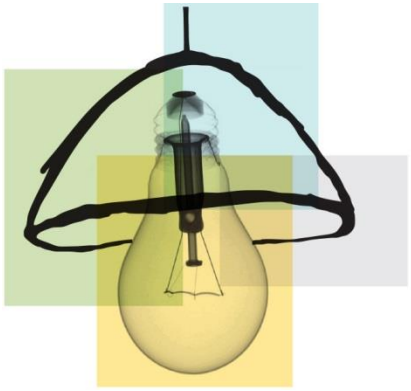

Regulatory Newsletter January 2019

Decision of panel to proceed in absence of doctor was unimpeachable

We first considered the case of *General Medical Council v Hayat* in our Autumn 2017 newsletter. In that case, the High Court held that a panel had unfairly proceeded in the absence of a doctor. It quashed the decision of the panel and remitted the matter to be reheard. The Court of Appeal has now overturned the decision of the High Court, holding that the panel's decision to proceed in the absence of the doctor was unimpeachable. (*General Medical Council v Hayat [2018] EWCA Civ 2796*.)

Friends Life referred Dr Hayat, a GP, to the General Medical Council after he made a claim on an insurance policy which was alleged to be false. A 15 day hearing before a Medical Practitioners Tribunal was due to start on 31 October. In the preceding month, Dr Hayat made two unsuccessful applications for an adjournment, first on the basis that he had insufficient time to prepare and secondly that he had insufficient money to pay for lawyers. At the start of the hearing Dr Hayat, who was by that stage represented, made a third application for an adjournment. Dr Hayat provided the panel with a handwritten letter dated 30 October from an A&E doctor stating that he needed to be "off work for seven days" because of back pain. The panel refused the application to adjourn on the grounds that the medical evidence did not contain the dosage of any medication, nor any details as to the potential impact that the pain, discomfort or medication could have on Dr Hayat.

However, immediately after the panel's determination had been read out, Dr Hayat was found sitting in a chair presenting as unconscious. When a paramedic arrived and attempted to pass a tube through his nose, he reacted and informed the paramedic that he was suffering from chest pains. The hearing was adjourned and Dr Hayat was taken to hospital by ambulance. Dr Hayat was discharged from hospital on Friday 4 November. He did not attend the hearing and the GMC applied for proceedings to continue in his absence, but the panel refused and adjourned the hearing until Monday 7 November.

On 7 November, two hospital doctors (Dr Bright and Dr Cunnington) who had treated Dr Hayat until his discharge on 4 November, sent separate emails to the GMC, both concluding that Dr Hayat's condition was such that it should not stop the disciplinary proceedings from continuing. Also on 7 November, Dr Hayat submitted a Statement for Fitness for Work form to the panel (referred to as the "sick note"), issued by his GP surgery, which stated that he had developed an infection in his right arm, was to "continue with antibiotics" and was "not fit for work".

The hearing resumed on 7 November, and neither Dr Hayat nor his representative attended. On the basis of the emails from Dr Bright, Dr Cunnington and the sick note, the GMC made another application for the proceedings to continue in Dr Hayat's absence. The panel noted that the sick note indicated that Dr Hayat was not fit for work, but it did not suggest that he was not fit to attend and fully participate in the proceedings. The panel concluded that Dr Hayat had voluntarily absented himself from the hearing and thus agreed to

the GMC's application to proceed in his absence. It went on to find the key allegations against Dr Hayat proved. At a resumed hearing in February, which Dr Hayat attended, the panel found Dr Hayat's fitness to practise impaired and erased him from the register.

Dr Hayat appealed. He argued that it had been procedurally unfair to proceed with the hearing in his absence. The High Court concluded that the panel had not correctly applied the relevant legal principles to its decision on 7 November. The panel had relied on the evidence from Drs Bright and Cunnington that Dr Hayat was fit to be discharged and fit to attend the hearing, but neither of those doctors had made any mention of an infection. The sick note, on the other hand, had stated that he had developed an infection. As the sick note raised a new issue which had not been fully addressed in the evidence of Drs Bright and Cunnington because it post-dated their evidence, the High Court concluded that it ought to have resulted in an adjournment. The High Court said that the panel had not been entitled to disregard the sick note merely because it did not also say that he was unfit to attend the hearing. The panel ought to have considered whether and to what extent Dr Hayat's condition would have affected his ability to take part in the proceedings. As Dr Hayat had been deprived of the opportunity to give his evidence and to challenge the evidence of the GMC's witnesses at the fact-finding stage, the High Court decided that he had not received a fair hearing. Dr Hayat's appeal was allowed and the matter remitted for a fresh hearing before a new panel.

The GMC appealed to the Court of Appeal. The Court of Appeal reviewed the key authorities on proceeding with a hearing in the absence of a registrant and quoted extensively from the Court of Appeal decision in *General Medical Council v Adeogba (2016)*. The Court of Appeal also reviewed various authorities dealing with the nature and standard of the evidence necessary to found an application for an adjournment on the grounds of ill-health, in particular the case of *Levy v Ellis-Carr (2012)*. In that case, it was said that the medical evidence required to demonstrate that a party is unable to attend a hearing should:

> "identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination."

In *Forrester Ketley v Brent (2012)* it was said that "something more than stress occasioned by the litigation will be needed to support an application for an adjournment". The Court of Appeal also noted that in several cases it had been held that a pro-forma sick note may be "insufficient to justify non-attendance at a hearing, particularly if it refers only to an unfitness to attend work". In addition, the Court of Appeal said that although a panel has a discretion to conduct further enquiries if the medical evidence does not meet the requirements noted in *Ellis-Carr*, this is not a duty and the onus is on the registrant to engage with the panel and the process. Furthermore, the Court of Appeal stated that if a panel is to be criticised for not making further enquiries into the medical evidence, the complainant must be able to show that those further enquiries would have been material and likely to have led to a different decision.

Having set out the law, the Court of Appeal went on to conclude that the High Court had failed to apply the legal principles and, as a result, had come to the wrong conclusion. First, the High Court had appeared to conclude that, because the sick note post-dated the evidence of Drs Bright and Cunnington, it somehow trumped all that had gone before, which was wrong. The relevance of the sick note depended on its contents, not its date. Secondly, the High Court had wrongly equated the statement in the sick note that Dr Hayat could not work with a statement that he could not participate in the hearing. The sick note was, the Court of Appeal said, wholly insufficient to warrant an adjournment as it failed every element of the analysis required by the test in *Ellis-Carr*. Thirdly, the High Court appeared to have assumed that the sick note was diametrically opposite to the evidence of Drs Bright and Cunnington, whereas it was consistent with their reports. Fourthly, it was not correct to say (as the High Court had done) that the panel had disregarded the sick note. Instead, the Court of Appeal considered that the panel had considered it, but concluded that it essentially reiterated the medical information from Drs Bright and Cunnington.

The Court of Appeal also said that the High Court had been wrong to suggest that the panel should have carried out further investigations into Dr Hayat's medical

condition. This was incorrect in principle as the onus was on Dr Hayat and not the panel. In any event, there was no evidence before the High Court or the Court of Appeal that any further investigations into Dr Hayat's medical condition would have made any difference at all, so even if there had been a failure to make further investigations, the failure was not material. The Court of Appeal also considered that the panel had been entitled to weigh up the sick note against all of the other material available, including the fact that Dr Hayat had already made three unsuccessful applications to adjourn the hearing on entirely different grounds. The panel had also been entitled to take into account the public interest in avoiding adjournments which cause extensive disruption and inconvenience and waste huge amounts of costs. For all these reasons, the Court of Appeal concluded that the High Court had erred in principle and the panel's decision to proceed in Dr Hayat's absence was unimpeachable. The GMC's appeal was allowed.

Tribunal wrong not to adjourn case in face of medical evidence

In *Rodriguez-Purcet v Solicitors Regulation Authority [2018] EWHC 2879 (Admin)*, the Court held that a Solicitors Disciplinary Tribunal had been wrong not to agree to an adjournment of a hearing on the grounds of the respondent's ill health.

Mr Rodriguez-Purcet was the head of marketing and business development for a firm of solicitors. He was the respondent in proceedings before the Solicitors Disciplinary Tribunal in which it was alleged that he had dishonestly arranged corrupt payments for his own benefit, and recklessly arranged for confidential client information to be passed to third parties. Mr Rodriguez-Purcet was represented by a solicitor, Mr Hughes. In the month before the hearing, Mr Hughes wrote to the SRA to explain that he was having difficulties obtaining instructions because of Mr Rodriguez-Purcet's poor health. On the Friday before the hearing was due to start on the Tuesday, Mr Hughes submitted a medical report to the SRA from Mr O'Donnell and notification that an application to adjourn the hearing would be made, on the basis that Mr Rodriguez-Purcet was unable to attend due to ill health. He also explained that Mr Rodriguez-Purcet was unable to give him effective instructions.

Mr O'Donnell was a registered mental health nurse. He described Mr Rodriguez-Purcet as having a long history of mental ill health, in particular bi-polar disorder which was reasonably well managed with medication. He had performed some baseline psychometric tests on Mr Rodriguez-Purcet which indicated that he was suffering from moderately severe depression, severe anxiety and high stress rating. He concluded that these symptoms may be indicative of the early warning signs of a potential relapse of his bi-polar disorder. Mr O'Donnell described Mr Rodriguez-Purcet as reporting great difficulties in concentrating on reading, retaining and recalling information relating to the proceedings. He recommended that the hearing be adjourned so that a full assessment of Mr Rodriguez-Purcet's mental health needs could take place and his medication reviewed.

The SRA sent Mr O'Donnell's report to a consultant psychiatrist, Dr Mogg, who prepared his own report without examining Mr Rodriguez-Purcet or reviewing his medical records. Dr Mogg's report was dated on the Monday. Dr Mogg appeared to agree that the symptoms reported by Mr Rodriguez-Purcet were typical of a bi-polar relapse. However, he opined that the scores on the psychometric test would not be out of the ordinary for any individual who is highly stressed at the prospect of facing disciplinary proceedings. He then opined that, on the assumption that Mr Rodriguez-Purcet had been able to continue to work, any relapse of his bi-polar condition was not currently severe and adjustments (such as taking regular breaks during cross-examination) could be made to facilitate Mr Rodriguez-Purcet's attendance at the hearing.

At the start of the hearing on the Tuesday morning, the SDT adjourned to allow Mr Hughes time to consider Dr Mogg's report. In the afternoon, the SDT heard Mr Hughes' submissions over the telephone and from the SRA in person, before reaching a decision to refuse the application to adjourn the hearing on the basis that with suitable adjustments, Mr Rodriguez-Purcet could take part in the proceedings and, notwithstanding his medical condition, he could have a fair trial. The hearing proceeded on the Wednesday morning without Mr Rodriguez-Purcet being present, nor was he represented by Mr Hughes. The SDT found Mr Rodriguez-Purcet guilty of acting dishonestly and made an order that no solicitor should employ or remunerate him in connection with their practice as a solicitor.

Mr Rodriguez-Purcet appealed on the basis that the SDT had been wrong not to grant an adjournment. The Court studied the SDT's reasons for not granting the

adjournment and noted that it had determined that it was appropriate to rely on the report of Dr Mogg. However, the Court pointed out that Dr Mogg's report was based on a mistaken assumption that Mr Rodriguez-Purcet was able to work when, in fact, Mr Rodriguez-Purcet had been unable to work for a month prior to the hearing. In addition, the Court noted that the fact Mr Hughes had been unable to get instructions and was unable to represent Mr Rodriguez-Purcet did not feature at all in the discussion and reasoning of the SDT.

The Court concluded that the SDT had reached a decision which, on the facts and information available to them that day, was unjust and wrong. The SDT had medical evidence from a suitably qualified practitioner, Mr O'Donnell, who had very recently examined Mr Rodriguez-Purcet. That evidence clearly described a significantly worsening situation in his very long diagnosed mental ill health. It set out how his ability to participate properly in the hearing was impacted and impaired. It clearly stated that having to participate in the hearing might trigger a relapse in his major mental health condition and clearly advised that a full assessment take place to establish reliably what the situation was. Accordingly, the Court set aside the SDT's order and remitted the matter to the SDT for a new hearing.

Failure to cross-examine registrant on question of sexual motivation was procedurally unfair

In *Sait v General Medical Council [2018] EWHC 3160 (Admin)*, the Court allowed an appeal against a finding of fact that a doctor had acted with sexual motivation.

Dr Sait was a consultant orthopaedic surgeon. He faced a hearing before a Medical Practitioners Tribunal in relation to his behaviour towards two patients. All allegations in respect of Patient A were found largely unproved. In particular, the panel was not satisfied that Dr Sait's actions had been carried out with sexual motivation. However, in respect of Patient B, the panel found that, in consultations between 2014 and 2016, Dr Sait had on more than one occasion told Patient B that she was "pretty"; that on 9 May 2016 he telephoned her and asked her to meet him in a pub; that he met Patient B at the pub and told her that she was "very pretty" and that she should consider divorcing her husband; that at the end of the meeting he asked Patient B to go with him to his car and that all of his actions in this regard were sexually motivated. Other parts of Patient B's complaints were not accepted by the panel. The panel suspended Dr Sait from practice for three months.

Dr Sait appealed against the finding that he had acted with sexual motivation. It was accepted by the GMC that, without the finding of sexual motivation, the other facts found proved would probably not have been capable of meeting the standard of impairment of fitness to practise.

The Court referred to the case of *Basson v GMC (2018)*, in which it was said that the "state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence." In *Basson* it was also said that a regulatory appeal against a "finding of fact derived from inference or deduction is less stringent than a challenge to a concrete finding of fact".

The Court also referred to the passage in *Basson* in which it was said that a "sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship". The Court noted that the shorthand "grooming" has sometimes been adopted to describe the second type of sexually-motivated conduct. On the facts, the Court held, it was obvious that Dr Sait's case was a case of both types. However, for future cases, the Court held that where sexually motivated conduct is alleged it should be made clear what type of motive is being alleged.

One of Dr Sait's grounds of appeal was that the panel failed to observe standards of procedural fairness in that it was never sufficiently put to him, whether in the course of cross-examination or in the panel's own questions, that he had conducted himself in the manner alleged because he intended to progress his relationship with Patient B with a view to sexual relations. The Court referred to extensive case law for its conclusion that "testing the evidence in the crucible of cross-examination" is the best way of gaining "the true and clear discovery of the truth". The Court went on to say that if an allegation made against a registrant is serious (and an allegation of sexually motivated misconduct against a doctor is about as serious as it gets, according to the Court), then the allegation must be fully and squarely put in cross-examination to the accused registrant. The content of the registrant's

replies, as well as his demeanour would, the Court said, equip the panel to decide whether the allegation was, or was not, true.

The Court went on to say that there was a "remarkable failure" to cross examine Dr Sait about his alleged sexual motivation beyond a couple of perfunctory questions, namely: "did it cross your mind whether Patient B was pretty?" and "your actions, were they sexually motivated at all?". In the Court's view, this was not good enough. The case of sexual motivation should, the Court held, have been put very clearly to Dr Sait in cross-examination and he should have been given a much fuller opportunity to respond to it. The failure to cross-examine Dr Sait comprehensively on the central allegation was, the Court held, procedurally unfair to such a degree that the appeal had to be allowed on that basis.

Dr Sait also argued that there had been no evidential basis for the finding of a pattern of sexually motivated behaviour and that the panel failed to carry out any sufficient assessment of Dr Sait's subjective state of mind. The Court observed that in relation to Patient A, the panel had found that when Dr Sait called her "pretty" this was just a clumsy attempt at conversation. The panel had not, the Court held, explained why it reached a different conclusion in relation to the same phrase being used in conversation with Patient B. The Court referred to its earlier conclusion that this aspect of the case had not been the subject of any cross-examination at all beyond a single question. The Court also explained that there was a virtually complete absence of reasoning as to how the conclusion was reached that at the consultations with Patient B the use by Dr Sait of the word "pretty" was with sexual motivation. Accordingly, the Court concluded that there was virtually no evidential foundation, nor was there any clear or sufficient reasoning, for the panel's finding that there had been sexual motivation in this respect. The Court concluded that this finding was therefore clearly wrong and had to be set aside.

Having allowed the appeal, the Court remitted the matter to be reheard.

Panel entitled to take no action in case of sexually motivated conduct where exceptional circumstances were present

In *General Medical Council v Mehta [2018] CSIH 69*, the Court of Session in Scotland (Second Division, Inner House) dismissed an appeal by the GMC against the decision of a panel to take no action against a doctor who had been found guilty of sexually motivated conduct against a junior colleague.

A Medical Practitioners' Tribunal Service panel found that Dr Mehta had invited Dr X, a junior colleague, to attend his office to view teaching presentations. However, instead of showing Dr X any slides, Dr Mehta told her that if she "found someone to confide in" that was not her boyfriend this "would not be cheating"; he moved his chair close to Dr X so that their knees were touching; he made prolonged eye contact with her, and hugged her and kissed her shoulder on more than one occasion. The panel found that this conduct was inappropriate and sexually motivated. It considered that Dr Mehta's fitness to practise was impaired by reason of misconduct.

With regard to sanction, the panel noted as an aggravating factor that it had found a lack of candour in Dr Mehta's evidence regarding aspects of his misconduct. However, it identified significant mitigating factors. It noted that he had admitted many of the allegations at the beginning of the hearing, he had shown a significant degree of remorse and a high level of insight as demonstrated by his efforts to remediate. It noted the passage in the Sanctions Guidance on the exceptional circumstances which may lead to a finding that no action is required following a finding of impairment. Paragraph 70 states that "Exceptional circumstances are unusual, special or uncommon, so such cases are likely to be very rare." The panel noted that Dr Mehta had, over a lengthy period of time since the incident, publicly involved himself in presentations and discussions which were specifically based on his own inappropriate behaviour and at least one of which was attended by more than 75 colleagues. He had held himself out as an example from which other doctors might learn. The panel observed that Dr Mehta had shown exceptional candour and openness and that it was "very unusual" for doctors to use their reflection to the extent which he had in order to assist colleagues.

The panel concluded that, as a result of Dr Mehta's willingness to personally serve to restore public confidence in the profession, no sanction was necessary.

The GMC appealed on the basis that the panel's decision was not sufficient for the protection of the public. It argued that the panel had referred to the Sanctions Guidance but had failed to give proper effect to it. The Sanctions Guidance indicated that in a case of sexual misconduct involving a breach of trust a significant sanction, such as suspension, would be appropriate. Further, the panel had failed to recognise that the reasons given for not imposing a sanction related mainly to insight and remediation, which would already have been taken into account in deciding the question of impairment and, as indicated in the Sanctions Guidance, were unlikely on their own to justify taking no action. The panel had failed to identify any further exceptional factor, which would be necessary to justify a decision to impose no sanction.

The Court disagreed. First, the Court held that the panel had had due regard to the Sanctions Guidance. Although it was true that the panel had not referred to specific paragraphs in the Guidance, it did not mean that the panel had not taken them into account. It was quite clear, the Court held, that the panel had been alive to the principles set out in the Guidance. The Court was not convinced by the GMC's argument that there was an express requirement on the panel to make reference to the relevant paragraphs in the Guidance, even if merely to confirm that a certain paragraph had been discounted, as to do so could result in the process becoming a box ticking exercise rather than an evaluation of the complaint within its own factual matrix.

The Court also held that the panel did not state that misconduct of the type in question was not worthy of sanction. Rather it reached the decision that Dr Mehta's case was exceptional. Notwithstanding the fact that three years had elapsed since the events complained of, and the steps taken in remediation, the panel made a finding of impairment and the seriousness and impact of such a finding on a professional could not be ignored, the Court said. The Court also dismissed the GMC's argument that remediation and insight could not constitute "exceptional circumstances" in the meaning of the Guidance. Whilst the Guidance sets out that remediation and insight are "unlikely on their own to justify a tribunal taking no action", there is, the Court held, nothing in principle preventing them from being the determining factors. The fact that Dr Mehta had participated in public presentations on the subject, educating the profession to prevent others from crossing boundaries and educating junior staff to speak up, together with the impact these activities might have on public confidence in the profession, were all important and distinct considerations for the panel.

The Court refused the appeal.

Erasure was the appropriate sanction for a doctor who had been dishonest in his dealings with his regulator

In *General Medical Council v Mmono [2018] EWHC 3512 (Admin)*, the Court quashed the decision of a panel to impose a sanction of suspension on a doctor who had been dishonest in his dealings with the GMC.

Following a complaint by a patient (Patient 1), various interim conditions were imposed on Dr Mmono's practice, including one that he not carry out any intimate examination of patients without a chaperone, and that he keep a log of every intimate examination, signed by the chaperone. The complaint by Patient 1 was heard by a panel between 26 October and 2 November 2016 (the 2016 panel), and Dr Mmono was ultimately suspended for four months. During the course of the 2016 panel hearing, Dr Mmono handed up his chaperone log, which detailed examinations of Patient 2 on 15 October and 18 October and which was purportedly signed by a chaperone. No document was supplied in connection with an examination of Patient 2 that had taken place on 26 October.

On 22 November, Patient 2 made a complaint about Dr Mmono to the GMC. At the subsequent panel hearing in March 2018, it was found that Dr Mmono had carried out intimate examinations of Patient 2 on 15, 18 and 26 October without a chaperone, and that the log that Dr Mmono had produced at the panel hearing in October 2016 had been untrue. He was found to have breached his interim order conditions and acted dishonestly in misleading the 2016 panel. The 2018 panel found that his fitness to practise was impaired and determined that he should be suspended for 12 months with a review hearing to follow. The panel acknowledged that its decision was finely balanced and that without some of the factors which mitigated his conduct, erasure might have been the appropriate sanction.

The GMC appealed against this decision, arguing that it did not adequately reflect the severity and nature of Dr Mmono's misconduct and that, having considered the Sanctions Guidance, the panel then failed to accord the Guidance sufficient weight. The GMC argued that the only sanction consistent with the discharge of the panel's function of public protection was erasure. This was a case, the GMC said, in which there was a lack of insight, an ongoing risk to patient safety, dishonesty at two tribunal hearings, and repeated failures by Dr Mmono to recognise the potential risks to patients and the public confidence. Dr Mmono did not attend the appeal hearing, although he provided a witness statement to the Court.

The Court started by approving the comments of the Court of Appeal in *Bawa-Garba v GMC (2018)* that the Sanctions Guidance should always be consulted by panels, but that it is no more than non-statutory guidance, the relevance of which depends upon the precise circumstances of the particular case. The Court went on to say that if having considered the particular facts and features of the case, the Guidance points clearly in the direction of a particular sanction, the panel must explain in the determination why that sanction is not to be imposed. In Dr Mmono's case, the Court held that the panel had not identified any good reason for imposing a suspension rather than erasure. The panel had not, the Court said, identified which factors in mitigation had "tipped the balance" in favour of suspension. Of the mitigating factors that it had listed in the determination, none was of particular relevance to the elements of the case which the panel had (correctly) determined to be the most serious, namely Dr Mmono's dishonesty and his blatant disregard for the system of regulation. The determination, the Court said, made no sense.

The Court also held that the determination failed to reflect the serious nature of the panel's findings against Dr Mmono. The panel found that Dr Mmono had been dishonest in his dealings with his regulator, which undoubtedly placed his dishonesty at the more serious end of the spectrum. It also found little evidence of insight or remediation or reflection. There was no good or cogent reason provided to justify suspension over erasure. On the facts found proved, the Court held that erasure was appropriate and proportionate and in the public interest.

The Court was satisfied that this was a clear case in which there was no need to remit the case back for consideration by the panel. It therefore allowed the appeal, quashed the panel's decision and substituted the sanction of erasure.

Judicial review of an investigation committee decision to amend an allegation fails

In *R (on the application of Rudling) v General Medical Council [2018] EWHC 3582 (Admin)*, the Court dismissed an application for judicial review of a decision by an Investigation Committee to expand an allegation to include matters relating to a doctor's probity.

In 2013, Dr Rudling, a GP, received a Rule 7 letter from the GMC giving details of an allegation that her fitness to practise was impaired following the death of a 12 year old (Patient A). The GMC alleged that she failed to assess Patient A's records when receiving a telephone call from Patient A's mother on Friday 7 December, failed to make a contemporaneous record of the discussion and recorded the discussion in Patient A's medical notes on 10 December without making it clear that this was a retrospective entry. In Dr Rudling's detailed response to the Rule 7 letter, she stated that the telephone discussion had taken place after she had finished her appointments and she had unplugged her computer and phone to facilitate building works to take place over the weekend. She took the call in reception as there were no patients in the building. She said she was aware that Patient A's mother had spoken to another doctor earlier in the day for advice as she had seen a summary of that call. She did not record the conversation at the time because her computer had been disconnected and when she returned to work the following Monday, she backdated the entry of the conversation. With the benefit of hindsight, she accepted that she should have made it absolutely clear that it was a retrospective entry.

An Investigation Committee hearing was fixed for November 2013 but was adjourned pending the outcome of a police investigation which led to criminal charges against Dr Rudling. She was subsequently tried but acquitted of gross negligence manslaughter. However, during the course of their investigation, the police obtained evidence from an IT expert who stated that Dr Rudling was logged into the electronic record system and was actively updating a patient's records for 10 minutes after the time of the telephone call with Patient A's mother. He also told the police that there was no record of Dr Rudling having reviewed a

summary of Patient A's mother's telephone conversation with another GP earlier on 7 December. In June 2017, the GMC wrote to Dr Rudling to inform her that the relisted Investigation Committee hearing would take place on 11 July. The letter contained draft particulars that were substantially different to those previously given to Dr Rudling. First the revised particulars alleged that the retrospective record of the telephone call had been intended to mislead anyone reviewing the record into believing it was contemporaneous. The draft particulars also included a charge of dishonesty in relation to the assertion that Dr Rudling's computer had been disconnected at the time of the pertinent telephone call and her statement that she had reviewed the summary of the record made by another GP earlier on 7 December.

Dr Rudling complained that the significant allegation of dishonesty had not been in the Rule 7 allegations presented to her in 2013, that she had no opportunity to consider or respond to the new material and it was unfair for the GMC to circumvent the Rule 7 process in this way. The GMC rejected this suggestion and the case proceeded to the IC hearing, at which the new material concerning Dr Rudling's probity was admitted. Dr Rudling applied for a judicial review. She alleged that the IC's decision to admit the new material deprived her of the statutory protections afforded by the Rules at the stage when allegations are considered by Case Examiners. The outcome was unfair for Dr Rudling because she was denied the opportunity to make written representations by way of explanations, denials or mitigation on the probity allegations to the Case Examiners. She further argued that the GMC's case about her probity amounted to a new allegation that was additional to the allegations made during the Rule 7 process in 2013 and in those circumstances the Rule 7 process was mandatory.

The Court disagreed. The Court noted that it had to approach the interpretation of the Rules in a purposive way, taking the public interest – not fairness to the doctor – as the primary yardstick by which to measure its conclusions. It held that the language of Rule 7 did not imply that a panel should treat an allegation as frozen in time. Detailed provisions for further investigation and further evidence were made at each stage of the regulatory process. Further, there was no procedural unfairness for Dr Rudling arising from the GMC's submission of new material to the IC. Dr Rudling knew and had been provided with a detailed account of what was alleged and had been provided with the evidence on which the GMC relied. The Court also held that a requirement to re-start the Rule 7 process after an allegation had been referred to the IC would add delay which would be contrary to the public interest. Finally, the Court held that the probity matters plainly amended the existing allegation and did not amount to a new allegation. Accordingly, the application for judicial review was dismissed.

Breach of a procedural requirement did not result in panel having no jurisdiction

In *Dorairaj v Bar Standards Board [2018] EWHC 2762 (Admin)*, the Court dismissed an appeal by a barrister who alleged that the decision of a panel against her had been null and void because of a procedural error.

Ms Dorairaj was an unregistered barrister. In 2015, she was caught on a nightclub's CCTV picking up another customer's purse and placing it in her pocket. She was arrested and dealt with by way of Community Resolution, whereby she accepted responsibility for the offence and agreed to participate in the Women's Pathfinder Diversion Scheme. Ms Dorairaj was referred to the Bar Standards Board. The BSB's Professional Conduct Committee referred her case to the Bar Tribunal and Adjudication Service as it decided that "there was a realistic prospect of a finding of professional conduct being made". It also decided that, having regard to the likely sentence on a finding of misconduct, a referral to a five person panel was appropriate. In 2016, a panel found Ms Dorairaj guilty of behaviour that was likely to diminish public trust and confidence in the profession. However, it took into account that the offence involved a single heat of the moment incident and concluded that this was one of those rare cases where disbarment would be disproportionate. She was suspended for 12 months and ordered to pay a £3000 fine.

In 2018, the BSB wrote to Ms Dorairaj explaining that it had recently come to appreciate that, under the rules applicable at the time, the PCC did not have power to direct her case to be heard by a five-person panel. Instead it should have been referred to a three person panel. Regulation rE60 of the BSB's Complaints Regulations stated that the PCC shall direct a five person panel to be constituted if a BSB authorised person would be likely to be disbarred or suspended from practice for more than twelve months, otherwise the PCC must direct a three-person panel to be

constituted. The phrase “authorised person” was defined in Part 6 of the BSB’s Handbook as including practising barristers. Therefore, unregistered barristers, such as Ms Dorairaj were not included in the scope of regulation rE60.

The BSB accepted that the decision to direct the matter to be heard by a five-person panel was not valid, but considered this to be a procedural irregularity and not a matter of jurisdiction. Therefore, it did not consider the findings against Ms Dorairaj invalid. Ms Dorairaj then launched an appeal out of time against the 2016 findings, on the basis that the decision was null and void as the panel had had no jurisdiction to make it.

The Court reviewed the authorities and confirmed that the correct approach to an alleged failure to comply with a provision prescribing the doing of some act before a power is exercised is to ask whether, objectively, it was a purpose and intention of the legislature that an act done in breach of that provision should be invalid. The purpose and intention of the draftsman must be derived from the wording used in the instrument concerned. The Court said that it had to focus on the wording of the Handbook as it stood at the relevant time, and ask whether on its true, objective construction it imposed a condition precedent such that, if an unregistered barrister was referred to a five-person panel, the panel had no jurisdiction to deal with the matter. In the Court’s view, there was no intention to make the number of persons in the panel a condition precedent to a panel having jurisdiction. The Court held that the PCC’s direction to refer a matter to be heard by a panel was severable and distinct from the direction the PCC made with regard to the constitution of the panel. The provisions for the constitution of the panel were, in the Court’s view, clearly procedural requirements that did not, if breached, mean that a panel had no jurisdiction. Accordingly, the Court confirmed that the panel did have jurisdiction to hear and determine Ms Dorairaj’s case. Moreover, there was no unfairness to Ms Dorairaj in her case being heard by a five-person panel. Ms Dorairaj’s appeal was dismissed.

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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