

# Professional Regulatory Spring seminar – regulatory case update

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## Miscellaneous

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### Delay

#### ***R (on the application of Lloyd Subner) v Health Professions Council [2009] EWHC 2815 (Admin)***

The appellant, an operating department practitioner, was employed as an anesthetic practitioner. He faced three allegations before a committee of the HPC in relation to him having physically and verbally assaulted another member of staff, and having left work early without permission.

The appellant did not attend the hearing however an unsigned statement was submitted on his behalf and was taken into consideration by the committee. The committee found all three allegations proved and found that the allegations relating to the verbal and physical assault amounted to misconduct. The appellant was struck off.

The main ground of appeal was that the hearing did not take place within a reasonable time, amounting to a breach of Article 6.1 of the ECHR.

The court considered each respective stage of the regulatory proceedings followed by the HPC. In respect of the amount of time the Council had taken to send to the appellant notice requesting observations (just over one month), the court found that the Council plainly needed time to consider whether the allegations merited the next step in the disciplinary procedure, and that such a period of time was reasonable. The notice of referral was sent three days after the Committee met, which was also deemed to be reasonable. The court then went on to determine whether the period of time from the date upon which the complaint had been received by the Council, and the date upon which the lawyers had completed their investigation (approximately 18 and half months) was reasonable.

The court referred to the case of *Dyer v Watson [2004] 1 AC [2004] 1 AC 379*, where, at paragraph 52, Lord Bingham referred to the fact that the ECHR, in terms of delay, is directed not to departures from the ideal but to infringements of basic human rights and that the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. The court found that the period of time relevant in this case did not fall within the range that would cause real concern that a basic human right had been infringed. In any event the court found that there was a further "insurmountable obstacle" in that it is now established authority that a breach of Article 6 is not in itself a ground for striking out, setting aside, or quashing a decision. It is necessary to show that the unreasonable delay would not permit a fair trial to take place/fair trial had not been possible. In applying this principle to the present case, the court found that the appellant had failed to establish that a fair trial had not taken place. In particular the court noted that the witnesses were available, they had given contemporaneous statements, the appellant could have given evidence if he had chosen to attend, and he or his representative could have cross-examined the witnesses. There was no ambiguity in the Committee's findings or general approach.

A further point relied on in the appellant's skeleton argument was that the HPC had failed to call two witnesses. In dismissing this point the court found that there was no substance in such an argument as it was a matter for the HPC to decide what witnesses it wished to call. If the appellant wished to call further witness, then that was a matter for him.

The last ground of appeal considered related to sanction. The court found that the Committee had correctly directed itself in relation to the approach to be adopted and the need to consider the available sanctions in ascending order. The Court found that the Committee was also:

**"plainly correct to give considerable weight to the fact that the appellant had not attended, had shown no insight whatsoever into the seriousness of the findings against him and gave no indication whatsoever that he was minded in any way to embark upon remedial measures..."**

## Bias

### ***R (on the application of B) v Wolverhampton Youth Court (2009)***

The claimant appeared before Magistrates in relation to taking a pedal cycle without consent (he was 15 years of age at the time). Prior to the hearing the chairman recognized the claimant's name and on making enquiries (the legal advisor was asked to speak with the claimant's solicitor) it was confirmed that the chairman had taught at the claimant's school. The chairman had no personal dealings with the claimant whilst at the school.

There was a dispute as to whether the Magistrates had raised this issue prior to the hearing, with the claimant alleging that the chairman had not raised the issue prior to determining his case. According to the claimant, when the panel retired to consider the case, he informed his solicitor about the issue regarding the chairman.

The panel returned and found the claimant guilty of the offence. The claimant's solicitor raised the matter regarding the chairman having worked at the claimant's school and requested that the judgment be set aside and for the case to be considered by a differently constituted panel. That application was denied and the claimant sought judicial review of the panel's decision.

In dealing with the application for judicial review, the Court held that the fact that a magistrate had taught at the school where someone appearing before her had previously attended, was no bar to a Magistrate hearing the case. Irrespective of the account accepted in respect of whether the chairman raised the matter or not, the court found that a fair-minded observer would not conclude that there was a real possibility of bias.

## Service outside of jurisdiction

### ***GMC v Brauwers [2010] EWHC 106 (Admin)***

In accordance with section 41(A) and (7) of the Medical Act 1983, the GMC applied to the High Court for an extension of an interim suspension order for an additional period of 6 months, that order having originally been put in place on 18 July 2008.

The registrant was registered with the GMC as a visiting medical practitioner from a relevant European state in accordance with section 2(2)(b) of the 1983 Act. The registrant supplied an address in Germany as his contact address. The only other contact details the GMC had for the registrant were two email addresses and a mobile telephone number. The registrant is of German nationality, qualified in Germany and at the time of the GMC proceedings, appeared to be domiciled in Germany.

The GMC had attempted to serve the relevant papers in respect of the High Court application, on the registrant at his address in Germany via courier. Initially they attempted to serve the unsealed claim form and then a sealed claim form, but on both occasions the courier was unable to locate the registrant at the address. The GMC also emailed a copy of the papers to the registrant, receipt of which had been confirmed by the registrant. The registrant's

geographical whereabouts at the time of the High Court application were unknown. The only information the GMC had in this respect was that contained within a fax sent to the GMC dated 17 July 2008 in which the registrant stated that he would be working in Asia and the Pacific for a year from that date. Attempts to contact the registrant by mobile phone were unsuccessful.

When matters were initially referred to the Council, the Council invited the registrant to undergo an assessment regarding his competency and also in relation to his health. The registrant failed to respond to either invitation and upon being notified that the matters had been referred to a Fitness to Practise Panel, the registrant confirmed that he did not wish to engage with the Council in respect of its ftp proceedings.

In considering the application for an extension of the interim order in place, the Court highlighted that the GMC had not given proper consideration as to whether permission to serve out of the jurisdiction was required. The first question the court had to consider was whether the claim form could be served without permission out of the jurisdiction and, whether in the circumstances the claim form had been properly served, assuming it could be served without permission.

Counsel for the GMC argued that permission to serve a claim form out of the jurisdiction was not required either (a) in relation to medical practitioners domiciled in the EU by operation of Article 23 of Council Regulation (EC) 44/2001 (the judgment regulation) and/or (b) in relation to all registered practitioners not domiciled nor resident in England by operation of CPR Part 6.33(3).

HHJ Pelling QC rejected the argument regarding the "judgment regulation" on the basis that the judgment regulation has no applicability to a claim of this nature. Article 1 provides that the judgment regulation only applied to civil and commercial matters whatever the nature of the tribunal or court considering the matter. The court found that the effect of this provision was to exclude claims by public bodies in exercise of their public functions. Article 1(1) expressly excludes "administrative matters".

The court then went on to consider **CPR 6.33(3)** which, under the subheading "Service of the claim form where the permission of the court is not required – out of the United Kingdom" provides:

**"The claimant may serve the claim form on a registrant out of the United Kingdom where each claim made against the registrant to be served and included in the claim form is a claim which the court has power to determine other than under the 1982 Act or the Judgments Regulation, notwithstanding that-**

- (a) the person against whom the claim is made is not within the jurisdiction: or**
- (b) the facts giving rise to the claim did not occur within the jurisdiction"**

The above provision applied to claims brought under legislation implementing international conventions. HHJ Pelling QC found that the provision needed to be construed restrictively when determining whether it had any wider effect. A restrictive construction was necessary so as to avoid a situation whereby the provision would negate the protective effect of the requirement that permission be obtained before someone not domiciled in England could be brought before the court. Having regard to *Re Harrods (Buenos Aires Ltd) No2 [1992] Ch72* and *Re Banco Nacional de Cuba [2001] 1 WLR 2039*, the court found that to fall within the provision the enactment concerned must indicate on its face that it expressly contemplated proceedings against persons who are not within the jurisdiction of the court.

Counsel for the GMC argued that the requirement was satisfied by virtue of section 2 of the 1983 Act which contemplates expressly that the GMC register will include both visiting overseas doctor's lists, and the list of visiting medical practitioners from relevant EU states. It was further argued that this was to be read in conjunction with section 41A, which by implication creates a contemplation of a foreign element sufficient to satisfy the analysis.

These arguments were rejected by the HHJ Pelling QC who found that registering and regulating medical practitioners from other countries while described as "visiting" does not expressly contemplate proceedings being taken against such persons when they are no longer resident in the UK particularly in light of the fact that such doctors are likely to be regulated by their home regulator and/or the regulator of any jurisdiction to which the doctor has travelled after leaving the UK.

Having determined that the provisions of CPR 6.33(3) did not apply, the court then went on to consider whether the court had jurisdiction to grant permission to serve the claim under section 41A of the Medical Act out of the jurisdiction.

The court found that such jurisdiction exists by virtue of CPR 6.36 and paragraph 3.1(2) of the Part 6B Practice Direction.

Whilst normally permission had to be sought before proceedings were served, the court has the power to grant permission retrospectively. HHJ Pelling QC indicated that if it were necessary he would exercise his jurisdiction in favour of the claimant because there was no possible prejudice that the registrant could legitimately complain about.

The issue in the present case was the "real concern" that the registrant had not be served regarding the High Court application for an extension to the interim order. The courier had been unable to locate the registrant, and there were real doubts as to whether the registrant lived at the address at the time. In addition, there were doubts as to whether the leaving of such documents at the registrant's last known address constituted good service according to German law, assuming he was domiciled in Germany.

If the GMC wished to contend that the documents had been properly served by leaving them at the address they had for the registrant in Germany, the onus of establishing this rested on the Council. Whilst the documents had been sent to the registrant by email, and were received, there was no evidence that service by email was permitted by German law.

In such circumstances the court found that the only safe way forward was to assume that the registrant had not been validly served.

Applying the test set out in *GMC v Hiew [2007] EWCA Civ 369*, HHJ Pelling QC indicated that he was entirely satisfied that but for service, it would have been appropriate to extend the interim order, as the evidence served indicated that such an order was necessary for public protection and also in the public interest. The standard practice in relation to section 41 A applications involves the service of a claim form and particulars of claim together with evidence in support and applying for the extension at the first hearing. The court found that such standard practice ought to be adopted "in all but the rarest circumstances". HHJ Pelling QC went on to state:

**"However, there is nothing in the Medical Act 1983 or in the rules of the court or the court's practice which precludes an application for suspension being applied for before service of proceedings can be effective, at any rate where the circumstances of the case merit it and where the interests of the registrant can be adequately protected."**

However it was stressed that such a course would be a last resort and should only be resorted to where, despite all reasonable efforts, service of the claim form cannot be effective before the application has to be heard. Such applications would be rare and,

**"...will always have to be justified by reference to comprehensive evidence as to the steps taken to serve a registrant. A failure to effect service because of a failure to commence proceedings in sufficient time will normally not be a sufficient or permissible reason for adopting this course."**

In the present case the court recognized that the circumstances were very unusual. The registrant was domiciled abroad. Attempts to serve the registrant at his address had failed but notwithstanding that he had been given notice of the hearing by email, which he confirmed. The evidence in support of the application was substantively strong and the period of extension sought was relatively short. The court was also satisfied that this case had arisen due to the GMC having failed to appreciate the consequences of having to serve the registrant abroad in sufficient time. In such circumstances relief granted would ordinarily be confined to granting the GMC leave to serve out of the jurisdiction, leaving the GMC to effect service in accordance with that permission and then to consider the application on the merits once service had been completed.

In the present case HHJ Pelling QC went further due to the circumstances of the case, namely (a) notice of the hearing had been given to and received by the registrant albeit informally: and (b) the failure to extend the suspension may expose the public to risk. HHJ Pelling QC was also satisfied that the registrant was adequately protected in that a copy of the court's decision would be emailed to him and the order could be drafted in such a way so as to allow him to apply at short notice for the order to be varied or discharged.

In the circumstances, and in balancing the public interests against the interests of the registrant, the court ordered the following: (1) permission was granted for the GMC to serve proceedings on the registrant out of the jurisdiction either in Germany or elsewhere pursuant to paragraph 3.1(20)(a) of practice direction 6B; (2) the GMC had to file and serve a witness statement that complied with CPR 6.37 by no later than 4pm on a date to be fixed; (3) the ISO was extended until a date to be fixed; (4) the court will consider whether to further extend the order; (5) the registrant could apply on 48 hours notice, in writing, to vary or discharge the order; (6) a copy of the order was to be sent to the registrant at each of his email addresses and sent to his last known address in Germany by courier.

## Charges, Absent Witness, Unrepresented Registrant

### ***Ogbonna v NMC [2010] EWHC 272 (Admin)***

The appellant, a midwife, was found guilty of misconduct and made subject to a striking off order, and interim suspension order imposed for a period of 18 months. The 15 allegations against the appellant, all of which were found proved, related to the care that the appellant provided/failed to provide to a single patient, Patient A, during the 25 and 26 April 2005.

The appellant appealed on the following grounds.

- The amendment allowed to one of the allegations was prejudicial and should not have been allowed.
- The panel misdirected itself in allowing a statement of one of Council's key witnesses to be read in the witness' absence.
- The panel failed to have due regard to the fact that the appellant was unrepresented and disadvantaged in her position.
- The panel failed to give appropriate weight to the appellant's evidence (oral and documentary).
- The factual findings were unjust.
- The sanction was wholly disproportionate, excessive, unfair and unjust.
- The interim order was disproportionate.

### **Amendment to charge**

The Court dismissed this ground of appeal.

The original charge read as follows:

**"Failed to ensure that Patient A was made aware of and understood the nature of the care that she was receiving."**

The panel allowed the charge to be amended so that it read:

**"Failed to ensure that Patient A was made aware of and understood the nature of the invasive procedure to the pubic area which you carried out."**

In allowing the amendment the panel accepted that the purpose of the amendment was to clarify the nature of the charge. The Council had notified the appellant, in writing, of its intention to amend the allegation. The appellant argued that the amendment did not reflect the patient's original complaint and that there was no specific mention of this in the patient's first complaint. However the Court accepted that the purpose of the amendment was to clarify the allegation and in the circumstances it was an appropriate and fair amendment and one which could only assist the appellant.

### **Reading of witness statement**

This ground of appeal was allowed.

During the ftp hearing the Council made an application, pursuant to Rule 31 of the Nursing & Midwifery Council (Fitness to Practise) Rules Order of Council 2004, for the statement of one of the witnesses to be read in her absence. The basis upon which the application was made, was that the witness no longer lived in the country and now resided in Trinidad and Tobago. In making the application the Council relied on emails between the Council and the witness concerned. The Council had notified the appellant, in writing prior to the hearing, that it intended to apply to read the relevant statement. The appellant had responded to the Council indicating that she objected to such an application.

The absent witness, a midwife, was the Team Leader and Coordinator of the Delivery Suite. She was the Council's only witness in respect of charge 1 and gave some evidence in respect of charge 3. The Court recognized that she was an important witness.

The appellant submitted that no attempts were made by the Council to secure the attendance of the witness, a point which the Council did not seek to rebut. The Court noted that no efforts had been made to secure the attendance of the witness at the ftp hearing, either in person or by way of video link. When informed that video link facilities were not available and were not used at NMC hearings, the Court considered this to be "a surprising statement in 2010". The Court was informed that a pragmatic decision had been made in relation to the attendance of the witness, in that charge 1, was not the "important" charge, and the view taken by the Council was that if the application to read the statement had failed, the Council would have been "content" to rely on the remaining charges.

In deciding to allow the Council to read the statement the panel referred to the emails between the Council and the witness concerned and noted that the witness "explains that she is unable to attend this hearing because she no longer lives in the United Kingdom."

The appellant submitted that the email from the witness, although indicating that the witness no longer resided in the UK, did not state that she was unable to attend the hearing. The Court accepted this point and went on to note that when it became known to the Council that the witness lived abroad, no request to attend was made of her.

Taking into account to provisions of Rule 31, the test of relevance and fairness when determining the admissibility of evidence, the Court accepted that the evidence was relevant, and in fact crucial. The appellant submitted that she did not have a positive working relationship with the witness in question and that there were bad feelings between the two woman (evidence to this effect was put before the Court). The Court found that the relevance of the witness's evidence, together with the evidence of bad feeling between the two women meant that:

**"Every effort should have been made to secure [the witness's] attendance. Fairness required that the appellant was entitled to test the evidence of the [the witness] by way of cross-examination unless good and cogent reasons could be given for non-attendance. It is difficult to see what those reasons could be, given that her attendance had never been sought."**

The Court noted that the "pragmatic" approach adopted by the Council:

**"...included little by way of consideration of fairness to the appellant. If the charge was not regarded as sufficiently important to warrant the attendance of the sole witness of fact, the fair course was not to proceed with that charge."**

Given the content of the email from the witness, the panel had misdirected itself in finding that the witness had indicated that she was unable to attend the hearing, as the Council had never sought the witnesses' attendance. The Court found that this issue highlighted "the difficulty of the unrepresented practitioner". The appellant had never before been involved in such proceedings. She was reliant upon the Council for proper disclosure, in particular the letters/emails which would have demonstrated "the inactivity on the part of the respondent." The Court was also concerned at the fact that the statement included details of other incidents alleged against the respondent but which were irrelevant to the charges she faced. As such the inclusion of such matters was prejudicial. The Court found that those who conducted the case, or even the Legal Assessor, should have sought the redaction of the irrelevant and prejudicial paragraphs before it was read to the panel. The Court noted that the case presenter had requested the redaction of irrelevant material from the statement of the appellant and therefore had been alive to the process of redaction.

In allowing this ground of appeal the Court found the following.

- The Council failed to make any effort to secure the attendance of a critical witness.
- The panel misdirected itself in finding that the witness was unable to attend.
- The appellant was disadvantaged in her response to this application by reason of her being unrepresented.
- The admission of the statement was unfair.

### **Weight attached to the appellant's evidence**

The Court dismissed this ground.

As part of the Council's case preparation for the ftp hearing, it had obtained a statement from Dr Parisaei. The statement was disclosed to the appellant and the appellant was notified that the Council did not seek to rely on the statement or call the witness at the hearing. The statement was unsigned. It was subsequently agreed that it could be adduced in evidence, following a request from the appellant.

The Court found that such a statement, being unsigned, would carry limited evidential weight. The fact that the panel failed to refer to the statement would not, in itself, be grounds for appeal. Even taking the evidence at it's highest the statement was of limited value to the appellant.

At the ftp hearing the panel permitted the appellant to read out a prepared statement addressing various allegations, as a result of her being unrepresented. The Court found that there was nothing unfair in allowing the appellant to give evidence in such a way. The appellant was subject to cross-examination and questioning from the panel.

The Court found that the panel preferred the evidence of Patient A and her husband, which it was entitled to. In its reasons, the panel identified particular aspects of Patient A's evidence and that of her husband, which it found to be convincing.

### **Misconduct and Impairment**

The Court allowed this ground

The Court noted that in arriving at its decision on misconduct, the panel had taken into account charge 1, which was reliant on the evidence contained within the witness statement read during the course of the hearing owing to the witness' living abroad.

In announcing its decision on impairment, the panel referred to the fact that although the events only involved two days, the failings were serious, numerous and wider ranging. The Court noted that the first of the two days to which the allegations related, could only be a reference to charge 1, which was wholly dependant on the evidence of the absent witness. As a result the Court found that the findings in relation to misconduct and impairment were:

**"...clearly tainted by Head of charge 1 and cannot stand".**

### **Sanction**

Although the question of sanction no longer needed to be determined by the Court in light of its findings in relation to misconduct and impairment, the Court highlighted several matters of concern in relation to the sanction imposed.

- From the reasons provided by the panel, it was clear that it had placed little weight on the testimonials provided by the appellant. In so doing the panel had failed to give proper account to the fact that the appellant was unrepresented and did not have the advantage of a legal representative who would know what to obtain and how, for the purpose of testimonial evidence.
- In considering whether a conditions of practice order would have been appropriate, the panel appeared to limit its consideration to the appellant's work as an agency nurse and failed to give any consideration to her work within "the wider hospital environment". This was of particular concern to the Court in light of the fact that the appellant had practised since 1986 without any previous complaint within hospital settings.
- The events which formed the basis of the ftp proceedings against the appellant occurred on two consecutive days after which the appellant went on sick leave. The Court noted that "no real effort was made by the panel to explore the isolated nature of these incidents and the ill health of the appellant. It is another example of a failure to have due regard to the fact that the appellant was unrepresented and disadvantaged in the presentation of her case.

### **Interim Order**

In light of the other findings, the interim order could not stand.

## Impairment

### ***Sarkodie – Gyan v Nursing & Midwifery Council [2009] EWHC 2131 (Admin)***

Following an attempt by defence representatives to rely on this judgment, the case was sent back to the High Court under the slip rules provision, and the extracts of the judgment relating to impairment being a matter of proof have now been removed.

## Interim orders

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### ***R (on the application of Sosanya) v General Medical Council [2009] All ER (D) 73 (Oct)***

The claimant doctor was married to an accountant who was found guilty of fraud in 2008. The claimant was arrested in connection with those criminal proceedings but was subsequently released without charge. Later that year she was charged with money laundering.

During the period between the claimant's arrest in relation to her husband's criminal proceedings, and subsequently being charged with money laundering, the claimant began a course of vocational training supervised by the GMC. She did not inform the Council of her arrest or charge.

The Council made the claimant subject to an interim suspension order relying on the provisions of the guide to Good Medical Practice which requires a doctor to notify the Council in the event of him/her being charged with an offence. It did not require notification in respect of an arrest.

In making the order the Committee found that there was a risk to the public and that it was in the public interest and the claimant's own interest that she be interimsly suspended. The Committee stated that the failure of the claimant to notify the Council of her arrest might demonstrate a lack of probity. There was no challenge in relation to her clinical skills.

In considering the application, the court had regard to the guidance notes which states that to justify suspension from practice for non-clinical issues; the risk posed has to be so serious that it would be in the public interest to suspend, even if no risk was posed to patients. The judge provided examples of allegations which may justify suspension which included: murder; rape and sexual abuse of children.

The court did not consider that an allegation of fraud was on the same level of seriousness and the suspension was unreasonable and inappropriate. There were no cogent reasons given as to why an interim suspension order was in the public interest.

The suspension order was therefore terminated.

### ***GMC v Lauffer [2009] EWHC 3497 (Admin)***

The respondent surgeon was the subject of an interim suspension order for a period of 18 months. That order had been reviewed on three occasions and had been continued on each occasion. The GMC applied to the Court for a 12 month extension order.

In considering the application the Court had regard to the case of *GMC v Hiew [2007] EWCA Civ 369*. In that judgment the Court found that:

- the Court is the primary decision-maker and the question to be considered is whether, and if so what, extension beyond the initial period is appropriate
- the Court has to have regard to: public protection; public interest and the registrant's own interests
- the Court has to have regard to: the gravity of the allegation; the nature of the evidence; the reasons why the case has not been concluded; and the prejudice to the registrant if an interim order is continued
- it is for the GMC to satisfy the Court that the order should be made

- the evidential standard is the balance of probabilities
- full regard must be accorded to the previous decisions of the relevant panel
- the Court is not bound to follow or to defer to the opinion of the GMC panel
- if the Judge can clearly see that the case has little merit, although it will be inevitably extremely rare, the Judge can take that factor into account when arriving at his/her decision.

In deciding the present case, the Court identified two questions that needed to be answered: (a) do the allegations justify the prolongation of the suspension; and (b) whether in the circumstances any suspension out to be extended for the period sought by the GMC or for some lesser period. The Court also stated that the GMC needed to consider that the longer a registrant is suspended, the greater possibility of him/her being deskilled. In addition, it should never be the default position that the maximum period of suspension should be applied, particularly where a registrant has been suspended for the maximum period at the outset of the order.

The Court found that administrative difficulties faced by the GMC in arranging hearings can never be a sufficient reason for prolonging the period of suspension.

In the present case the Court was satisfied that suspension, in principle, was appropriate due to the suggestion that the registrant had harmed patients and given the registrant's previous failure to comply with conditions imposed on his employment by the Trust, an interim conditions of practice order was not appropriate. However, the Court found that there was no real satisfactory explanation as to why this case has not been disposed of already. Therefore the Court permitted an extension of the suspension order for a period of six months.

Note: It is interesting to note the slightly different and more cautious approach adopted by the Courts regarding the application to extend the interim orders in the cases of *GMC v Sulaiman [2009] EWHC 3496 (Admin)* and *Health Professions Council v James Rice [2009] EWHC 3404*. In these latter two cases, whilst the Court was reluctant to extend the orders for the periods requested by the GMC and HPC respectively, ultimately the Court did so, recognizing the listing constraints of both the GMC and HPC, the likelihood of the cases being concluded within a shorter period of time and the fact that in the event that the cases were no concluded within a shorter period, the inevitable cost implications in the GMC and HPC having to return to the High Court for an application for further extensions.

# Proceeding in Absence

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## ***Faulkner v Nursing & Midwifery Council [2009] EWHC 3349 (Admin)***

The appellant appealed against the decision of a fitness to practise Committee of the NMC to proceed in his absence, and the sanction of striking off.

The allegations related to incidents which occurred in 2004. The case was originally listed for substantive hearing on 15 July 2008. On that occasion the appellant did not appear. He wrote to the Council explaining that he was currently unwell suffering from stress, and that he wished to attend and to be represented. The Committee decided that it would be unfair to proceed in the registrant's absence and the hearing was adjourned. In adjourning the case the Committee indicated that it was likely to be re-listed by the end of September 2008 and that in the event of the registrant being unwell at the time of the re-listed hearing, that he was to provide detailed written evidence to show that he was unfit to attend the hearing. The Committee also made it clear that the registrant needed to be aware that due to the sexual nature of some of the allegations, he would not be permitted from carrying out cross-examination himself.

The hearing was re-listed for the beginning of December 2008. The registrant made an written application for an adjournment explaining that he was extremely distressed. This was accompanied by a letter from his GP in which he stated that the registrant was struggling psychologically with the strain of the ongoing inquiry and that he was reluctant to appear at the hearing without proper legal representation, which he could not afford.

After receiving legal advice, the Committee decided to adjourn the hearing.

The matter was re-listed for the end of March/beginning of April 2009. Following receipt of that notice the registrant contacted the NMC and was advised that if he wished to make an application for and adjournment, such application would need to be in writing. There was no further contact between the Council and the registrant prior to the re-listed hearing taking place as scheduled.

In determining whether to proceed on that occasion, the Committee had regard to the previous history and to the fact that the registrant had not submitted a written application for an adjournment, nor had he provided any explanation as to his failure to attend.

The Court dismissed the appeal and found that the Committee were right to proceed in the absence of the registrant. They had indicated that such discretion needed to be carefully exercised. The registrant was clearly entitled to a fair hearing, he knew the hearing date and had failed to make an application to adjourn. He had failed to submit medical evidence or any information regarding his difficulty in obtaining legal representation. Taking into account the case of *Jawid Yusuf v The Royal Pharmaceutical Society of Great Britain [2009] EWHC 876 (Admin)*, the registrant had voluntarily failed to attend and the Committee in all the circumstances had exercised its discretion correctly.

## ***R (on the application of Bennett) v General Teaching Council [2010] EWHC 258 (Admin)***

The registrant teacher was found guilty of unacceptable professional conduct and was made subject to a prohibition order. She appealed against the Committee's decision to proceed in her absence, the Committee's decision not to read the registrant's statement prepared for the purposes of Employment Tribunal proceedings, findings of fact, and sanction. The Court dismissed the appeal.

In dismissing the appeal the Court considered the statutory powers available to the Committee and the appropriate test to be applied in GTC proceedings involving unacceptable professional conduct. The Court found that the standard was in part statutory in so far as paragraph 8 of Schedule 2 of the Teaching and Higher Education Act 1998 defines unacceptable professional conduct as "conduct which falls short of the standard which is expected of a registered teacher". The standard is also in part non-statutory in that the definition as contained within Schedule 2 of the Act includes an additional element that the teacher's conduct involves, "a breach of the standard of propriety expected of the profession." With that in mind the Court found that such provisions sets a higher mark than the statutory definition of unacceptable professional conduct.

### **Proceeding in absence**

The GTC hearing was originally scheduled to take place on 29 and 30 November 2007 and notice in respect of that hearing was served on 12 July 2007. On 29 August 2007 the appellant requested an postponement, a request which was granted. On 9 November 2007 the appellant was notified that the hearing would take place on 23 and 24 January 2008. On 18 December 2007 the appellant made a further application for a postponement, that application being unsuccessful. On the first day of the hearing the Committee considered a faxed request from the appellant for the hearing to be postponed, a request which was granted. On 24 January 2008 the appellant was informed that the hearing would take place on 17 and 18 April 2008. The hearing took place on 17 April. The appellant did not attend and did not ask for a further postponement. She submitted a bundle of 72 documents mainly concerned with her absence from work and related health reasons.

The Committee decided to proceed in the appellant's absence taking into account the history of the case and the previous requests for postponements which had been granted, and the fact that witnesses on behalf of the Council had attended on two occasions to give evidence. The Committee was satisfied that the appellant had waived her right to attend the hearing and that it was in the public interest to proceed.

In relation to the appeal hearing, the initial hearing was adjourned at the request of the appellant and the appellant was directed that in the event that she required a further postponement that she was to make such application in good time together with supporting documentation. Nine days prior to the re-listed appeal hearing the appellant contacted the Court Office to request a postponement and was advised that she would need to submit an application form together with the appropriate fee. The appellant did neither. The hearing proceeded and the appellant did not attend.

The Court recognized that her conduct in respect of the appeal proceedings was in line with her conduct in relation to the GTC proceedings. The Court found that the Committee was entitled in all the circumstances to proceed in the appellant's absence.

### **Failure to read witness statement**

During the course of the GTC proceedings the Presenting Officer informed the Committee that the Council was in possession of a witness statement provided by the appellant for the purposes of earlier Employment Tribunal proceedings. However the appellant had not provided the GTC with a copy, rather, a copy had been supplied by the Local Authority. In addition, the statement included material which may be prejudicial and therefore taking all factors into account the Presenting Officer invited the Committee not to have regard to the statement.

The Legal Advisor advised the Committee that it would need to think very carefully before accepting such a statement.

The Court found that the arguments put forward by the Presenting Officer and the approach adopted by the Committee in not reading the statement was correct, and well within the discretion of the Committee.

### **Findings of fact**

The Court recognized that if the appellant had attended the GTC hearing the Committee may have reached different conclusions, however, in the circumstances and based on the information available to the Committee, it was open to the Committee to reach the findings of fact it reached.

### **Sanction**

Similarly, in relation to the Committee's determination on sanction, the Court recognized that whilst the outcome may have been different if the appellant had attended, based on the evidence available and the factual findings made, the Committee's decision to prohibit the appellant was reasonable.

On appeal the appellant argued that the Committee had failed to take into account the medical reasons for the appellant's absence from the school. In this respect the Court found that whilst it may be that health problems were a significant contributory element, ultimately the Committee's task was to maintain the standards by which teachers must conduct themselves and public confidence in the profession. With that in mind and the findings of fact, the Court accepted the Committee's decision on sanction as entirely reasonable and proportionate.

## Sanction

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### ***Howlett v Health Professions Council [2009] All ER (D) 87 (Dec)***

The appellant was a physiotherapist working as a sole practitioner. He appeared before a fitness to practise panel of the HPC in relation to allegations that he had failed to inform a patient that she would need to remove her clothing; massaged gel into the patient's breast and chest area without adequate reasons; and strapped the patient into a garden chair without adequate reason.

During the course of the hearing the panel heard evidence from another patient who had made a complaint against the appellant. The panel also heard evidence from the appellant as to what he had done since these incidents. The Committee found that the appellant's fitness to practise was impaired and as a result removed the appellant's name from the register.

The appellant appealed against the panel's findings in respect of all three stages of its decision making process.

The Court found that although there were inconsistencies in the evidence the panel had taken those into account and had been entitled to reach the factual findings they did. In relation to misconduct, the Court found that given the tenor of the factual findings, the Panel had considered that each head amounted to misconduct. Regarding impairment the Court found that it could not have been said that there was no evidence on which the panel could have found impairment.

The Court went on to state that in relation to its factual findings the panel needed to explicitly set out precisely why it had reached the conclusion it had in light of the evidence. It was not clear whether the panel had considered the changes that the appellant had made to his practice and the fact that he had treated others without complaint. It was only the appellant's bedside manner which appeared to remain a concern. Taking such factors into account the Court found that it would be difficult for the panel to say that there was no realistic prospect of the appellant changing his attitude and by failing to take into account the appellant's age and chance of future employment, the panel had fallen into error. Therefore there was a limited degree to strike out only. The matter was remitted for reconsideration on sanction.

### ***Udom v General Medical Council [2009] EWHC 3242 (Admin)***

Following a GMC Performance Assessment ftp proceedings were brought against the registrant, a consultant anaesthetist, on the basis of both deficient professional performance and the registrant's adverse physical or mental health. Impairment was found and as a result the registrant was made subject to conditions of practice for a period of 9 months.

The registrant appealed against the sanction on the basis that the conditions put in place robbed the registrant from registration of all effect. In substance the conditions amounted to a suspension rather than a conditional registration, and in imposing such conditions, the Committee erred as S 35D(2) of the Medical Act 1983 permitted a Committee to impose a suspension order or conditions, but not both.

The second ground of appeal related to the Special Performance Adviser in that it was alleged that he had given his personal opinion evidence which he was not permitted to do.

In granting the appeal the Court found that the intention of the Committee was to ensure that the registrant only undertook clinical attachments. Carrying out clinical attachments did not require a registrant to be registered and so in substance, the order forbade the registrant from practising medicine. In particular the Court found; "if conditions are such that they divest registration of all effect, then that cannot properly be called a 'conditional registration'. In substance it is no registration at all. The statutory provisions provided for a Committee to make a registrant subject to a suspension order or conditions and not both.

The Court held that the Committee erred in law "in applying conditions which resulted in the emasculation of the appellant's registration, with further conditions as to his conduct towards his rehabilitation as a doctor."

As a result the sanction imposed was wrong in law.

The Court then went on to determine the role of the Special Performance Adviser, and whilst it was not concerned with all of the Adviser's involvement, the Court was concerned that in response to a question from the Committee, the Adviser has expressed his opinion as to the length of clinical attachment he considered to be appropriate (which was reflected in the sanction). In so accepting the opinion of the Adviser, the registrant was denied a fair hearing because he was unable properly to test or respond to that opinion.

The matter was remitted to a newly constituted Committee for the determination as to what may be appropriate conditions.

### ***Odes v GMC [2010] EWHC 552 (Admin)***

The appellant, a Locum Consultant Physician in General (Internal) Medicine & Cardiology, was found guilty of misconduct and was suspended for a period of 4 months.

The appellant appealed against the findings of facts, impairment and sanction.

#### **Factual findings**

The allegations related to the treatment of two patients. Patient B was admitted with a spontaneous pneumothorax, and advice was sought from the Cardiothoracic Team in relation to treatment required. Contrary to advice received, the appellant removed the patient's chest drain. The patient's condition deteriorated and a further drain was inserted after which his condition started to improve.

Whilst the appellant accepted that he had removed the drain contrary to advice and without consulting the Respiratory Department, he denied that the removal was inappropriate, not in the best interests of the patient and that his standard of care fell below that expected of a registered medical practitioner. The panel found all aspects proved.

On appeal the appellant argued that his decision to remove the drain had been justified as the patient was in considerable pain at the time. However, the patient, when giving evidence, denied this. The appellant submitted that the panel erred in finding Patient B credible and in the alternative it was argued that if panel disbelieved the appellant, it gave inadequate reasons for such a finding.

In determining this aspect of the appeal the Court referred to the fact that the panel had two advantages over the Court in that it had heard live evidence from all relevant witnesses, and the panel had relevant professional expertise. In particular the Court stated that it would not interfere with factual findings of a disciplinary panel unless satisfied that those findings were wrong. Although the appeal amounted to a re-hearing, the Court would be cautious in concluding that factual findings of a panel were wrong.

In the present case the Court found that the panel was entitled to find Patient B credible. Although the panel was not required to give extensive reasons as to why it preferred the evidence of Patient B, in the determination the panel did state that the patient "would be very likely to remember whether or not he was in pain at the time the chest drain was removed."

The panel also found that even if the patient had been in pain at the time of the removal of the drain, the removal would still have been inappropriate. The Court found that the expert called on behalf of the GMC during the original hearing had dealt with this issue and the panel was entitled to accept that evidence.

In the circumstances the findings of the panel in relation to the removal of the drain being inappropriate, was not wrong and the panel was entitled to find that the removal was not in the best interests of the patient and represented a standard of care which fell below that which could be expected.

The second patient, Patient A, had been admitted with pain following two weeks of sciatica. The patient, although discharged, relapsed. She was readmitted and following further deterioration, died. There were numerous allegations relating to all aspects of the care provided by the appellant in relation to Patient A over several days during which she was an in-patient. All factual findings in relation to Patient A were challenged by the appellant.

The Court found that in relation to each factual finding, the panel had substantial evidence upon which to make such findings. The Court was not persuaded that the panel was wrong in relation to those factual findings, most of which were in the context of clinical practice and procedure. In addition the Court found that there was no merit in the suggestion that the panel had failed properly or adequately to take into account systemic factors relating to Patient A's care. The panel was entitled to consider, as they did, that such matters did not detract from the appellant's own misconduct or his responsibility for his conduct.

## **Impairment**

The appellant submitted that the panel had adopted the incorrect approach when determining impairment in that it had failed to take into account the fact that the appellant had been in practice over many years and had treated many patients without complaint and with positive appraisals. In putting forward such arguments the appellant relied on *Cohen v GMC [2008] EWHC 581*.

In dismissing this ground the Court found that the panel had adopted the correct approach.

The panel referred to Cohen and in particular the fact that a panel has to consider whether the conduct in question was easily remediable, had been remedied, and was highly unlikely to be repeated (paragraph 65 of Cohen). The panel expressly indicated that it had taken into account, documents relating to the appellant's workload, and appraisals, as such matters were relevant when considering impairment. The panel concluded that the conduct in relation to Patient A and Patient B did not represent a single error, "but rather a series of misjudgements" and "persistent failures to meet the standards set out in Good Medical Practice". The panel also found that the appellant demonstrated a lack of insight in his attempts to deflect criticisms, which the Court found continued to be an issue at the time of the appeal.

The appellant also attempted to rely on the exoneration of another practitioner in relation to the care of Patient A. The Court noted that the exoneration of the practitioner in question did not happen until after the panel had decided the appellant's case and therefore the panel could not have erred in failing to take that exoneration into account. In any event the circumstances relating to the appellant and the other practitioner were different and whilst the error on the part of the other practitioner was an isolated error, the panel was not so satisfied in relation to the appellant.

## **Sanction**

The appellant argued that the sanction was excessive and wrong, due to the effect it would have on both the running of the hospital and his own career.

In dismissing this challenge the Court noted that the primary object of imposing a sanction is to maintain the standing of the profession and the confidence of the public in the profession although the need to protect the public is also a purpose. The impact of a sanction on a practitioner is relevant bearing in mind that any sanction has to be proportionate. However the Court stated that the primary objective is the wider public interest.

In the present case the panel took into account all relevant factors including the impact on the appellant of the sanction imposed.

### ***Sheldon v NMC [2010] CSIH 17***

The appellant, a registered nurse, was found guilty of misconduct and suspended from practice for a period of 6 months. The allegations related to the registrant's degree course in midwifery whilst a student nurse.

The appellant should have been supervised by a mentor who needed to sign off her work but the mentor in question had had little contact with the appellant and little knowledge of her performance. At the completion of a module, the appellant acted dishonestly in that she fabricated an entry in her Labour Ward Record Card which ought to have been completed by her mentor. She forged her mentor's signature at the bottom of the entry. She also forged the signature of her mentor and another midwife, on her Practice Placement Record of Hours.

The university instituted disciplinary proceedings and determined that the appellant had failed the labour ward module. She was not given the opportunity of a re-assessment.

In relation to the subsequent NMC proceedings the appellant pleaded guilty to both charges and admitted that her fitness to practise was impaired.

The appellant appealed on the basis of adequacy of reasons and sanction.

In relation to the reasons provided by the panel, the Court found that it was a properly reasoned decision which could not be faulted. In relation to sanction, the Court accepted the appellant's arguments that the purpose of any sanction is not the punishment of a registrant however, the Court stated that it also followed that matters personal to the registrant which would normally be relied on in mitigation in other proceedings are of less immediate significance in professional regulatory proceedings.

In dismissing the arguments relating to the sanction being excessive, the Court did not accept the suggestion that the conduct did not concern clinical judgment. In particular the Court noted that the obtaining of a professional qualification where the appellant's competence had not been proved and where a lack of competence could have serious consequences. Whilst no patient suffered harm in this particular instance, the potential for such harm was obvious in such a situation involving the appellant having gained qualifications dishonestly. In addition the Court found that the panel correctly judged the appellant's misconduct in light of its effect on the mutual trust and confidence that should exist among clinical staff.

## ***Saunders v The Hearing Aid Council [2010] EWHC 629 (Admin)***

Over a period of approximately two days (uncontested) through a social networking website, the appellant, a registered hearing aid dispenser, received adult, legal pornographic images which he stored, together with a naked image of himself (contested but found proved by the Committee), in a file marked "dirty". Approximately one year prior to the Council proceedings, the appellant deleted the file. Although the appellant had deleted the images, they remained stored in the computer as thumbnail images.

The computer in question was kept in the 'open hearcare' testing room, in which hearing tests and the programming of hearing aids was conducted. The computer was used by other colleagues and on one such occasion, when a colleague inserted a USB stick into the computer, the thumbnail images were displayed. The matter was referred to senior employees and although the police took no action, the matter was referred to the Council.

At the Council's hearing, the appellant admitted to having stored pornographic images on a work computer, and was made subject to an order of erasure and ordered to pay costs of £30 000 in relation to the Hearing Aid Council proceedings.

The appellant appealed against the decision of the Committee in relation to sanction on the basis that erasure was disproportionate and that the order for costs was wrong or excessive. It was argued on the appellant's behalf that the Committee:

- gave insufficient weight to the fact that the images were legal, and relatively few in number
- gave insufficient weight to the fact that the appellant had deleted the images at least one year prior
- gave insufficient weight to the unlikelihood of the images being seen by others
- was unfair in describing the appellant's behaviour as showing contempt for colleagues, and patients, as there was no basis for such a finding
- had wrongly and unfairly described the appellant's evidence as unreliable and evasive, and had failed to give examples thereof
- gave no weight to the appellant's early admissions and expression of regret
- gave insufficient weight to the appellant's good character, professional record and positive testimonials
- gave no weight to the fact that the appellant had already lost his job, and had not been working for a period of two years by the time of the Council's hearing
- gave no or few reasons for not imposing a lesser sanction.

At the outset of the appeal hearing the Court set out the approach to be adopted in such matters namely that:

- the question is whether the Committee's decision was wrong
- this involved a broader test than judicial review of rationality
- weight must be given to the expertise of a specialist tribunal, particularly in relation to sanction, but that the amount to be given depended on the composition of the panel, for example whether it has more lay than professional members.

In allowing the appeal, the Court noted that at the outset of the Council's hearing, the case presenter on behalf of the Council made it clear that the scope of the allegations was being limited such that the number of images being relied on was reduced, and it was made clear that the images in question were images of adult pornography. The Court stated that a **"fundamental difficulty"** for both the Committee had the Court was the fact that the images were never produced, and the exact number of images relevant to the charge had not been specified.

The Court went on to note that in its decision the Committee had referred to the conduct of the appellant having been a **"sustained course of conduct, with repeated downloading, opening and storing of the pornographic material."** However, the uncontradicted evidence of the appellant was that the events took place over a period of approximately two to three days. The Court noted that it was unfortunate that evidence had been led from Council's witnesses which did not confine itself to the specific images and relevant timeframes, and the finding of the Committee, as set out above, did not reflect the fact that a limited amount of images were contained in the final charge, and was not supported by the evidence. The Court commented that this was:

**"... a regrettable consequence of a failure to identify at the outset the number of images relied upon by the Council."**

Whilst the Court accepted that the appellant's conduct was unprofessional and wholly inappropriate for any person on the workplace, it went on to note that the conduct was not illegal, it was contained both as to time and place, and the appellant had done all he reasonably believed he could to delete the images. The Committee failed to make any mention of such factors, and it appeared that insufficient weight was attached to these elements of the appellant's case.

On the facts of the case the Court found that it was difficult to see what purpose erasure served other than to punish the appellant, and that a period of suspension would have reflected properly the gravity of the appellant's conduct and would have been proportionate to the nature and the circumstances of the offence.

The order for erasure was quashed and substituted by a suspension order for a period of 6 months.

The Court recognized that the appellant was a man of no means having been dismissed from his employment, and having subsequently encountered difficulties in obtaining employment as a result of Council's proceedings. Whilst the Council only sought to recover costs of £11,270.63, the Court, taking all the circumstances into account, quashed the order for costs.