion is reached. This can happen for a number of reasons, such as because a student's studies may have been terminated on academic grounds (such as repeated examination failure), or because a student has decided to abandon their medical studies and possibly change career. It may not be possible to require a former student to attend an FTP committee hearing unless students are warned in advance that once FTP processes have commenced there will nevertheless be a hearing to which the ex-student is given a full opportunity to participate in the hearing.

Conclusions

The arrangements regarding the construction of determinations in medical student FTP cases are haphazard, and this paper sets out some examples of different approaches at UK universities. This variation is in marked contrast with the detailed procedures that are applied to all MPTS cases.

At a number of universities in the UK the committee members have no say in the wording of the written determination which is supplied to the student, and which forms a formal record of an FTP committee meeting.

These determinations (if one has been supplied) have to be disclosed by graduates applying for GMC provisional registration, and the lack of a determination is likely to hamper the GMC in its task of deciding whether or not to grant provisional registration and hinder a student who wishes to have legal advice.

When inviting an individual to serve on a medical student FTP committee, it must be made clear that an agreement to serve includes specific agreement to carefully study the papers in advance of the FTP committee meeting, and to provide prompt written responses to requests for comments on a draft determination. The obligations of the Committee members and the procedures to be followed when preparing determinations should be set out in the university's FTP regulations.

Regardless of the outcome, whether this is an adjourned hearing or a final decision, a student FTP committee hearing is a formal meeting and a written outcome should always be provided to the student and other relevant staff, within a defined period, no more than 1-2 weeks after the meeting.

Providing a verbal outcome at the conclusion of an FTP committee hearing may be inadvisable. There is a risk that what is said conflicts with what is written in the written determination that follows, or at least creates ambiguity. This can easily happen because the process of writing a determination may lead to a recognition that a change in wording, minor or major, is needed.

An increasing number of UK universities will not allow medical students to be legally represented at a FTP committee hearing, making it even more important that FTP guidance and regulations spell out the requirements of written determinations.

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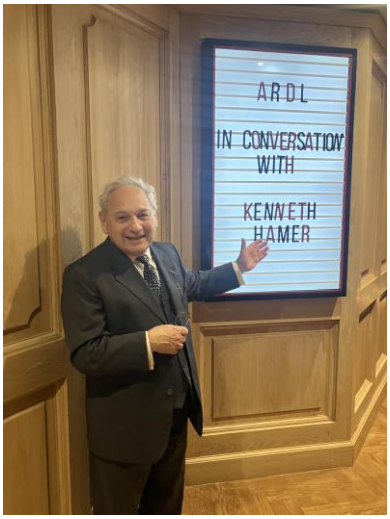
[10] Gomez D. The Regulation of Healthcare Professionals: Law, Principle and Process. Second edition. London, Thompson Reuters, 2019. Chapter 14. The regulation of persons studying or training for entry into the healthcare professions, pp 783-839.

ARDL Scotland Seminar, In Conversation with Kenneth Hamer, 28 September 2023



Welcoming guests to ARDL's Scotland Seminar held at The Picture House, The Scotsman Hotel, Edinburgh, Catriona Watt of Anderson Strathern introduced Rosemary Rollason to speak in conversation with Kenneth Hamer about his years of expertise in professional regulation, to look back on significant events and cases and to talk about what the future of regulation and professional conduct proceedings might hold. At the start of the seminar Catriona played a short video of Kenneth being interviewed in 2013 on the publication of the second edition of his *Professional Conduct Casebook.*[11] Amongst the questions asked and the topics discussed in conversation between Rosemary and Kenneth were the following.

Rosemary Rollason: How did it all begin? Where did modern regulation start?

Kenneth Hamer: Firstly, may I say that it is privilege and a personal pleasure for me to be here in Edinburgh this eventing. And I should like to thank Catriona and ARDL for giving me the opportunity to speak at this seminar. The Medical Act 1858 is perhaps the best place to start with the advent of modern regulation in the medical profession. The Act of 1858 brought together representatives from the Colleges of Medicine in England, Scotland and Ireland to form 'The General Council of Medical Education and Registration of the United Kingdom', the predecessor of today's General Medical Council. The list of representatives in Section 4 of the Act included persons from the Colleges of Physicians and Surgeons in Edinburgh and Glasgow, and the Universities of Edinburgh, Glasgow, Aberdeen and St Andrews, together with persons chosen from medical colleges and universities in Ireland. The critical provision so far as professional misconduct is concerned was Section 29. This provided for a medical practitioner's name being 'erased' from the register following a conviction in England or Ireland of a felony or misdemeanour, or in Scotland of any crime or offence, or after 'due inquiry' by the General Council to have been 'guilty of infamous conduct'.

The legal profession started earlier with the Statute of Westminster 1275. It introduced disciplinary control over serjeants and pleaders or those who provided 'deceit or collusion' in the King's Courts. This became known as 'silencing', and was eventually abolished in England in 1948. However, I am not certain it has ever been possible to silence many barristers either in England or in Scotland!

Nowadays all professions and professionals are regulated either by statute, such as the Medical Act 1983, or the Dentists Act 1984 or, here in Scotland, for example, the Solicitors (Scotland) Act 1980; or by Royal Charter and Bye-laws, such as the Institute of Chartered Accountants in England and Wales, or the Royal Institution of Chartered Surveyors.

How did you get involved in professional regulation? And how did the book come about?

In 1993 I moved to 2 Harcourt Buildings in The Temple where Roger Henderson QC (now Roger Henderson KC) was head of chambers. Roger, who is retired from practice, was for a great number of years the leading practitioner in professional regulation. He was involved in such landmark cases as *Roylance v. GMC (2000)* and *Meadow v. GMC (2007),* and was Leading Counsel for the GMC at the *Shipman Inquiry* before Dame Janet Smith. When in practice Roger used to have four full lever arch files

[11] The video is available on the website of Henderson Chambers www.hendersonchambers.co.uk under Kenneth Hamer's profile.

of useful case law and when I began as a legal assessor, initially with the NMC and later with the GMC, I would carry around files full of reported and unreported cases. The book was first published in 2013 in the hope of removing the need for such a burden, and be more comprehensive and up to date. Further editions of the book followed in 2015, 2019 and now this year 2023.

The Fourth edition of your book has recently been reviewed, where the reviewer said: *'If I were on a desert island and were permitted only one book on professional conduct, this would be it'.*[12] What would you read on a desert island?

That was very flattering. However, if I were asked to choose eight judgments to take with me to read, they would be as follows:

1. Starting with absence of the practitioner and adjournments, the modern leading case is *GMC v. Adeogba (2016).* It requires the panel to balance the interests of the practitioner against the overarching objective of the regulator.
2. Abuse of Process. The case of *Council for the Regulation of Health Care Professionals v. GMC and Saluja (2006)* starkly asks is the regulator an agent of the State? It is an important case and gives us much to consider.
3. Bias. In *Rasool v. General Pharmaceutical Council (2015)* Carr J, soon to be the first Lady Chief Justice of England and Wales[13], reviewed the cases on bias in professional conduct proceedings, including the important Scottish case of *Helow v. Secretary for the Home Department (2009)* involving Lady Cosgrove.
4. Concurrent proceedings and double jeopardy raise difficult and complex issues. The judgment in *T and I v. Financial Conduct Authority (2021)* dealt with ongoing proceedings in the Commercial Court and their possible outcome having a decisive influence on the regulatory proceedings. In that case the court did grant a stay. The case of *Thomas v. Council of the Law Society of Scotland (2006)* is a good example in explaining the difference in nature between criminal proceedings and disciplinary proceedings. As the Lord Justice Clerk (Gill) said: the criminal proceedings are to obtain a conviction and sentence, the domestic proceedings are to obtain a finding of misconduct and sanction under the Solicitors (Scotland) Act 1980.
5. As that was two cases, I had better move on to number 6 now!
6. Perhaps I should have something on evidence. There are many aspects of evidence in disciplinary proceedings but I think the judgment I would take with me is *Thorneycroft v. NMC (2014),* rather than *Bonhoeffer v. GMC (2011). Thorneycroft* emphasises that whilst hearsay evidence is permitted, we must remember that for a person to be deprived of their professional livelihood based on hearsay evidence, without the opportunity to cross-examine, the evidence must be clear and compelling, and fair to admit it.
7. Findings of Fact. There have been a plethora of recent cases on findings of fact but after a bumpy ride I think the judgment of Mr Justice Warby in *Dutta v. GMC (2020)* must rank as one of the outstanding cases in this field of law. In that case, the judge made the hugely important point that we should always start at the beginning of the story and with any contemporaneous documents, and remember that whatever sympathy you may have with the complainant or victim there must always be due process, and the burden of proof lies firmly on the regulator throughout.
8. Having found the facts proved against the unfortunate registrant, and that his or her fitness to practise is currently impaired, the panel has to decide on the appropriate and

[12] New Law Journal, 22 September 2023
[13] Sworn in on 2 October 2023 as Dame Sue Carr, Lady Chief Justice of England and Wales

proportionate penalty. Here I would take with me on this desert island the case I did with Tom Kark KC in the Supreme Court, on appeal from the Extra Division of the Inner House. The judgment of Lord Wilson JSC in *Khan v. General Pharmaceutical Council (2016)* is a model of clarity, and was followed and applied in *Bawa-Garba* in 2018.

Do you have a key case from this year?

Yes, I do. Catriona mentioned the recent freedom of speech case of the COVID conspiracy doctor that might change the course of regulatory history. That is the case of *Dr Adil v. GMC*, which raises issues under Article 10 of the ECHR and will figure as part of ARDL's Autumn webinar on 2 October. I will look forward to that.

For myself, I think that the judgment of Mr Justice Fordham earlier this year in *Sun v. General Medical Council (20 June 2023)* may have long term implications. At the heart of the case were questions of mental health and dishonesty. The judge held that the tribunal was not wrong in deciding on the sanction of erasure. The key passage in the judgment is where the judge said that Dr Sun's conduct affected by her mental health condition did not extend to any sustainable suggestion that her mental health led her to misappreciate what she was doing. Dr Sun knew what she was doing. The key point was this. Dr Sun's mental health condition did not alter the character of the 'misconduct'. The judgment is not inconsistent with the previous solicitor's case of *SRA v. James and others (2018,)* which considered the weight to be attached to mental health issues, workplace issues and work-related pressures when assessing and evaluating both conduct and sanction. This balance between work and well-being and the conduct of a practitioner also figured largely in *Bawa-Garba,* and only time will tell whether we have got the balance right.

Finally, where do you see the future of professional regulation?

This is a serious question and a good question on which to end. We have travelled a long way from Dame Janet Smith's recommendations in the Shipman Inquiry, practically all of which are now commonplace, to the joint report in 2014 of the Law Commissions of England and Wales, Scotland and Northern Ireland, which recommended a single healthcare statute to be called *The Regulation of Health and Social Care Professions etc Act,* to the Consultation Paper in 2021 of the Department of Health and Social Care entitled *Regulating healthcare professions, protecting the public.*

We know that a Health and Care Bill is expected to be presented to Parliament shortly. It is likely to include reform of the GMC's processes and deal with governance, education and training, registration, fitness to practise and the role of associates. If enacted the Bill is expected to give a much greater role to Case Examiners. Case Examiners, employed by the regulator, will have the power to conclude cases with and sometimes without the consent of the practitioner. They will have the full range of sanctions available to them, with limited scope to challenge their decisions before a fitness to practise tribunal. There will be just two grounds of impairment for regulatory intervention, namely lack of competence and misconduct. Lack of competence is expected to include lack of knowledge of English or a health condition which affects a registrant's ability to practise safely. To classify a health condition as lack of competence seems to me wrong. 'Misconduct' is to be an all-embracing term to include any form of misconduct deemed to be serious.

A working party of ARDL submitted representations of concern to many of the Department's proposals but tonight is not the time to debate these matters. And we must wait to see what the Bill says when it is published.

However, standing back from any reforms proposed by the government of the healthcare professions, my own and very much personal concerns for the future include the following.

- Firstly, a if not *the* fundamental question is this. Should the professions themselves

continue to judge professional conduct? A second question is: what role does the State play and the public have in professional regulation? These are not questions with simple answers.

- Practically all professional bodies, whether operating under statute or by Royal Charter, now have separate investigation and adjudication arms which, on the whole appears to work well. I would leave it to the professions to adjudicate on issues of conduct and competence. Not surprisingly perhaps, I am in favour of the approach of the GMC and the MPTS to largely having a legally qualified chair to oversee hearings. Lord Burnett in the Foreword to my book said that disciplinary panels and tribunals operate now much more like courts than was once the case.

- Secondly, it is important to emphasise that a legally qualified chair although a legal professional is a lay member of the panel. Previously he or she was solely a legal assessor or legal advisor and had no role in the decision-making process. It therefore made sense to have separate lay representation on the tribunal. In my experience there is much to be said for panels to sit with two professional members and a LQC as the lay member. I have sat many times at the GMC with the panel consisting of two doctor professional members and one lay member, the LQC. The Solicitors Disciplinary Tribunal is made up of two solicitor members, one of whom chairs, and a lay member. In many cases it often helps to have two professional members on a panel, coming from different parts of the profession to give a broader view of what is acceptable and workable in the interests of patients, whose care and well-being lie at the heart of medical practice. An additional lay representative could be retained to increase the strength of the panel, and can be highly useful in some cases. I do not see a problem with an even number, and ultimately it is the quality of judging that is important which ensures public confidence, rather than the appearance or make-up of the tribunal. The Privy Council frequently sits as a tribunal of four, and the Court of Appeal will sometimes have just two judges to decide a case. And one should not overlook that the public interest is protected and represented by the Professional Standards Authority on appeal in healthcare cases, and that judicial review is available by any aggrieved person through the courts.

- Thirdly, however disciplinary hearings are run and whatever the composition of the tribunal concerned, I do seriously think that we should restrict any allegation of misconduct to what the Law Commission recommended, namely, 'disgraceful misconduct'. Misconduct generally denotes behaviour which has been undertaken deliberately or recklessly. It should be limited to cases of truly deplorable or appalling behaviour or actions on the part of a registrant or practitioner. The Law Commission placed particular emphasis in their report on deficient professional performance, or as Dame Janet called it, deficient clinical practice. They argued that it should be given greater prominence in a new legal framework, and might include a single instance of negligence, or breach of duty in failing to provide care to a sufficient standard on one or more occasions, or the breach of an undertaking agreed with a regulatory body. This is in preference to basing deficient professional performance on a sample of the practitioner's work.

- I have always felt that once you allege professional misconduct, a term which carries a stigma, and add to that an allegation of dishonesty, you immediately raise the stakes. Undoubtedly, there are some cases where the facts are such that nothing short of a finding

of misconduct and dishonesty and the most severe sanction are called for. The approach of the Bar Standards Board is to have a five-person panel (three professional and two lay members) in more serious cases where an order of disbarment may arise, leaving cases of less serious misconduct and a lesser sanction to be heard by a three-person panel (two professional and one lay member). And going back to what I said earlier, matters relating to health issues alone are dealt at the bar with by an entirely separate process, interesting called 'Fitness to Practise'.

- Finally, why not impose a financial penalty on any professional found guilty of misconduct? I am not thinking here of an order for costs, which can be made in GMC cases, but the sanction of a fine. Fines against practitioners found guilty of misbehaviour are an everyday occurrence in the accountancy and legal professional worlds and in other regulatory proceedings such as cases involving surveyors. The amount of any financial penalty must be fair and proportionate and within the means of the professional concerned. The General Optical Council I believe is the only healthcare regulator that provides for the imposition of a financial penalty, but it is rarely used. Going back to the Medical Act 1858, section 38 provided for punishment by fine against any registrar guilty of falsification. So perhaps the idea of imposing by way of penalty a fine on a healthcare professional is not such a novel one.

As I say, those are some thoughts and my own personal views and not those of ARDL or any regulator.
I could go on, but perhaps now it is time to hear comments from the audience and their questions. Thank you.

Kenneth Hamer
Henderson Chambers
Catriona Watt
Anderson Strathern

ARDL Seminar Questionnaire Feedback from Kate Steele and Seminar Sub-Committee

We had 128 responses to the feedback to the ARDL Seminar Questionnaire, which greatly helps to shape our seminar and webinar programme for 2024. The results and feedback were follows;

- 49% of respondents felt that our seminars are held often enough whilst 46% felt that they are not often enough. We have increased the number of sessions this year and hope to do the same next year as a result.
- We asked whether people would be likely to attend lunchtime seminars. 54% of respondents said that they would be highly likely or likely to attend. We will continue to consider whether lunchtime seminars should be trialled, although are mindful that diary commitments during the working day can change at short notice which may be challenging in co-ordinating a Chair, Speaker and Zoom Host.
    - We asked the same question in relation to evening seminars and 70% of respondents said that they were highly likely or likely to attend. We continue to arrange seminars and bitesize sessions at close of business with this in mind.
    - There remains an appetite for in person seminars, with 54% of respondents being highly likely or likely to attend. Since the pandemic we have focussed on having more virtual seminars in the hope that this will attract a wider audience and we will continue to do so, although hope to still hold one or two in person events in Edinburgh, Manchester and London to provide opportunities for in-person networking.
    - Our mix of full length and bitesize seminars has been well received, with 59% of

respondents finding them very helpful. We are mindful that some respondents would like more of both bitesize and full length seminars and are working hard to make this happen in 2024.

- We had great feedback in relation to the subjects that our seminars have covered and topics that respondents would like to see. We have noted that some respondents felt that more practical topics and those which crossed different regulatory arenas would be helpful. These including ethics, fair procedures, handling registrant's mental health/capacity concerns, remediation, disclosure, social media and hearsay. Some respondents commented that case law updates would also be helpful. Members will be aware that an annual case law update is provided by Kenneth Hamer at the conference. Practical topics are high on the list for next year's programme.

- We had a number of comments regarding links to in person seminars and recording of webinars. Whilst we do want our seminars to have a wide reach, having the technology to allow us to live stream in person seminars is currently a little tricky although we will continue to consider whether this is feasible. To ensure that attendees feel able to ask questions, speakers do not feel constrained in what is discussed and to allow anecdotal stories being shared along with information governance and data protection requirements around recording virtual seminars, we took the view historically that this would not be done. We do try to ensure that any speaker slides are uploaded to the members area of the website.
- One respondent suggested a recommended reading list to accompany our seminars and we will commit to asking speakers to provide these, for upload to the website along with their slides.

A number of respondents offered to either chair or present a seminar in the future and we have made contact with those who left their details on the questionnaire. If you have not yet heard from us it is because we did not have your details to reply so please do get in touch through ardl@blakemorgan.co.uk so that we can take your kind offers forwards.

The questionnaire and your responses are very much appreciated and we hope that you will see in the coming year that we have taken all of your feedback on board.

Kate Steele and the Seminar Sub-Committee

Legal Update

Bluecrest Capital Management (UK) LLP v. Financial Conduct Authority **[2023] UKUT 140 (TCC)**

Amendment of statement of case – subject matter of reference – whether new allegation of same nature and based on same factual background

In proceedings before the Upper Tribunal concerning references by Bluecrest Capital Management (UK) LLP against two decision notices of the Financial Conduct Authority (the Authority), the Authority applied for permission to amend its statement of case pursuant to rule 5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008. At [44]-[81] of its judgment, the Upper Tribunal (Judge Timothy Herrington and Judge Rupert Jones) considered the tribunal's jurisdiction to amend a statement of case. Section 133 of FSMA 2000 deals with proceedings before the tribunal and s133(4) provides that the tribunal may consider any evidence relating to the *'subject matter of the reference'.* The question of what is within the subject matter of a reference to the tribunal had been considered in a number of authorities: *Jabre v. FSA (Decision on Jurisdiction)* [2002] UKFSM FSM035 (10 July 2006); *James Parker v. FSA* (FSMT, 13 October 2004); and *Seiler, Whitestone and Raitzen v. FCA* [2023] UKUT 133 (TCC) where the tribunal referred to *Allen v. FSA* (2012) FS/2012/0019, *FCA v. Hobbs* [2013] EWCA Civ 918, and *Khan v. FCA* [2014] UKUT 186 (TCC).

The Upper Tribunal said that when it was faced with the situation where the Authority seeks to rely on allegations which were not made in the warning notice but could have been the starting point is to consider whether those allegations and the facts relied on in support of the allegations form part of the subject matter of the reference. The tribunal was satisfied that *Jabre* and the later authorities are to be read as follows. In order for new allegations to form part of the subject matter of the reference and be considered or determined by the tribunal, they must be of the same nature and based upon the same factual background as the allegations made to the Regulatory Decisions Committee and contained in the warning and decision notices, even if no findings are made upon them therein. If the tribunal was of the view that the new matters on which the Authority seeks to rely do fall within the scope of the subject matter of the reference, even though not contained in the warning notice, then the tribunal has a discretion as to whether to allow matters concerned to be pleaded, exercised through its case management powers. In those circumstances, the burden on the Authority to satisfy the tribunal that the new allegations should be pleaded was a heavy one. Section 133(4) of FSMA empowers the tribunal to make findings on a reference based upon evidence that was not available to the decision-maker at the time of the decision so long as the evidence relates to the subject matter of the reference. In the instant case, the tribunal, at [400], concluded that in relation to the Authority's four disputed applications to amend its statement of case: the first disputed amendment was refused as a matter of discretion as it did not raise a case with a realistic prospect of success; the second disputed amendment was granted; and the third and fourth disputed amendments were refused as falling outside the subject matter of the reference and not being within the tribunal's jurisdiction. Permission was granted for the Authority to make those amendments to the statement of case which were not disputed.

Suleman v. General Optical Council **[2023] EWHC 2110 (Admin)**

Bias - committee member – involvement with complainant company – ongoing relationship – rehearing ordered

The allegations against the appellant, a registered student dispensing optician, arose from her time when she worked in September 2019 at the Huntingdon and St Ives branches of Specsavers. It was alleged, and found proved by the committee, that she carried out restricted activities as a dispensing optician whilst unregistered, and dishonestly gave her employers a false registration number in order to conceal that she was not yet fully qualified. Her name was erased from the register. For the most part the appellant did not attend the fitness to practise hearing, lasting some ten days between and December 2022, and the committee proceeded in her absence. The committee was made up of five members, three lay and two dispensing opticians. The members of the committee included Mr P, one of the dispensing opticians. In the absence of the appellant or any representative on her behalf Mr P stated that he was 'formally [sc. formerly] a director of a Specsavers practice, a position I held for 25 years, but I resigned from that three years ago when I retired'. Mr P confirmed that he had had no contact with anyone involved in the case. The legal adviser advised the committee that Mr P's situation was a 'tenuous connection' and that he could not see 'in any way, shape or form it would give rise to any potential conflict of interest'. In the course of the appellant's appeal the appellant sought disclosure from Specsavers of further information about the nature and extent of Mr P's interest. The information provided by Mr P included that he was a director and co-owner of the Hounslow Branch of Specsavers from 1994 until May 2019; and that from 2019 onwards he was a locum dispensing optician at nine Specsavers practices. In the 2019-2020 tax year, he worked 110 days, in 2020-2021 he worked 46 days and in the tax year 2021-2022 he worked 73 days, all as a locum dispensing optician for the various Specsavers branches. In an application determined on the papers prior to the hearing of the substantive appeal, Constable J observed that the fair minded and informed observer would conclude

that Mr P 'had a business relationship with a Specsavers branch and with the brand more widely which can safely be described as a substantial, long-lasting and (at the time of the panel hearing) ongoing one.'

Chamberlain J, in allowing the appeal and remitting the matter to the council for re-hearing before a differently constituted committee, said that the historic relationship between Mr P and Hounslow Specsavers was, on any view, both 'substantial' and 'long-lasting'. An historic relationship confined to that single branch, which ended in 2019, might not have given rise in the mind of the fair-minded and informed observer to a real possibility of bias, though it might have aroused some concerns. But the relationship arsing from Mr P's work as a locum was, in the court's judgment, more significant. Although Mr P had not said whether at the date of the hearing he hoped to obtain further such work, the only proper inference from what he had said, and what he had no said, was that did entertain that hope. In this sense the relationship was 'ongoing'. The number of days worked showed that Mr P must have been deriving (and, it is to be inferred, expecting to continue to derive) significant income from his locum work. It appeared to have been Mr P's only source of work-derived income (other than sitting as a committee member of the council's fitness to practise committee). Whilst Mr P had no financial interest in the Huntingdon or St Ives branches and had not worked there, the allegation against the appellant was that she had broken the trust put in her by colleagues *and Specsavers* and undermined public confidence *in Specsavers* and the profession. This suggested that neither those making the complaint nor those formulating the charges saw the branches as wholly separate businesses. Constable J referred to this as 'the brand', which was a perfectly sensible description. The fact that Mr P entertained the hope to obtain more centrally allocated locum work from Specsavers would lead the fair-minded and informed observer to conclude that there was a real possibly that, consciously or unconsciously, he would be disposed (a) to find that the appellant had engaged in conduct likely to injure the reputation of 'Specsavers' and/or (b) to resolve evidential disputes in favour of those individuals and against the appellant. Mr P should have recused himself. The committee's decision was not saved because he was only one of its members. The committee sat for ten days and will bound to have discussed the case in detail. It was impossible to know how influential the views of the individual panel members had been. If one member is tainted by apparent bias, the committee's decision will be vitiated.

M v. A Scottish University [2023] CSOH 52

Nature of student fitness to practise proceedings – procedural fairness

The petitioner, SM, was a final-year dental student at a Scottish university. He was subject to fitness to practise proceedings at the instance of the university. A panel concluded that the petitioner's fitness to practise was impaired on the basis of his lack of insight into professionalism and the impact of absences on clinical care and those arranging clinical teaching, his disengagement from his course from its early years, his heavy reliance on counselling as the single solution to his issues, and the existence of a query around his understanding of probity. The panel decided that the petitioner's studies on the university's Bachelor of Dental Surgery course should be terminated. That decision was subsequently upheld by an appeal committee. Refusing a petition for judicial review, Lord Sandison, at [46]-[47], considered the nature of student fitness to practise proceedings and the extent they corresponded to those of the General Dental Council (GDC) in relation to registered dentists. After referring to the GDC's document *"Student professionalism and fitness to practise. Standards for the dental team. Guidance for students',* the judge said that the document makes clear that, at least as far as the GDC is concerned, the conduct of student fitness to practise proceedings is for the educational institution in question and not for it. Certain basic or key elements of student fitness to practise procedure are identified in the GDC's relative publication for education providers, but the consequence of failure on the part of the educational institution to provide those elements

would be a matter between the GDC and the education provider, and not give rise to any complaint on the part of the student against the provider. The judge continued:

> 47. The question of what proper procedures in the context of student fitness to practise proceedings may be cannot, in any event, simply be surrendered to the views of the GDC or the education provider, but is a matter over which the court must, if asked to do so, exercise its own supervision. In that context, one requires to consider whether there is any reason why the law ought to require student fitness to practise proceedings to conform or at least approximate to such proceedings in the context of registered members of a profession which the student aspires to enter. It is difficult as a matter of principle to see why that should be the case. Fitness to practise proceedings against an established member of a profession will generally turn on his or her ability or willingness to behave in a way acceptable to the requirements of the profession in question. In many though not all cases, the lack of such ability or willingness is likely to be demonstrated by misconduct of some kind. In that context it makes sense to proceed in the familiar structured way of fact-finding followed by a determination of whether misconduct has occurred before passing to the question of whether impairment has in consequence been established and the deciding sanction. In the context of student fitness to practise procedures, the question is whether the student is meeting various requirements in the course of his or her training which are deemed necessary in order to satisfy the criteria for entering into the relevant profession in the first place. The answer to that question need not, as it did not in the present case, involve any issue of misconduct at all, but rather requires an overall consideration of both matters of fact (for example, how many absences from classes or clinics actually occurred) and matters of impression or opinion (for example, the degree to which the student is engaging with the course of study or demonstrating insight into his position), all feeding together into a rather more wide-ranging and holistic determination of fitness to practise than might typically be the case in fitness to practise proceedings against an established professional.

A rigid requirement to proceed in set stages of procedure was not a legal requirement in the student context. Criticisms based simply on deviation from what would have been the GDC's procedures or outcomes in the case of a registered dentist could not be sustained. Moreover, the fact that the university did not see its own procedures as being essentially disciplinary in nature was not a valid ground of complaint. At [48]-[53], the judge went on to hold that there was no procedural unfairness or lack of adequacy of reasons given by the panel or the appeal committee. In the present case, no suggestion was made that the petitioner's case was conducted otherwise in accordance with the internal rules of the university. The petitioner was given a real and effective opportunity to take part in and influence the outcome of the fitness to practise proceedings, and took that opportunity. The focus of the proceedings was not on the petitioner's health but on the consequences of his condition for the management of his professional obligations towards patients and colleagues. The essentially undisputed factual background disclosed behaviours and attitudes on the part of the petitioner which seriously called into question his suitability to continue on his course. His health difficulties which previously had provided some degree of mitigation for him had resolved without apparent improvement in the matters of concern.

Sun v. General Medical Council [2023] EWHC 1515 (Admin)

Mental health and dishonesty – doctor knowing that she is communicating false information – mental health condition not relevant to statutory overarching objective – relevant to mitigation of sanction

This was a case at whose heart were questions about

mental health and dishonesty. The appellant, Dr Sun, was a trainee in vascular surgery. The allegations of fact, including 13 incidents of dishonesty, were admitted as was misconduct. In 2018-2019, whilst acting as a clinical research associate, the appellant, amongst other things, dishonestly stated that she had been given permission to submit a manuscript to a medical journal, made untruthful job applications for training programmes, a self-declaration for revalidation and a work details form to the GMC, and stated to the GMC that two of her supervisors had criminal proceedings against them and had received a warning by the police for sexual harassment of a female trainee, and that a third supervisor had received a police warning for threatening behaviour. All of this was untrue and Dr Sun knew at the time that her statements to the GMC were untrue. The agreed expert medical evidence was that Dr Sun had had a mental health condition during the period in which the conduct had taken place. However, because of updated health assessments in early 2022, she was no longer suffering from any mental health condition such as to impair her fitness to practise. The GMC, pursuant to rule 17(6) of the GMC (Fitness to Practise) Rules 2006, with the approval of the tribunal, withdrew an allegation that Dr Sun's fitness to practise was impaired by reason of adverse mental health. The GMC invited the tribunal to impose a sanction of suspension. But the tribunal decided on erasure.

Analysing the issues raised by the appeal, Fordham J said, at [32]-[45], that the tribunal was not wrong in deciding on the sanction of erasure, which was appropriate and necessary in the public interest. At [35], the judge said:

> It is quite right that the role played by Dr Sun's mental condition in relation to the Conduct was at the heart of this case. The Tribunal appreciated that. But there was a key point - in the Tribunal's assessment – about what that role was <u>not</u> [Emphasis in judgment]. The tribunal rightly explored this at the hearing and emphasised it in the Determinations. The key point was that all the evidence and argument, regarding Dr Sun's conduct being 'affected by her mental health condition', did not extend to any sustainable suggestion that Dr Sun's mental health had led her to misappreciate what she was doing. Dr Sun knew what she was doing. She had the actual state of knowledge and belief which made the entirety of the Conduct 'misconduct'. She had the actual state of knowledge and belief which made the 13 incidents 'dishonest'. There was no mental health distortion capable of defending, excusing or exonerating any of the Conduct. That was a central point made by the GMC. It was a central point accepted by the Tribunal. To take each of the 13 incidents, the Tribunal found that Dr Sen wrote those untruthful communications on all 13 occasions, she did so knowing and understanding that what she was saying was false. As the Tribunal recorded, Dr Sun: *knew what she was saying was false, but she said it anyway.* The key point was therefore this. Dr Sun's mental health condition did not alter the character of the 'misconduct'. It did not excuse or exonerate. This was carefully explored by the Tribunal, whose conclusions were clear and fully justified. As [counsel for the GMC] put it in her oral submissions, the recognition of this key point 'fundamentally changed the exercise' in evaluating the evidence relating to the mental health condition.

The judge went on to say, at [40], that the evidence about Dr Sun's mental health condition could not bear the weight of making a substantial difference to the key evaluative assessment of the appropriate and necessary sanction in the public interest, by reference to the two applicable limbs (b) and (c) of the statutory overarching objective in section 1(1B) of the Medical Act 1983. At [41], the judge said that there was no substance in the criticism of the tribunal in identifying Dr Sun's mental health as a 'relevant mitigating factor' while concluding that it 'did not significantly mitigate her behaviour'. Whether a factor can be identified as a relevant mitigating factor is one question. The appropriate

weight to be given to such a factor, once identified, is another. Moreover, the idea of 'mitigation' needed to be approached remembering that the tribunal was not exercising a punitive jurisdiction, but a prospective assessment of fitness to practise applying the public interest imperatives of the statutory overarching objective.

Adil v. General Medical Council [2023] EWCA Civ 1261, [2023] EWHC 797 (Admin)

Human Rights – Article 10 – social media and professional conduct – Covid 19 pandemic – doctor promoting baseless and dangerous views on YouTube – disciplinary proceedings and 6 month's suspension justified

Between April 2020 and October 2020, the appellant, a locum consultant colorectal surgeon, appeared in videos on YouTube in which he made statements about the Covid 19 pandemic. What he said was to the effect that the SARS-CoV-2 virus did not exist; that the pandemic was a result of a conspiracy between the United States, the United Kingdom and the Israeli governments to impose a new order, and was being exploitered for profit by pharmaceutical companies, reputable medical organisations, and Bill Gates. He further contended that Mr Gates had infected the world with SARS-CoV-2 virus in order to sell vaccines that would be given to all, by force if necessary, that might contain microchips to further the agenda of 5G mobile technology, and would be used to control or reduce the world's population. Dismissing the appellant's appeal against the finding of impairment and sanction of suspension for six months: [2023] EWHC 797 (Admin), Swift J said that all this was outlandish. Taking account of *Good Medical Practice* and the GMC's Social Media Guidance it was or should have been reasonably foreseeable to the appellant that his actions might conflict with professional standards set by the GMC. Maintaining the good-standing of the medical profession was, for the purposes of article 10(2), pursuit of a legitimate objective. It was clearly open to the tribunal to conclude that the appellant's remarks, presented by him on the basis of his medical credentials, were likely to diminish public trust in the medical profession. The article 10 right is a qualified right. Exercise of the right to freedom of expression may be restricted when necessary in the interests of public safety, and for the protection of public health, and for the protection of others. Each of these legitimate objectives was material to the tribunal's consideration of the appellant's YouTube videos. The decision on sanction was entirely consistent with the Sanctions Guidance.

The Court of Appeal dismissed the doctor's further appeal: [2023] EWCA Civ 1261. Giving the lead judgment, Popplewell LJ (with whom Bean and Dingemans LJJ agreed) said that by using his professional medical credentials, the appellant's views were intended to, and likely to, engender more credence than if expressed by a layman. The key aspects of the appellant's conduct was that his views were (a) baseless and (b) dangerous. There was an important qualitative difference between a doctor's views which have some supporting scientific basis, even if not widely accepted, and views whose validity or accuracy is unconnected to any supporting evidential medical basis, in other words baseless. In the instant case, the appellant's views that the virus and disease did not exist, that the pandemic was caused by conspiratorial engineering and manipulation by the UK/USA/Israel/Bill Gates, and that vaccines were intended to serve commercial and world domination purposes not medical purposes, were baseless. Further, the court agreed with the tribunal that the appellant's views were likely to undermine public health and safety. They were dangerous, both in relation to social behaviour and in relation to vaccination. There was little doubt that sanctioning the appellant for misconduct was in pursuit of the legitimate article 10.2 aim of protecting public health and safety, and was proportionate: [51]-[72]. Further, it was clearly foreseeable from the GMC's published guidance that using one's status as a doctor to promote views on social media which are baseless and damaging to patient health would be regarded as misconduct and attract disciplinary sanction: [73]-[81].

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Marion Simmons QC Essay Prize 2024

ARDL is delighted to announce that the annual Marion Simmons QC Essay Prize is now open to entrants.

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- solicitors who qualified in the UK and who have been so qualified for fewer than three years;
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- 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 26 April 2024** by email to: ARDL@blakemorgan.co.uk. Please confirm your eligibility to enter in the covering email.

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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