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Admissibility of evidence and weight are distinct and should be considered separately

In *El Karout v Nursing and Midwifery Council* [2019] EWHC 28 (Admin), the Court quashed a decision because the panel had not considered the admissibility of hearsay evidence as a matter of fairness before moving on to consider its weight.

Suspicions were raised about Ms El Karout, a midwife, when it was discovered that a patient, Patient A, did not have in her "TTO" (to take out) medication the dihydrocodeine that Ms El Karout had signed out in the controlled drugs register and had purportedly given to her. The missing medication could not be found. An investigation was carried out, overseen by the manager of maternity services, Ms 3. Six other patients were identified for whom Ms El Karout had signed out dihydrocodeine as part of their TTO in a ten day period. Telephone calls were made by Ms 3 and her colleagues to each of these six patients at home to establish whether they had received and taken home the medication. In each case, the response was given that no dihydrocodeine had been given. A few days later, Patient A was readmitted to hospital and discharged the same day, again without dihydrocodeine as part of her TTOs. Again, it was Ms El Karout who had signed for the withdrawal of the medication by Patient A.

The police were then informed. Ms 3 and her colleague Ms 1, a lead midwife who had also made some of the telephone calls to the patients, made witness statements to the police. Ms El Karout was arrested and in her handbag the police found an empty torn packet of dihydrocodeine tablets, labelled for Patient B. Patient B had not wanted the medication and Ms El Karout had failed to return it to the drugs cupboard. Ms El Karout alleged that she had simply forgotten to return the packet to the drugs cupboard before her nightshift ended and when she realised she still had the packet in her possession on her drive home, threw the tablets away but retained the box. Ms El Karout was suspended from employment and her case was referred to the NMC. She was subsequently tried and acquitted of theft in the Crown Court.

A fitness to practise panel found that Ms El Karout had incorrectly signed in the controlled drug record that dihydrocodeine had been given to Patients A, B, C, D and G, but found the same charge not proved in relation to Patients E and F. The panel found that she had deliberately falsified the records of Patients B, C, D and G, but not those of Patients A, E and F. Further, the panel found that she had stolen the medication of Patients A, B, C, D and G, but not that of Patients E and F. The panel struck Ms El Karout off the register. She appealed.

Ms El Karout represented herself on the appeal. After the hearing of the appeal, and on reviewing all the material including the full transcript of the seven day panel hearing, the Court became troubled about an aspect of the panel hearing that had not been addressed on the appeal. This related to the admissibility of the hearsay evidence on which the charges in respect of Patients D, E, F and G was based. The Court invited further assistance from the parties on this issue.

The Court noted that the NMC's case against Ms El Karout on four of the seven charges of stealing dihydrocodeine depended entirely on hearsay evidence. In relation to Patients D, E, F and G the only evidence that the patient had not received the dihydrocodeine as part of her TTO medication came from the audit conducted by Ms 3 and her colleagues in which the patients had been telephoned at home, on the pretext of a welfare call. Patients A and B made witness statements to the police and Patient C had agreed to be a witness in the disciplinary proceedings. The other four patients declined to co-operate with the NMC. Given that context, it was, the Court said, extremely regrettable that no consideration had been given by the NMC in framing the charges, or by counsel or the Legal Assessor at the hearing, as to the admissibility of the hearsay evidence from Patients D, E, F and G, as opposed to the weight to be attached to that hearsay evidence. The distinction was, the Court held, important.

The Court held that, had the issues of weight and admissibility been properly analysed and separated, as required by the authorities of *Nursing and Midwifery Council v Ogbonna* (2010) and *Thorneycroft v Nursing and Midwifery Council* (2014), the panel could not possibly have reached a proper conclusion that it was "fair" to admit the evidence. It followed that the panel's findings in relation to Patients D and G must be quashed as the proceedings were rendered unfair by a serious procedural irregularity. For this reason, the findings as a whole could not stand, because it could not safely be assumed that the panel would necessarily have found the other allegations of misconduct proved, or reached the same conclusion on impairment or sanction.

The Court was satisfied that, although Ms El Karout had not advanced the hearsay point herself in the grounds of appeal, there was a general complaint that the proceedings had contravened Article 6 and, in particular, that a person accused must have a real opportunity to present his case or challenge the case against them. Further, the Court did not accept the NMC's submission that because Ms El Karout's counsel had not formally challenged the admissibility of the hearsay evidence at the hearing, but had just made submissions as to its weight, the panel had been entitled to move straight on to assess its weight without determining its admissibility. The Court noted that the advice of the Legal Assessor had failed to make the distinction between weight and admissibility clear, nor provided the panel with the transcript of the judgment in *Thorneycroft*, from which the distinction would have been apparent. The consequence was, the Court held, that the panel's attention had not been directed to the requirement that, as a matter of law, they must first determine admissibility as a question of fairness before considering the issue of weight.

There were, the Court said, several reasons why the panel would have been obliged to find that the hearsay evidence of Patients D, E, F and G was inadmissible. First, none of those patients had engaged with the process nor provided a witness statement. The hearsay evidence was the oral response each of them purportedly made to an enquiry over the telephone. No audio recording, or a precise note of the conversation had been made, nor had any contemporaneous notes been preserved. Secondly, the Court described the context of the conversations as being very different from the formal setting of a request for information which must be used in disciplinary proceedings with the career of a midwife at stake. Third, the hearsay from the telephone conversation was the sole and decisive evidence to prove each of the charges in respect to those four patients. Fourth, there was unfairness if the hearsay evidence was admitted as the panel would inevitably rely upon the greater accumulation of examples of patients who had not received their dihydrocodeine as rebutting any suggestion of innocent coincidence. It was, the Court said, impossible to say that if there had there been no mention of Patients D, E, F and G at the hearing that the overall conclusion in relation to Patients A, B and C would necessarily have been the same.

The Court noted that in Ms El Karout's case, there had not been a preliminary meeting (as provided for by the rules), nor at the outset of the hearing had the panel chair asked Ms El Karout the prescribed question under the rules, namely whether she wished to make any objection to the charge on a point of law. The Court held that is was regrettable that the critical question of the admissibility of the hearsay evidence was not flagged up early enough to have been considered at a preliminary meeting so that the appropriate prominence could have been given to the issue from an early stage.

The Court quashed the findings in respect of Patients D and G and, consequently, the findings in relation to Patients A, B and C as well. It remitted the matter to a fresh panel to re-hear the allegations in relation to Patients A, B and C. It ordered that all references to Patients D, E, F and G be deleted from the schedule of charges and other documentary evidence placed before the panel, and no evidence in relation to those patients should be admitted.

Flawed determination leads to Court remitting matter for redetermination of sanction

In *General Medical Council v Sledzik* [2019] EWHC 189 (Admin), the Court held that there were flaws in a panel's determination and remitted the matter to the same panel to redetermine sanction.

Various complaints were made against Dr Sledzik, a specialist in ophthalmology in relation to his treatment of 8 patients whilst working as a Locum Ophthalmic Medical Practitioner for Boots and 60 patients whilst working as a Locum Optometrist for Specsavers. The complaints included numerous instances of failing to take a proper medical history or make an adequate medical record, failing to undertake an adequate examination and failing to refer appropriate cases to hospital. A Medical Practitioners Tribunal concluded that the facts found proved amounted to misconduct and/or deficient professional performance.

The panel went on to find first that Dr Sledzik's fitness to practise was impaired by reason of deficient professional performance. The panel held that there had been broad and repeated failures over a sustained period in fundamental areas of clinical practice. It considered that he lacked insight into his failings and there was a significant risk of repetition, thus putting patients at risk. There was no evidence of remediation, nor testimonial evidence from colleagues or patients.

On the issue of misconduct, Dr Sledzik admitted that the record keeping failures amounted to misconduct. He also admitted that the failure to refer patients to the hospital service was outside of guidance in place at the time, but maintained that the guidance had been imperfect, resulting in too many unnecessary referrals, and that it had since been changed to reflect his practice. The panel was concerned by Dr Sledzik's belief that his knowledge and experience outweighed that of those who produced the national guidance. It concluded that the failure to refer did amount to misconduct and that his fitness to practise was currently impaired because his actions had put patients at risk and was liable to do so in future. Although his conduct was capable of remediation, there was no evidence it had been remediated or that Dr Sledzik had any more than limited insight into the need to follow guidelines.

On sanction, the panel determined that Dr Sledzik's deficiencies in professional performance and his misconduct were capable of remediation and that he could in the future be a doctor who practised safely. It imposed conditions on his registration for 18 months with a review. The GMC appealed, arguing that the panel had failed to apply its own findings on impairment when determining sanction without any adequate evidential basis for doing so. It maintained the appropriate sanction was erasure.

The Court accepted that there appeared to be a contradiction between the panel's strong findings of a lack of insight and lack of evidence of remediation at the impairment stage, and its subsequent findings at sanction stage where it said that "it was reassured by [Dr Sledzik's] developing insight and willingness to work collaboratively with colleagues". The Court agreed with the GMC that it was not clear why the panel had altered its view, as the evidence submitted at sanction stage had been limited. The GMC also criticised the panel for only identifying one aggravating factor, namely Dr Sledzik's lack of insight in the care of a 2 year old patient. The Court agreed, stating that the panel had not explained why it decided to include only this patient as an aggravating factor and the Court was unable to ascertain the reason.

The Court said that the flaws in the panel's determination may be a consequence of a defective approach to the case by the panel, or may be a result of poor drafting and inadequate reasons. However, the Court said that it could not discern the cause without clarification from the panel. The Court allowed the appeal on the basis of the flaws in the determination and remitted the case to the same panel to redetermine sanction, in the light of the Court's judgment.

However, the Court was unable to conclude that the panel had been wrong to impose conditions on Dr Seldzik's registration. It was, the Court held, reasonable for the panel to conclude that he should be given the opportunity to improve the standard of his work, under supervision, on the basis of its findings. Given that the GMC had been successful only in part of its appeal, the Court ordered that each party bear their own costs.

The Solicitors Disciplinary Tribunal has a wide and unfettered discretion to make a costs order

In *Gale v Solicitors Regulation Authority* [2019] EWHC 222 (Admin), the Court dismissed a solicitor's appeal against the costs awarded against him by the Solicitors Disciplinary Tribunal.

Mr Gale, an experienced conveyancing solicitor, was found by a Solicitors Disciplinary Tribunal to have acted improperly in relation to five conveyancing transactions. The SDT imposed a fine of £10,000 and restrictions on Mr Gale's practising certificate. It also ordered that Mr Gale should pay the SRA's costs which it summarily assessed at the hearing.

Mr Gale appealed. The principal ground of his appeal was in relation to the award of costs. The SRA had sought costs of £30,091 which included a sum for the SRA's investigation costs, a sum for the SRA's legal costs and disbursements. The SDT ordered that Mr Gale pay the total sum of £28,091 to the SRA. Mr Gale advanced various arguments on the appeal, including that the SDT should have ordered a detailed assessment of the costs bill, that the sum awarded for the investigation costs was disproportionate to the complexity of the issues and that the SDT provided inadequate reasoning for its decision.

The Court referred to the case of *Shah v Solicitors Regulation Authority* (2017), in which it was confirmed that the SDT has a wide and unfettered discretion as to the making of a costs order, the question of a referral for detailed assessment and the amount of any order made upon a summary assessment. The Court said it should be "particularly slow to interfere in a SDT's decision as to whether it should fix costs or refer the bill for detailed assessment by a costs judge". In Mr Gale's case, the Court confirmed that the sum sought by the SRA was of the type that is routinely assessed summarily. It was "quite hopeless", the Court said, to contend there was some error of law in the SDT's decision to fix costs in this case, particularly where neither party had asked the SDT to refer the bill for detailed assessment.

On the reasons point, the Court referred to the case of *English v Emery Reimbold & Strick Ltd* (2002), in which the Court of Appeal said that the reasons for a costs award must be apparent, either from the reasons, or by inference from the circumstances in which costs are awarded. The Court of Appeal also stated that, in general, a judge should be free to dispose of applications as to costs in a "speedy and uncomplicated way". In Mr Gale's case, the Court observed that the SDT had set out its approach to the assessment of costs in the determination, considered the parties' submissions and made clear, albeit succinct, rulings reducing the claim. As for the SRA's own investigation costs, the Court held that the SDT had far greater experience than the Court as to the level of costs that it would expect to see and that it had considered Mr Gale's objections at the hearing and ruled that the costs were reasonable. Accordingly the Court held that the SDT's summary assessment of costs was neither wrong in principle nor plainly wrong. It dismissed this and all other grounds of Mr Gale's appeal.

Capsticks' advocate David Collins acted for the SRA at the SDT hearing and in the High Court.

Tribunal entitled to take account of its own assessment of a litigant's capacity to participate in proceedings

In *Maitland-Hudson v Solicitors Regulation Authority* [2019] EWHC 67 (Admin), the Court confirmed that a tribunal is entitled to take account of its own assessment of a litigant's capacity to participate effectively in proceedings, alongside the medical evidence, if it considers it appropriate to do so.

Mr Maitland-Hudson appealed against the decision of a Solicitors Disciplinary Tribunal to strike him off the Roll. His appeal was based on grounds of alleged procedural unfairness in that he was a litigant in person, and was substantially impaired in his ability to defend himself to the extent that he admitted himself to hospital. He also complained that despite the fact that consultant psychiatrist experts on both sides agreed that he was unable to represent himself, the SDT had refused to dismiss the proceedings on the basis of "incurable unfairness" or to stay or adjourn the hearing.

In this summary, we will focus on the facts and legal arguments relating to the aspect of Mr Maitland-Hudson's appeal based on the so-called "appearance trap". The salient facts are as follows:

- Prior to the hearing, Mr Maitland-Hudson informed the SDT that he suffered from anxiety and panic attacks and produced letters from his GP suggesting that he be allowed to address the SDT sitting down, with frequent breaks and restricted hearing hours. The SDT broadly complied with these suggestions throughout the hearing.

- Mr Maitland-Hudson was represented by counsel until 14 January, namely the day before the hearing was due to start. However, he then dispensed with his legal team's services and represented himself at the hearing. The SRA opened its case and called 3 witnesses, which Mr Maitland-Hudson cross examined.

- On 19 January, Mr Maitland-Hudson provided the SDT with a further letter from his GP which said that he had seen Mr Maitland-Hudson the previous day and his mental state was poor and "negatively affecting his ability to perform in court".

- On 24 January, Mr Maitland-Hudson provided the SDT with an email from his consultant psychiatrist which stated that his depression and anxiety "impact his performance". That same day, the SRA concluded its case following which Mr Maitland-Hudson made an unsuccessful application to dismiss the proceedings on the grounds of ill-health. He opened his defence with a speech lasting over 3 hours, then gave evidence and was cross-examined at length. He completed his oral evidence on 30 January.

- On 31 January, Mr Maitland-Hudson did not attend, having admitted himself to a private psychiatric hospital the previous evening for depression. The hearing was adjourned to 26 February, with a direction that either party could serve medical evidence 7 days before the resumed hearing.

- On 26 February, Mr Maitland-Hudson did not attend but was represented by a solicitor pro bono. He submitted two letters from Mr Maitland-Hudson's consulting psychiatrist Dr Bourke, which concluded that Mr Maitland-Hudson was not fit to represent himself as a litigant in person, nor fit to attend on 26 February but was fit to instruct counsel. The medical evidence submitted by the SRA agreed that Mr Maitland-Hudson was unfit to represent himself but was able to instruct counsel and was fit to attend. The SDT adjourned until 3 April in order to give Mr Maitland-Hudson the opportunity to secure representation and directed that he could make his closing submissions in writing if he wished.

- On 3 April, Mr Maitland-Hudson did not attend but his pro bono representative attended and applied for an adjournment or a stay to allow his health to improve or to allow him to obtain funding to instruct counsel for the remainder of the hearing. The SDT granted a further stay, with hesitation, to 16 April, indicating it was Mr Maitland-Hudson's final opportunity to instruct counsel to assist with closing submissions.

- On 16 April, Mr Maitland-Hudson was represented by leading counsel, but only for the purpose of making an application to dismiss the proceedings as an abuse of process, as Mr Maitland-Hudson had not been able to effectively participate in the hearing or to adjourn/stay the proceedings. The SDT rejected Mr Maitland-Hudson's application, the hearing continued and it announced its findings on 20 April. A sanctions hearing took place on 2 May.

On the appeal, the issue of the "appearance trap" arose in relation to the applications of the 24 January and the 16 April and it is worth noting what the SDT said in its determination on each application. In regard to the application on the 24 January, the SDT said that Mr Maitland-Hudson's ill health had been raised before the start of the hearing following which it had implemented the suggested ways of adapting the proceedings to enable him to manage the process. It noted that Mr Maitland-Hudson had made coherent and detailed submissions on complex areas of law both in writing and orally, as well as making a number of applications on matters of evidence and he had cross-examined witnesses. There was, the SDT said, nothing in the medical evidence to suggest he was unfit to follow proceedings, represent himself or put his case forward providing the appropriate measures remained in place.

With regard to the application on 16 April, the SDT said that although Mr Maitland-Hudson had become emotional on occasions during the hearing, he had been fully engaged, had spoken eloquently, behaved entirely appropriately at all times, had attended on time every day and had been ready to proceed. The issue of his mental health had been raised before the start of the hearing and had been kept under review throughout with adjustments being made. It said that although Mr Maitland-Hudson had relied on the evidence of his consultant psychiatrist, it was right for the SDT to carry out its assessment of the fairness of the proceedings to date by reference to the totality of the medical evidence before it. It noted that Mr Maitland-Hudson's presentation to Dr Bourke was significantly different to his presentation in Court which had been eloquent, coherent and engaged throughout. It concluded that Dr Bourke had not been in possession of

all the material facts when reaching his conclusions, pointing to the fact that Dr Bourke had not been provided with transcripts of Mr Maitland-Hudson's submissions or the hearing as a whole. Nor was Dr Bourke seemingly aware that Mr Maitland-Hudson was continuing to work as an Avocat in Paris. It concluded that Mr Maitland-Hudson had not demonstrated that he had been unfit to participate in the proceedings, nor had there been procedural unfairness to him, nor an abuse of process.

On his appeal to the High Court, Mr Maitland-Hudson argued that the SDT had fallen into the "appearance trap". He referred to the case of *Solanki v Intercity Telecom* (2018), in which the Court of Appeal had criticised the trial judge for basing his assessment of a litigant's ability to participate in the proceedings on his observations of the litigant in court, rather than on the professional medical evidence which demonstrated that the litigant had a genuine history of depression and mental problems. Mr Maitland-Hudson argued that any view based on appearance was positively dangerous. He argued that the tribunal's assessment should not come into play unless that assessment was put to the expert before being acted on and the tribunal's assessment should never come into play where mental health concerns were at issue.

The Court rejected this argument. It said that there was no blanket rule that a tribunal must ignore what it sees and hears. *Solanki* was, the Court noted, a very extreme case on its facts. It is, the Court held, quite legitimate for a tribunal to take account of its own assessment of a litigant's capacity to participate effectively in its overall assessment of the evidence before it, including the expert medical evidence, if it considers it appropriate to do so. Furthermore, no tribunal is ever bound to accept the expert evidence before it, even if that evidence is agreed, but instead is entitled to weigh up the medical evidence against all of the other material available to it. The Court said that if the tribunal intends to depart from the conclusion of an expert it needs to exercise caution, and also to bear in mind that litigants with mental health illnesses may mask their problems or not understand that it may not be in their interests to continue. It must also give reasons for its conclusions. However, it was not correct, the Court said, that a tribunal is only able to depart from medical evidence where there is a basis found in other medical evidence to a different effect. The task of the tribunal is, the Court held, to weigh up the expert medical evidence alongside all the other material available to it.

As to the challenge to the decision of the SDT on the 24 January application, the Court held that the SDT did not fall into some impermissible appearance trap. Instead, having concluded that the medical evidence did not suggest that Mr Maitland-Hudson was unable effectively to participate, it carried out the perfectly legitimate and necessary exercise of cross-checking by reference to his actual performance in the proceedings to date. The Court held that it could not be criticised for doing so. The SDT was not, the Court held, substituting its own views for those of the medical experts but rather considering the evidence in the round. With regard to the 16 April application, the Court again held that the SDT had proceeded in an entirely appropriate manner, considering all of the medical evidence carefully, giving full reasons for its reservations as to the reliability of the central medical evidence from Dr Bourke. It was, the Court held, fully entitled to include in that consideration what it had heard and seen of Mr Maitland-Hudson first hand during the hearing.

The Court dismissed this basis of Mr Maitland-Hudson's appeal and all his other arguments.

Supreme Court reviews the rehabilitation of offenders and disclosure and barring regimes

On 30 January 2019, the Supreme Court handed down its judgment in four joint cases brought by individuals known as Lorraine Gallagher, P, G and W. The lead judgment was given by Lord Sumption and three other Supreme Court judges agreed with him, with one dissenting. **(***In the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland) and others* [2019] UKSC 3*.)*

Each of the individuals involved in the case had been convicted or received cautions or reprimands in respect of comparatively minor offending. In each case, the relevant convictions or cautions were "spent" for the purposes of the Rehabilitation of Offenders legislation, but in each case would have to be disclosed if the individuals applied for jobs involving contact with children or vulnerable adults. The Supreme Court acknowledged that the applicants' challenge raised issues of great sensitivity and difficulty and turned on the two competing interests of the rehabilitation of ex-offenders and the protection of the public.

The Supreme Court undertook a detailed analysis of the Rehabilitation of Offenders Act statutory scheme, which governs the situations in which an offender must disclose his criminal history and the Police Act 1997, which

governs the disclosure of criminal records by the Disclosure and Barring Service in England and Wales and its Northern Ireland equivalent. The applicants challenged the statutory regimes as not being "in accordance with the law" for the purposes of Article 8 of the European Convention on Human Rights (protecting the right to respect for private and family life), an argument that the Supreme Court rejected.

The applicants also argued that the statutory regimes were not proportionate. With respect to the first limb of the applicants' argument on this point, the Supreme Court held that it was entirely appropriate that the legislation required disclosure by reference to pre-defined categories, rather than by the circumstances of each case. However, in the second limb of their argument, the applicants had complained that the balance between the risk of blighting the prospects of ex-offenders and the risk of appointing unsuitable persons to sensitive positions had been drawn in a place which had given too much emphasis on the latter and not enough on the former. The Supreme Court held that although the majority of the carefully drawn categories were proportionate, there were two exceptions to this.

First, it identified the multiple conviction rule. This rule provides that where a person has more than one conviction of whatever nature, any conviction must be disclosed in a criminal record certificate. The rationale of the rule was, the Court said, that the criminal record of a serial offender is more likely to be relevant to his suitability for a sensitive occupation because the multiplicity of convictions may indicate a criminal propensity. However, the Supreme Court said that the rule is framed in a "perverse" way, as it applies irrespective of the nature of the offences, of their similarity, of the number of occasions involved or the interval in time separating them. As a result, the Supreme Court held that the rule as currently framed is incapable of indicating a propensity and thus cannot be regarded as proportionate.

Secondly, the Supreme Court identified the issue of warnings and reprimands given to young offenders. A warning or reprimand given to a young offender requires no consent and does not involve the determination of a criminal charge (unlike a caution administered to an adult which does require consent). The purpose of a warning or reprimand given to a young offender is wholly instructive. Accordingly, the Supreme Court held that the inclusion of warnings and reprimands administered to a young offender amongst offences that must be disclosed was a category error and as a result was an error of principle.

It is now for the Government to review this decision and act on it. In the meantime, regulators may wish to consider the implications of this decision on the way in which they deal with multiple convictions and also with regard to warnings and reprimands given to young offenders.

This bulletin is produced for the interest of those involved in regulatory proceedings. It does not constitute legal advice or seek to direct decision makers in any way.

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