ARDL

Association of Regulatory and Disciplinary Lawyers

Quarterly Bulletin Spring 2024

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ARDL is very saddened to hear of the death of Mary O'Rouke KC. A full obituary will appear in the ARDL Quarterly Bulletin Summer 2024.

Chair's Introduction

Welcome to the Spring Bulletin 2024.

In these first 30 days since I became ARDL Chair on 22nd April 2024 ARDL has successfully held the 20th ARDL Dinner, signed-up to march in London Pride 2024, and has now published this Spring ARDL Bulletin. As I said in my speech at the ARDL Dinner it is for the ARDL Membership that the Committee are working: Kenneth Hamer (Henderson Chambers) and Charlotte Blackborn (Capsticks) publish the bulletin to draw to your attention the latest authorities and commentary; Kate Steele (Capsticks), Fiona Muir (Blackadders), Lauren Griffiths (MDDUS) and Duncan Toole (Office of Students) arranged the dinner so that ARDL members can convene and network; Laura Short (Capsticks) arranges the mentoring scheme so that junior members feel supported; and the entire Committee seek to promote EDI events so members who associate with various groups feel included.

I am grateful to the work of the entire Committee. However, special thanks needs to go out to Rachel Birks (Ward Hadaway) who has worked tirelessly as ARDL Chair over the last two years. Rachel has been instrumental in establishing the ARDL Conference, which is now a cornerstone of the ARDL calendar, and has sought to promote member inclusion across the country by creating ARDL Ambassadors to help arrange events. An excellent example of which was the Manchester Seminar and Supper: "Dealing with Regulator and Registrant Submissions in Interim Order Hearings", with speakers Iain Simkin KC (Deans Court Chambers) and Michael Rawlinson (2 Hare Court), chaired by

Sarah Ellson (Fieldfisher).

Turning to the 20th ARDL Dinner, this was a great success with Lady Justice Nicola Davies, as guest speaker, concentrating on some of the highlights of her career at the Regulatory Bar, and how she utilised this experience, for example in the Cleveland Child Abuse cases and her involvement in the Bristol Heart Surgeons Inquiry, first to take Silk, and then from there to take Judicial office. It was a speech resplendent with impressive personal achievements but also highlighting that it is possible for those other than from the most privileged backgrounds to succeed. Her Ladyship also spoke of the excellent work of the Inns of Court Alliance for Women, which has brought together the four Inns to support female legal professionals. A theme which is common to other ARDL events this year.

Since the last ARDL Bulletin was published in Winter 2023, ARDL has arranged: a bite size Zoom Webinar: "Transgender pupils: navigating the current regulatory landscape" with Alice de Coverley (3 Paper Buildings) chaired by Duncan Toole; a Zoom Webinar: "Lucy Letby Inquiry and the need to bolster accountability" with Kevin Dent KC and Alecsandra Manning-Rees (both 5 St Andrews Hill), chaired by Lauren Griffiths; "Private life and public confidence: a healthcare professional regulation case study" with speaker Clare Strickland (Blake Morgan); and the "Financial Services Regulation Update" with James Alleyne (Kingsley Napley) as speaker, and Richard Coleman KC (Fountain Court) as chair.

For more junior ARDL members, Laura Short chaired a Junior ARDL round-table discussion and networking event with speakers Clare Strickland, Leanne Silvestro (Nursing and Midwifery Council), Tim Grey (Old Square Chambers) and Tope Adeyemi (33 Bedford Row); and Duncan Toole chaired the Student Seminar – "FtP, duty of care, sexual misconduct and all things in between" with speakers Shannett Thompson and Alfie Cranmer (both Kinsley Napley).

Finally, and by no means least, a host of inspiring female speakers, chaired by Kate Steele, delivered Inspiring Inclusion in 2024: Celebrating International Women's Day Building connections with ARDL – Discussion, Learning and Empowerment – "career challenges and tips for success". Melinka Berridge (Kingsley Napley) spoke on organisational culture; Jocelyn Ledward (QEB Hollis Whiteman) on the challenges for women applying for Silk and for those working in the field of professional discipline; Lucy Kinder (9BR Chambers) on authenticity in the workplace and returning to work after having a child; and Rachel Birks on career progression and utilising skills and knowledge to grasp opportunities. The event was well-attended by women willing to share their experiences, and the discussion afterwards demonstrated the supportive environment within ARDL.

Looking to future events, the ARDL Conference will take place on 8th November 2024, and the Scotland Winter Supper has been arranged for 21st November 2024. More imminently, ARDL will march this year at London Pride, on 29 June 2024. Those who wish to attend can sign-up through the ARDL website. Entry is free to members but places are limited.

At the ARDL Dinner I thanked people for their attendance, commitment and support. I wanted to echo that in my first introduction to the ARDL Bulletin because it is the collaborative nature of this association, everyone working together as part of the team, which will ensure that we continue to grow ARDL over the next 20 years.

Sam Thomas
2 Bedford Row

Dishonesty in Disciplinary Investigations: do you know it when you see it?

Honesty is a fundamental principle common to all regulated professions. The concept of a regulated profession is predicated on the basis that certain professionals are held to a "higher standard" than others and reflects the heightened level of trust and confidence which the general public place in such professionals.

For that reason, codes of ethics and conduct will

commonly require registrants to act with "integrity", in a way which is "straightforward", "truthful", or "honest". That expectation of fair and honest dealing has permeated even further, and is often included in the codes of ethics for professional membership bodies more widely.

While the specific wording of the honesty requirement may differ by professional body, it is standard practice for regulatory/membership bodies to look to the common law definition of dishonesty to inform their disciplinary approach. That definition has evolved over time, and the generally accepted test is that as set out in the well-known case of *Ivey* v *Genting Casinos* [2017] UKSC 67. That test was reaffirmed in the more recent criminal case of *R* v *Barton and another* [2020] EWCA Crim 575.

The *Ivey* test contains two parts; a subjective element and an objective element. Firstly, the fact-finder must ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. Secondly, the fact-finder should consider whether the conduct in question was honest or dishonest by applying the (objective) standards of ordinary, decent people.

There are a couple of pitfalls for investigating teams in applying this definition in the context of a disciplinary investigation, which can sometimes create a reluctance to include dishonesty within the charges put to the member.

Firstly, there is the danger of applying the wrong standard (objective vs. subjective) to the wrong part of the test. In terms of determining the member's understanding of the facts (i.e. the first part of the *Ivey* test), whether or not the belief was reasonable should not, in and of itself, be determinative; the crucial question is whether that belief was genuinely held by the member. In this way, ignorance can, in the right circumstances, be an excuse. This does not mean that the credibility of the member's understanding cannot be tested – it certainly should be, based on the evidence available. By the same token, in terms of whether the conduct would be considered dishonest (i.e. part two of the test), it is not relevant to consider whether the member themselves (subjectively) considered their conduct to be dishonest. Fact-finders should not be dissuaded from pursuing a charge of dishonesty simply because there is no "smoking gun" which shows that the member considered that they were behaving in a dishonest way. This was the legal position under *R* v *Ghosh* [1982] QB 1053, but this has since been expressly overturned. The relevant standard to apply is the objective standard of ordinary, decent people. A sensible development as, if the subjective mindset of the member was determinative, the lower the ethical standards of the member, the easier it would be for them to escape a charge of dishonesty.

Another common difficulty for fact-finders is establishing, with the requisite degree of certainty, the subjective understanding or belief of the member being investigated. There will often be an evidential challenge in satisfying this first element of the *Ivey* test, with the only available evidence being the testimony of the member themselves. However, it may be possible to obtain additional evidence which helps inform the assessment of whether the belief was genuinely held. One of the simplest ways to do this is to point to a clear objective obligation or standard, which the member was aware of and failed to meet. For example, if a member was clearly signposted to a set of written professional rules and obligations, and expressly confirmed their understanding of these obligations, this will seriously undermine the credibility of any argument that they did not understand the responsibilities incumbent on them. In cases like this, it is possible to infer that this is so unreasonable that it cannot have been the genuinely held belief. Importing this objective concept of reasonableness into the subjective first element of the test can be a difficult balance to strike, but is often necessary in the absence of first-hand evidence of the member's understanding.

What about a case where the evidence is not strong enough to confirm that the member categorically *knew* of wrongdoing, but does indicate that the member suspected something was amiss and deliberately turned a blind eye? In these cases, a charge of dishonesty might still be appropriate. The doctrine of "blind-eye knowledge" allows a fact-finder

to infer actual knowledge from (i) the existence of the member's suspicion that certain facts may exist and (ii) a conscious decision not to take any further steps to confirm the existence of those facts (*Group Seven Ltd* v *Notable Services* [2019] EWCA Civ 614; *Manifest Shipping Co Ltd* v *Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 AC 469; *Twinsectra Ltd* v *Yardley* [2002] 2 AC 164). It is not enough simply to show that the member negligently failed to investigate a matter which they ought to have (this would better support a competency-related charge); the evidence must point to both a suspicion and a conscious decision not to investigate. When considering how to demonstrate blind-eye knowledge, one possibility is to look to the member's contemporaneous notes or communications with third parties; if the member noted a concern or raised a query, but there is no evidence that this was addressed or subsequently followed up, this could suggest that the member held a suspicion but decided not to probe further into whether that suspicion was justified.

Turning lastly to what is meant by the objective standards of "ordinary, decent people". Clearly, standards of honesty vary across the population and across industries, but for the purpose of this test, the fact-finder must put themselves in the position of a reasonable, honest member of the public. It is important that the objective standard applied is that of society as a whole, not of a more narrowly-focused market or profession. For example, in *R* v *Hayes (Tom Alexander)* [2018] 1 Cr. App. R. 10, a banker accused of conspiracy to defraud was unsuccessful in arguing that the jury should measure his conduct against an objective standard for a market or a group of traders, instead of the ordinary standards or honest and reasonable people. This was firmly rejected, on the basis that allowing a market or industry to set the objective standard of dishonesty would "gravely affect the proper conduct of business".[1] The Court of Appeal referenced the damage which can be caused when markets abandon the standards of honesty held by ordinary, reasonable people. This interpretation of the objective standard of honesty should act as a deterrent to professionals – and wider markets – from adopting practices which stray from the societal norms of honesty.

Whether to include a charge of dishonesty in the context of a disciplinary allegation will ultimately be a matter of professional judgment for the fact-finder. Of course, evidential challenges will endure in any matter which requires an investigator to look beyond the member's actions and consider the member's knowledge at the time. However, as demonstrated by the evolving case law, the member's mindset is not the only factor to consider. The final, determinative factor will be whether the ordinary, decent member of the public would consider the conduct to be dishonest. This is significant, and appropriate, given that the purpose of a dishonesty charge is to protect the public from professionals who have breached the enhanced level of public trust and confidence which they enjoy.

Rebecca Roberts
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Burness Paull LLP

Vetting Clearance verses Police Misconduct Proceedings

Those of us that are involved in cases of police misconduct will likely have had little if anything to do with the Unsatisfactory Performance Procedure ('UPP') found in the Police (Performance) Regulations 2020 because the UPP Regulations fall within the employment law jurisdiction rather than misconduct. This is however, changing.

In July 2023, Parliament adopted a new Vetting Code of Practice, presented to it by the College of Policing. Paragraph 5.10: *'Following the conclusion of misconduct proceedings that result in a sanction other than dismissal, an individual's vetting clearance will be reviewed .. This review can result in the clearance being:*

- *Granted*
- *Granted with conditions*
- *Downgraded (with or without conditions)*

[1] Paragraph 32

- *Declined*

If a person working in policing is unable to hold the required vetting clearance to perform their role, the force will consider an alternative suitable role with a lower level of vetting clearance. If such a role is not available or clearance cannot be granted at the lowest level, the individual will be subject to dismissal proceedings, as vetting clearance is a requirement of their role.'

If we take a working example: My client is a long-standing police officer and in 2023 when they appeared before a Misconduct Panel, the factual allegations were found proven and the Panel determined misconduct (not gross misconduct) and the officer was given a final written warning. My client returned to work. The police force, in line with the new Vetting Code of Practice reviewed my client's vetting clearance and decided that there was a continuing risk of repeat behaviour and declined the clearance. The Police Misconduct Panel specifically stated in their written reasons that they had not regarded my client as posing any risk to colleagues or to members of the public. Having had their vetting clearance removed, the officer was informed that they cannot enter any police building in the police force unsupervised and the officer has no access to police computer systems.

This is when the UPP Regulations apply because the officer was subsequently invited to a UPP meeting to consider (by a panel of three people all employed by the police force), whether the officer is 'grossly incompetent' on the basis that they cannot perform their role. The UPP Regulations are (arguably) designed to address under-performing rather than the removal of vetting clearance but nevertheless, it is these Regulations that apply.

Where 'gross incompetence' is found the outcome for the officer, according to the UPP Regulations will be,

- Dismissal
- Redeployment to alternative duties
- Reduced in rank
- Exceptionally, final written improvement notice

In reality, where the force has identified when carrying out the vetting clearance review that the officer poses a continuing risk, the likelihood is that dismissal will be the only appropriate and proportionate outcome.

What this means is that where a Misconduct Panel has determined that dismissal is not appropriate or proportionate, the officer may well be dismissed in any event because a review of their vetting clearance has removed the clearance and they can no longer do their job.

The lawfulness of the process has been and will likely continue to be challenged. My client's hearing was recently adjourned for an unrelated reason, but this was after I had made lengthy submissions on whether the Panel could satisfy themselves that it was a lawful procedure and did not undermine the police misconduct regime. On 10 May 2023, the High Court heard a Judicial Review application on this very subject in *R (on the application of Alice Victor) v Chief Constable of West Mercia Police Claim No: 2142/2022.* A probationer Police Officer received a final written warning from a Misconduct Panel and subsequently had her vetting clearance removed and was dismissed. Included in *Victor* was recognition of the following,

- The Police Officer was a probationary officer (and different rules and regulations apply).
- The judgement was confined to the context of admitted misconduct.
- There is a need to give primacy to the Misconduct Panel outcome, consider their conclusions carefully and not depart from them lightly.
- There is no blanket conclusion to be drawn in all cases that vetting-based decisions are always lawful in a case of misconduct.
- Whether vetting dismissal will be lawful will depend on the individual circumstances.

This is a huge area to discuss as you can imagine, and I have only referred to some of the issues. As always with police misconduct, the vetting clearance review process involves a balance of public protection and fairness to the individual. It will be interesting to see whether the vetting clearance

process is permitted to continue once the inevitable challenges occur, particularly as the current questions being raised include, is the process fundamentally flawed because it sits in direct conflict with the police misconduct regime?

Jennifer Ferrario
9 St John Street Chambers

Legal Update

***Mansaray v. Nursing and Midwifery Council* [2023] EWHC 730 (Admin)**

Hearsay evidence – contemporaneous handwritten notes made by NMC investigator

The appellant was employed as a Band 5 clinical nurse specialist on an acute in-patient ward at Highgate Mental Health Centre. Patient A was placed in the ward under section 3 of the Mental Health Act 1983, and the appellant was assigned to him as his keyworker. The appellant faced 13 disciplinary charges including breaches of professional boundaries and engaging in sexual activity with Patient A following his discharge from the ward. On referral of allegations of misconduct by the appellant's employer to the NMC, Ms Uzma Mahmood was appointed investigator and, as part of her investigation, on 23 August 2019 she spoke to Patient A about his relationship with the appellant. At the interview, Patient A said that he had been to the appellant's house on a couple of occasions and they had engaged in sexual activity. Following a break in the interview when Patient A appeared uncomfortable the allegations of a sexual element to the relationship were not repeated by Patient A and he became disengaged and the interview concluded. Patient A subsequently took his own life. During the interview, Ms Mahmood had taken brief handwritten notes. Patient A had had a diagnosis of paranoid schizophrenia, mixed personality traits and substance abuse issues at the time of the events. The appellant did not dispute breach of professional boundaries and most of the allegations were admitted by him. At the heart of the dispute was whether the relationship between the appellant and Patient A was sexual or sexually motivated, as alleged by the NMC, or based on altruism, friendliness and care as suggested by the appellant. On the first day of the hearing, the NMC applied to admit as hearsay the evidence of Ms Mahmood's contemporaneous handwritten notes and her witness statement. The application was successful. The committee went on to find the allegations proved and made an order striking the appellant's name from the register. Dismissing the appellant's appeal, Stacey J said:

> 42. The law on the admissibility of hearsay evidence is not in dispute. Both parties rely on *Thorneycroft v. NMC* [2014] EWHC 1565 (Admin) at paras. 45 and 56. The admission of the statement of an absent witness should not be regarded as a routine matter. The Fitness to Practise Rules require the panel first to consider the issue of relevance and fairness in determining the issue of admissibility of hearsay evidence. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to an objection to the admissibility of evidence.
>
> 43. The existence (or not) of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires a panel to make careful assessment, weighing up the competing factors. To do so, the panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The panel must be satisfied either that the evidence is demonstrably reliable or, alternatively, that there will be some means of testing its reliability.

> 44. The *Thorneycroft* judgment goes on to indicate the considerations to be taken into account by a panel when determining the issue of admitting hearsay evidence at paragraph 56.

In the present case, the judge said that the appellant's central criticism was that the hearsay evidence was neither demonstrably reliable nor capable of being tested. However, and notwithstanding the mental health problems of Patient A, there was nothing to suggest that he was lying or giving an inaccurate account about what happened with the appellant, especially in light of the weight of the corroborating features and circumstantial evidence. He had no motive to lie. The committee concluded that although Patient A was the only direct witness, which is not unusual in sexual allegations, much of the circumstantial evidence was corroborative and supportive, such as text messages, the admitted allegations and the evidence of Patient A's parents who had made a complaint to the Trust. Patient A made significant initial disclosures, he then became anguished and uncomfortable and, after a break, did not repeat them. Significantly however, he did not retract them. The evidence of Patient A was entirely consistent with the other evidence, apart from that of the appellant, whose evidence was implausible, inconsistent and had a number of provable inaccuracies. The appellant's behaviour was only explained by a sexual motivation and grooming behaviour leading to sexual behaviour towards a very vulnerable, former patient to whom he had been entrusted as a keyworker.

Imani v. General Dental Council [2024] EWHC 132 (Admin)

Hearsay evidence – document compiled with data of treatment to patients – original claim forms shredded – whether fair to registrant to admit evidence

The appellant appealed against the decision of the PCC suspending her registration as a dentist for 12 months. The PCC found that the appellant had caused or permitted claims to be made for NHS dental work at her practice relating to treatment to patients that had not in fact been provided as claimed. In total, the PCC found that in 23 instances her conduct was inappropriate and misleading and that in nine of those instances her conduct was dishonest. The GDC relied upon a document which set out in tabular form data relating to claims made by the appellant in respect of treatment concerning 20 patients. The document and spreadsheets which set out the claims data were drawn from records and prescribed forms submitted to NHS England of the date of completion of each treatment. The appellant contended that it was hearsay evidence that in fairness to the appellant should not have been admitted or should have been excluded by the PCC. None of the original forms submitted by the appellant were available, as the forms were only retained for 14 months and then were shredded after they had been scanned. Dismissing the appeal, Heather Williams J said at [115]-[119] that the authorities have drawn no distinction between the 'interests of justice' criterion and the requirement of 'fairness'. The PCC's reasoning in admitting the evidence, or not excluding it, showed that in assessing fairness it had regard to and carefully balanced the relevant considerations that the parties had relied upon in their respective submissions; whether it was the sole evidence with regards to the allegations of dishonesty; that it was a business record and, as such generally admissible in regulatory proceedings (see rule 57 of the GDC (Fitness to Practice) Rules 2006 and section 9 of the Civil Evidence Act 1995); the reliability of the information; whether the appellant would have the opportunity to challenge the evidence; and why the original forms were no longer available. The PCC was given a clear direction by the legal adviser, accurately reflected by the authorities, to the effect that the evidence must either be demonstrably reliable or capable of being tested. At [126] the judge said that the ability to test the evidence was characterised in *Thorneycroft* as an *alternative* basis for admitting hearsay evidence, if the panel was not satisfied of its reliability. Here, the PCC was satisfied as to the reliability of the data and, in any event, the PCC was entitled to take into account, as it did, that the appellant was able to present her

own detailed evidence about each of the patients and treatments, that she was able to rely upon the relevant dental records, and that she was assisted by the detailed reports and evidence of an expert. The present case was quite different from the situations in *Ogbonna, Bonhoeffer* and *Thorneycroft* where heavily contested witness evidence, central to the case and whose reliability (and in some instances, honesty) was seriously in question, was admitted in documentary form.

Seiler, Whitestone and Raitzin v. Financial Conduct Authority [2023] UKUT 133 (TCC)

Integrity – correct approach to integrity in financial services – whether applicants acted recklessly.

On 23 June 2021 the FCA (the Authority) through its Regulatory Decisions Committee, issued decisions notices to each of the applicant employees of the Julius Baer group of companies. The applicants referred the decision notices to the Upper Tribunal. The subject matter of the references was the conduct of the applicants in respect of arrangements entered into by Bank Julius Baer & Co Ltd with an individual connected with the Yukos group of companies, pursuant to which he would receive 'finder's fees' for introducing companies within the Yukos group to banks within the Julius Baer group of companies. The Authority alleged that Julius Baer's conduct in its relationship with the Yukos group demonstrated a lack of integrity, and that it must have appreciated the clear risk that by entering into the arrangements it might be facilitating or participating in financial crime. The Authority's case was that the applicants acted without integrity because they recklessly failed to have regard to relevant risks, being aware of those risks. The risks included that the finder's arrangements included the individual concerned being conflicted in his advice to the Yukos group companies and to the banks, that the arrangements would facilitate the improper diversion of funds from the Yukos group companies, that the arrangements were not in the interests of those companies, and that there was no proper commercial rationale for payment of the finder's fees by Julius Baer. Following a lengthy hearing the Upper Tribunal (Judge Timothy Herrington, chair) decided that the Authority had not made out its case that the applicants acted recklessly and consequently with a lack of integrity in relation to the subject matter of the references. The tribunal said that the correct legal approach to the concept of integrity in the financial services regulatory context was summarised in *Page and others v. FCA* [2022] UKUT 124 (TCC), at [56]-[59], adopting the summary of the relevant case law in *Tinney v. FCA* [2018] UKUT 345 (TCC), at [10]-[11] and *Forsyth v. FCA and PRA* [2021] UKUT 162 (TCC), at [40]-[44]. For the purpose of the present case, the following points were relevant:

1) There is no strict definition of what constitutes acting with integrity. It is a fact specific exercise.
2) Even though a person might not have been dishonest, if they either lack an ethical compass, or their ethical compass to a material extent points them in the wrong direction, that person will lack integrity.
3) Acting recklessly is another example of a lack of integrity not involving dishonesty. A person acts recklessly with respect to a result if he is aware of a risk that will occur and it is unreasonable to take that risk having regard to the circumstances as he knows or believes them to be.
4) To turn a blind eye to the obvious and to fail to follow up obviously suspicious signs is a lack of integrity.
5) There are both subjective and objective elements to the test of what constitutes a lack of integrity. The test is essentially objective but nevertheless involves having regard to the state of mind of the actor as well as the facts which the person concerned knew.

Lambert-Simpson v. Health and Care Professions Council [2023] EWHC 481 (Admin)

Social media and professional conduct – racially motivated post – act in question has racial purpose and shows hostility or discriminatory attitude towards racial group

This case was about social media posts which led to

the appellant, a registered psychologist, being suspended by the HCPC for four months with a review. The panel found that the appellant posted three 'inappropriate' and/or 'offensive comments' and/or posts on his social media account, of which one was 'racially motivated', and that his fitness to practise was impaired by reason of misconduct. Dismissing the appellant's appeal against impairment and sanction, Fordham J said, at [21], he agreed that the present case was distinguishable from *Professional Standards Authority for Health and Social Care v. General Pharmaceutical Council and Ali* [2021] EWHC 1692 (Admin), where the registrant 'used antisemitic words' in a speech which called for an objective test based on the words used, and whether the words used were racist. In the present case, the allegation was framed in terms of 'racial motivation' which depended on the registrant's intention, and the panel needed to consider the registrant's state of mind.

After considering the transcripts of the panel hearing, the judge said there were key features showing that the post in question was racially motivated. The judge said, at [24 (iii)], he agreed with counsel for the HCPC that when an 'inappropriate' and/or 'offensive' comment will be 'racially motivated' had really two elements: (1) that the act in question (here the posting of the content) had a purpose behind it which at least in significant part was referable to race; and (2) that the act was done in a way showing hostility or a discriminatory attitude to the relevant racial group. The panel's findings involved being satisfied as to these elements.

Gleeson v. Social Work England [2024] EWHC 3 (Admin)

Aggressive emotional abuse – non-professional mutually volatile relationship – whether serious misconduct – whether behaviour crossed dividing line between argumentative conduct and disgraceful behaviour affecting public's confidence in individual or profession

The grounds of appeal included that the respondent was wrong to find that the appellant's emotional conduct, in a non-professional relationship with Person A, was professional misconduct. Person A had no connection with the appellant's profession or employment as a social worker. The panel found proved that between 2012 – 2015, while registered as a social worker, the appellant often became aggressive towards Person A. His Honour Judge Stepehen Davies (sitting as a High Court judge) held that the findings made in relation to Person A were procedurally unfair and wrong and should be quashed.

At [99]-[109] the judge said that strictly speaking the ground of appeal that emotional conduct, in non-professional relationships, cannot amount to serious professional misconduct did not arise for consideration. However, it had been argued and the court should address it. It has always been recognised that misconduct may qualify as serious professional misconduct even though committed in the professional's private life, so long as it has a sufficient impact on the practitioner's professional reputation or that of the profession as a whole; see *R (Remedy UK Limited) v. General Medical Council* [2010] EWHC 1245 (Admin) at [37]. This was echoed in relation to social workers by Standard 3 of the respondent's professional standards current at the time of the allegations: 'You must keep high standards of personal conduct, as well as professional conduct. You should be aware that poor conduct outside of your professional life may still affect someone's confidence in you and your profession'. In *Beckwith v. Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) the court made clear that it was necessary to focus on the particular statutory and regulatory provisions applicable to the particular profession, rather than attempt some universal statement of principle. However, they did draw attention to the need to hold members of a profession to a higher standard on some matters, while not falling into the trap of requiring members of that profession to be paragons of virtue in all matters (paragraphs 30 and 34). In that case, principle 6 required solicitors to 'behave in a way that maintains the trust the public places in you and in the provision of legal services'. Similar principles must apply to Standard 3 or comparable standards in the case of a social worker. Members of

the public would be particularly concerned about emotionally abusive or aggressive behaviour by a social worker in their private life, but it does not necessarily follow that social workers are required to be paragons of virtue in their private life in relation to all their relationships with all other people, including consensual relationships with adults of full capacity. Applying those principles to the facts of this case, it is readily apparent that the panel was entirely justified in enquiring into the allegations on the basis that they were capable of amounting to serious professional misconduct. However, equally, the panel had to be careful to ensure that they did not get drawn into exceeding the ambit of their jurisdiction as regards their findings. The tribunal fell into error in making adverse findings in relation to general and unparticularised allegations of aggressive behaviour, and in relation to two incidents in 2012 and 2015, in the absence of clear reasoned findings, that such behaviour crossed the dividing line between conduct of which most people would not approve and conduct which was so disgraceful as to affect the public's confidence in the individual social worker or in the overall profession. Standing back only one incident reported to the police really provided support for an allegation that the conduct crossed the line between argumentative conduct in the context of a mutually volatile relationship, and being aggressive in a way that might impact on the professional reputation of the appellant and/or the profession as a whole.

Solicitors Regulation Authority v. Williams [2023] EWHC 2151 (Admin)

Anonymity of persons mentioned in tribunal decision – solicitor's clients identified in SDT judgment – names of clients anonymised in rule 12 statement – entitlement of clients to anonymity – legal professional privilege

The SRA appealed, pursuant to section 49(1) of the Solicitors Act 1974, the decision of the SDT refusing to make an anonymity order under rule 35(9) of the Solicitors (Disciplinary Proceedings) Rules 2019 on the grounds of legal professional privilege (LPP) in respect of several former clients of the respondent solicitor. The names of the clients and their property affairs were involved in disciplinary proceedings against the respondent. The allegations against the respondent in the rule 12 statement included that he had caused transfers to be made of money belonging to individual clients without their consent, and had created, or caused to be created, false documentation relating to certain clients. The rule 12 statement used letters to anonymise the persons and addresses referred to, and the names and details were given in an anonymisation schedule appended to the rule 12 statement. At the conclusion of the hearing the SDT announced that the charges were found proved and struck off the respondent. The SRA submitted that the SDT erred in law in not making the anonymisation order it sought and identifying the clients in its judgment.

Allowing the SRA's appeal, Julian Knowles J said the SRA's submissions on LPP were soundly based, namely, that the SDT failed to have regard to the public interest in maintaining LPP and that LPP is a fundamental right which cannot be overridden where it applies; see *Anderson v. Bank of British Columbia* (1876) 2 Ch D 644, 649; *R v. Derby Magistrates' Court ex parte B* [1996] AC 487, 507; *Balabel and anor v. Air India* [1988] Ch 317, 330D, 332E. Moreover, LPP cannot be overridden by some competing public interest and Parliament can only override it by express words or necessary implication: *R (Morgan Grenfell & Co Ltd) v. Special Commissioners of Income Tax* [2003] 1 AC 563. The principles of open justice are not equivalent to a statutory provision justifying a departure from LPP. The court said that in addition the SDT misdirected itself as to the effect of *Lu v. Solicitors Regulation Authority* [2022] EWHC 1729 (Admin). *Lu* was not a decision about LPP. The claims for anonymity in that case were concerned with interests other than LPP. Further, a claim for LPP does not involve the balancing of competing interests such as a client's right to the confidentiality of communications with his solicitor and the broader interests of justice requiring disclosure. LPP either applies or it does not. Where it applies, then it is absolute unless it is waived by the client.

Mond v. Insolvency Practitioners Association **[2023] EWHC 477 (Ch)**

Privileged material disclosed for determination of preliminary issue – whether disclosure waived for purposes of substantive hearing

The claimant was an insolvency practitioner licensed by the defendant to accept appointments as supervisor of individual voluntary arrangements (IVAs). Following a hearing before the defendant's disciplinary committee in May 2018, at which he was represented by counsel, three allegations of a complaint were found proved concerning the claimant's role in various IVAs in creating a scheme designed to avoid the requirement to obtain creditor approval for certain payments out of IVA estates. The disciplinary committee imposed a severe reprimand, a fine of £500,000 and a costs order of £208,369.51. The claimant appealed to the appeal committee of the defendant. Having changed counsel he sought permission to amend his grounds of appeal to allege that his former counsel was unable to act in his best interests by reason of a serious conflict of interest. The claimant alleged that his former counsel had been heavily involved in advising on the setting up of the arrangements to which the complaint related. The claimant stated expressly that he was only waiving privilege for the purposes of the appeal and not beyond. On this basis the claimant disclosed over 200 documents comprising communications and notes between himself and his former counsel. The appeal committee allowed the appeal and set aside the sanction and costs order and remitted the complaint back to the disciplinary committee to be heard by a differently constituted panel. The parties were in dispute about how the privileged material before the appeal committee should be dealt with on the referral back of the complaint to the disciplinary committee.

The claimant issued proceedings for a declaration that he had not waived privilege as to the disclosed material. The defendant put in a defence, and applied for summary judgment on the basis that privilege had been waived. It was common ground that the subjective intention of the person disclosing privileged material was not of itself determinative in ascertaining the proper limits of any waiver. In deciding whether the claimant had a reasonable prospect of success in showing that privilege had been maintained, the court considered *B v. Auckland District Law Society* [2003] 2 AC 736, *Scottish Lion Insurance Co Ltd v. Goodrich Corporation* [2011] SC 534, *R (Belhaj and anor) v. Director of Public Prosecutions (no 2)* [2018] 1 WLR 3602, *British Coal Corp v. Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113, *Berezovsky v. Abramovich* [2011] EWHC 1143 (Comm), *Property Alliance Group v. Royal Bank of Scotland plc* [2015] EWHC 3272 (Ch), *Pickett v. Balkind* [2022] 4 WLR 88 and *Kyla Shipping Co Ltd v. Freight Trading Ltd* [2022] EWHC 376 (Comm). Holding that the test for summary judgment was not met, the court said that (1) in this case, the limits of the waiver were clearly and expressly stated, and the claimant's statement that it was limited to the appeal was not contested at the time or indeed at any stage of the appeal committee process; (2) the claimant disclosed the privileged material to vindicate his article 6 rights because he had not received a fair trial; it was not to obtain a litigation advantage; and (3) the further disciplinary committee hearing was capable of taking place without the privileged material. The claimant had a reasonable prospect of showing at trial that the declarations he seeks have practical utility if his submissions on limited waiver were right.

Kenneth Hamer
Henderson Chambers

Dutton Bursary 2024

Applications for the Dutton Bursary 2024 opened on 20 May and will close at midnight on 28 June 2024

The Dutton Bursary has been created by ARDL and named after former Chair of ARDL, Timothy Dutton, CBE, KC. Practising from Fountain Court, Tim has been ranked as the Star Individual by Chambers & Partners for Professional Discipline in London. As

well as being a former chairman of ARDL, Tim has served as chairman of the Bar Council, Leader of the South Eastern Circuit and Head of Chambers at Fountain Chambers. Open to aspiring regulatory and disciplinary lawyers or those already embarking on their career, The Dutton Bursary aims to provide opportunities for educational and career development and progression for individuals who might not otherwise be in a position to take up the opportunity.

Applicants do not need to be a member of ARDL; the only requirement is that applicants are under 5 years PQE/call. Examples of the types of cost that people might apply for assistance with include the fees for the new Solicitors Qualifying Exam, Bar Training Course or a relevant Master's degree, or for living expenses to stay away from home during a period of work experience. ARDL will also accept applications for funding for a ticket (£150) and associated travel expenses for attending the ARDL Annual Conference taking place on 8 November 2024 at the Museum of London. Applications will be accepted annually.

For further information about how to apply, please visit www.ardl.org.uk/bursaries.

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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