



# Regulatory Newsletter

## Winter 2018

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### Principal focus in determining whether exceptional circumstances exist must be on the nature, scope and extent of the dishonesty

*In Solicitors Regulation Authority v James and others [2018] EWHC 2058 (Admin)*, the Court held that the principal focus in determining whether exceptional circumstances exist for the purposes of determining whether a sanction less than striking off the roll is appropriate in the case of a dishonest solicitor must be on the nature, scope and extent of the dishonesty itself.

#### **James**

Ms James, a solicitor, was instructed in a piece of clinical negligence litigation by G. Over a period of 17 months, Ms James made a series of misleading statements on nine separate occasions to G and the firm about the current position of the litigation, and also created four back-dated letters. The Solicitors Disciplinary Tribunal in November 2017 held that Ms James had been dishonest in respect of both the misleading statements and back-dated letters. The SDT found that Ms James' firm was a "challenging place to work", with "bad, ineffective and inappropriate management". The report of a consultant psychiatrist found that Ms James was suffering from a mild depressive disorder with mixed anxiety. The SDT held that the root cause of Ms James' misconduct, including the dishonesty, had been the combination of the culture at

the firm, in terms of the pressures placed on junior solicitors, and her mental ill-health arising from the pressures of work and difficult personal circumstances. Accordingly, it concluded that the circumstances were exceptional and the appropriate sanction was suspension for two years, suspended for three years, subject to compliance with a Restriction Order.

#### **MacGregor**

Mrs MacGregor was a salaried partner and the Compliance Officer for Legal Practice at a solicitors firm. She became aware that the firm had been over-claiming for disbursements from the Legal Aid Agency and that the equity partner and head of the immigration practice, Mrs Abey, had embarked on a scheme to falsify invoices to justify the over-claiming. Although she was horrified by Mrs Abey's actions, considered it wrong and told Mrs Abey so, and also appreciated that as COLP she had a duty to report it, she did not immediately notify the SRA as she feared for Mrs Abey's health. On four occasions she assisted in cross-checking the false invoices until she stopped doing so on the basis that she knew it was wrong. Some eight months after she discovered the wrong-doing, Mrs MacGregor made a full report to the SRA, in which she was frank about her own involvement. The SDT found that Mrs MacGregor had committed serious misconduct in failing to report the conduct of Mrs Abey and that her actions in assisting Mrs Abey had been dishonest. However, it found that Mrs MacGregor's only motivation had been to protect Mrs Abey. She was clearly an anxious person and there was medical evidence to support the fact that she had a fear of people dying.

Although the SDT could not be certain that Mrs MacGregor was suffering from a mental disorder at the time of the cross-checking, her concern for Mrs Abey's health placed her in a situation of unbearable pressure which impacted on her well-being and functioning. The SDT found that there were exceptional circumstances and the sanction should be reduced accordingly. It imposed a two year suspension, suspended for three years, with a Restriction Order.

### *Naylor*

Mr Naylor was an associate solicitor. He was instructed by H to make applications to the FCA to facilitate the restructuring of three companies, by 31 March 2014. In early 2014, he met with the two partners to whom he reported and said that he was unable to cope with the pressure he had been under at work in the previous six months and was "broken". He asked to be seconded to D, to which they agreed. The secondment commenced on 1 March 2014 and he took H's file with him. He did not comply with the 31 March deadline but sent H five emails in which he gave the misleading impression that the applications to the FCA had been made in time. A joint report of medical experts for the SRA and Mr Naylor concluded that, at the material time, he was suffering from an adjustment disorder as a reaction to severe stress. The SDT held that in relation to the emails, Mr Naylor had been dishonest. The medical evidence he submitted did not, in the SDT's view, establish that he did not know the difference between acting dishonestly and acting honestly. However, it accepted that Mr Naylor's misconduct arose at a time when he was affected by mental ill health that impacted upon his ability to conduct himself to the standards of a reasonable solicitor. Accordingly it concluded that his mental ill health was an exceptional circumstance and gave him a two year suspension, suspended for two years, with a Restriction Order.

### *Applicable legal principles*

The Court started with the wording from Sir Thomas Bingham MR in *Bolton v Law Society (1994)* who stated that the almost invariable sanction for a dishonest solicitor is striking off the roll. The Court also referred to the decision of the Divisional Court in *SRA v Sharma (2010)* in which it was said that "A finding that an allegation of dishonesty has been proved will almost invariably lead to striking off, save in exceptional circumstances". In *Sharma*, Coulson J went on to say that in deciding whether or not a particular case falls into the "small

residual category where striking off will be a disproportionate sanction", relevant factors "will include the nature, scope and extent of the dishonesty itself; whether it was momentary...or over a lengthy period of time; whether it was a benefit to the solicitor..., and whether it had an adverse effect on others". The Court noted that the courts have avoided seeking to define what does and does not amount to "exceptional circumstances" as this is a fact specific exercise in each case. However, it is clear from the case law that the principal focus in determining whether exceptional circumstances exist is on the nature and extent of the dishonesty and the degree of culpability. Finally, the Court held that it should only interfere with the decision of the SDT to impose a lesser sanction than striking off because of the existence of "exceptional circumstances" if satisfied that in reaching the particular decision the SDT committed an error of principle or its evaluation was wrong, in the sense of falling outside the bounds of what the SDT could properly and reasonably decide.

### *The parties' submissions*

The principal ground of the SRA's appeal was that the SDT had erred in principle or made an evaluation which was wrong in concluding that there were "exceptional circumstances" justifying the imposition of a lesser sanction than striking off. The SRA argued that in each of the three cases, in making an assessment of whether exceptional circumstances existed, the SDT had failed to focus on the critical factors, namely the nature, scope and extent of the culpability of the dishonesty and whether it was momentary or over a period of time. In each case, the SRA argued, the SDT had focused on other matters, such as pressure of work, mental health issues, stress and depression.

### *Conclusion*

The Court concluded that in all three cases the SDT had both erred in principle and been wrong to conclude that there were "exceptional circumstances" justifying a lesser sanction than striking off. The sanctions imposed were unduly lenient and clearly inappropriate.

First, the Court held that although it is well established that what may amount to exceptional circumstances is not prescribed, and depends on the various factors and circumstances of each case, it is clear from case law that the most significant factor carrying most weight and which must therefore be the primary focus in the evaluation is

the nature and the extent of the dishonesty. In other words, the Court said, the exceptional circumstances must relate in some way to the dishonesty. The Court accepted that matters of personal mitigation such as mental health issues and workplace pressures could be considered as part of the evaluation of whether exceptional circumstances exist. However, the Court held that where the SDT has concluded that, notwithstanding any mental health issues or work or workplace related pressures, the respondent's misconduct was dishonest, the weight to be attached to those mental health and working environment issues in assessing the appropriate sanction will, the Court held, inevitably be less than is to be attached to other aspects of the dishonesty found, such as the length of time for which it was perpetrated, whether it was repeated and the harm which it caused.

The Court went on to say that in each of the three cases, when it came to an evaluation of whether there were exceptional circumstances justifying a lesser sanction, the SDT had not focused on the critical questions of the nature and extent of the dishonesty and degree of culpability. It had also not engaged in the balancing exercise which that evaluation requires between those factors on the one hand, and matters such as personal mitigation, health issues and working conditions on the other. Had it done so, the Court held, the SDT should have concluded that in none of the cases could the dishonesty be said to be momentary, but in each case was repeated on a number of occasions. The Court held that in cases of repeated dishonesty a lesser sanction than striking off would not address the risk of harm to the public or the need to maintain the reputation of the profession.

The second basis on which the Court upheld the SRA's appeal was that it did not consider that mental health issues, specifically stress and depression suffered by a solicitor as a consequence of work conditions or other matters could, without more, amount to exceptional circumstances. The Court noted that the SDT had concluded that each of the three solicitors had acted dishonestly notwithstanding their mental health issues. It was therefore contrary to principle for the SDT to then conclude that those mental health issues could amount to exceptional circumstances. It was common, the Court said, for professionals to suffer such conditions because of pressure of work, or the workplace or other personal circumstances and such factors should be taken into account. However, the presence of such mental health

issues could not, without more, amount to exceptional circumstances. Thirdly, the Court held that whilst pressure of work or extreme working conditions were relevant to the assessment that the SDT would make in determining the correct sanction, those factors could not, either alone or in conjunction with stress or depression, amount to exceptional circumstances. Pressure of work could excuse carelessness or a lapse of concentration or making a mistake but could not, the Court held, ever justify dishonesty by a solicitor.

Accordingly, the Court allowed the SRA's appeal in all three cases and quashed the sentences of suspended suspension and substituted an order striking each solicitor off the roll.

## Court of Appeal reconsiders the correct test to be applied on an application for restoration to the register by a doctor

We first reviewed the case of *General Medical Council v Chandra* in our Christmas 2017 newsletter. Although the GMC was unsuccessful in its appeal against the restoration to the register of a doctor before the High Court, it successfully persuaded the Court of Appeal to quash Dr Chandra's restoration and remit his case to be reheard by a panel of the Medical Practitioners Tribunal Service (*General Medical Council v Chandra [2018] EWCA Civ 1898*).

To recap on the law, section 41 Medical Act 1983 provides that a panel may "if they think fit" restore a practitioner to the register. A doctor cannot make an application for restoration before five years from the date of erasure. Moreover, in exercising its power, the panel "must have regard to the over-arching objective". Section 1(1A) of the Act provides that the over-arching objective is the protection of the public. Section 1(1B) adds flesh to the over-arching objective by providing that the pursuit of that over-arching objective includes the pursuit of the following objectives: (a) to protect, promote and maintain the health, safety and well-being of the public; (b) to promote and maintain public confidence in the medical profession; and (c) to promote and maintain proper professional standards and conduct for the members of the profession.

As for the facts, Dr Chandra, a psychiatrist, had a sexual relationship with a vulnerable patient and was erased from the medical register in 2008. An important aspect of the case was that throughout the lengthy fitness to practise

proceedings and in a subsequent unsuccessful High Court appeal by Dr Chandra, he had maintained that the patient was lying and dishonest. In 2016, Dr Chandra made a successful application to be restored to the register. The GMC appealed to the High Court against that decision, but the GMC's appeal was dismissed. The GMC appealed to the Court of Appeal.

By the time the case reached the Court of Appeal, there were two questions to be decided: 1) is there an analogy between cases involving solicitors applying to be restored to the roll and doctors applying for restoration to the register and in any event can a doctor only be restored to the register if he can satisfy the panel that there are "exceptional circumstances" and 2) what is the proper approach to be taken by a panel to the over-arching objective when considering a restoration application by a doctor?

As to the first question, the Court of Appeal quoted extensively from the well-known words of Sir Thomas Bingham MR in *Bolton v Law Society* (1993), including the passage in which it was said that a solicitor who has discharged his duties with "anything less than complete integrity, probity and trustworthiness must expect severe sanctions" and that cases involving dishonesty will "almost invariably" lead to strike off. Bingham MR also said that "only infrequently" has a solicitor against whom serious dishonesty has been established been restored to the roll "even after a passage of years, and even where the solicitor has made every effort to re-establish himself and redeem his reputation." The Court of Appeal also noted the passage in which Bingham MR said that it was to maintain the reputation of the solicitors' profession and sustain public confidence in the integrity of the profession that it was "often necessary that those guilty of serious lapses are not only expelled but denied re-admission." The Court of Appeal concluded that the principles derived from *Bolton* apply equally to doctors as to solicitors, and the same principles and approach derived from that case apply equally to both sanctions and restoration cases for doctors.

The Court of Appeal then reviewed a number of cases in which the restoration of dishonest solicitors to the roll had been considered. The test which emerges from the cases (including *Jideofe v Law Society* (2006)) is that there must be "exceptional circumstances justifying restoration [of a solicitor] to the roll". The Court of Appeal held that this gloss of "exceptional circumstances" did not apply in the case of doctors applying to be restored to the roll. As a matter of principle, the Court of Appeal said that to import this phrase into doctors' restoration cases would imply that that is the test when, instead, the correct test is: having

regard to the three-pronged over-arching objective, is the applicant now fit to practise? In addition, the Court of Appeal held that there are certain differences in the regulatory regimes for doctors and solicitors which render the addition of the words "exceptional circumstances" unnecessary and inappropriate. First, the Medical Act requires a panel to consider the over-arching objective and there is no equivalent in the statutory regime for solicitors. Secondly, unlike doctors who must wait at least five years before they can make an application to be restored to the register, there is no minimum period before a solicitor can make such an application.

The Court of Appeal then considered the second main question on the appeal, namely the proper approach to be taken to the over-arching objective. Dr Chandra had argued that the case of *Yeong v GMC* (2009), and the forward looking fitness to practise approach identified in that case, was authority for the proposition that effluxion of time serves to change the emphasis from the seriousness of the misconduct to the extent of remediation. The Court of Appeal did not agree. Although passage of time is of considerable importance and has to be properly weighed in the balance on an application to restore, the Court of Appeal held that there was a "striking difference between cases involving clinical errors or incompetence and matters of dishonesty and sexual misconduct which apply equally at the sanctions and restoration stage". The observations in *Yeong*, that efforts made by the practitioner to address problems and reduce the risk of recurrence may be of far less significance in cases involving sexual impropriety than those involving clinical errors or incompetence, therefore applies equally to a restoration case as a sanctions case, the Court of Appeal stated. Reflecting the words in *Bolton*, the Court of Appeal said that it would be "hard to imagine" any feature in relation to any doctor that "goes so entirely to the essence, or heart, of his role as medical practitioner as the entitlement of each and every patient (whether vulnerable or not) to be entirely confident in the sexual probity of their physician".

Finally, the Court of Appeal considered whether the panel and the High Court had applied the wrong test. The Court of Appeal held that they had. First, the Court of Appeal held that it did not accept that there was a "bright line" between sanction cases and restoration cases, which required a different balancing act. Instead, in both cases, the balancing act is the same, namely is the doctor concerned fit to practise. Further, in reaching a view, the Court of Appeal held that the panel is required by statute to have regard to the over-arching objective which includes the active pursuit of the three objectives identified in the Act. The Court of Appeal said that, read overall, the

focus of the panel in Dr Chandra's cases had been limited to issues of Dr Chandra's acceptance of his wrong-doing, his insight, the risk of repetition and his competence. The panel had not addressed adequately the issue of whether public confidence and professional standards would be damaged by restoring to the register an applicant who had fundamentally fallen short of the necessary standards of probity and good conduct, by his sexual dishonesty, albeit many years ago.

The Court of Appeal concluded that the panel had relied almost exclusively on the issues of remediation and failed properly to understand the central importance of the overarching objective to their ultimate decision. Accordingly, it allowed the appeal and remitted the matter to the panel for rehearing.

## Court of Appeal restores sanction of suspension for doctor convicted of gross negligence manslaughter

We reported on the case of *General Medical Council v Bawa-Garba* [2018] EWHC 76 (Admin) in our Spring 2018 newsletter. In that case, the High Court held a panel had not given the correct weight to the verdict of a jury and had been wrong to conclude that public confidence in the profession and in its professional standards could be maintained by a sanction other than erasure for a doctor convicted of the gross negligence manslaughter of a patient. In August, the Court of Appeal reversed the High Court's decision, restored the sanction of suspension for the doctor concerned, and remitted the case for a review (*Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879).

Dr Bawa-Garba, a junior doctor specialising in paediatrics, was convicted in November 2015 of manslaughter by gross negligence of a six year old boy. The boy had been admitted to hospital and was initially misdiagnosed, and then died later that same day from sepsis. The Judge at the criminal trial concluded that Dr Bawa-Garba's failings had caused the young patient to die "significantly sooner than he would otherwise have done". She was sentenced to two years' imprisonment, suspended for two years. She applied for permission to appeal against the conviction, but the Court of Appeal Criminal Division refused.

A Medical Practitioners Tribunal found Dr Bawa-Garba's fitness to practise impaired. The panel concluded that a finding of impairment was required to

maintain confidence in the profession and to promote proper professional standards and conduct. When deciding on sanction, the mitigating factors identified by the panel included the following: that Dr Bawa-Garba had an otherwise unblemished record as a doctor, there was no evidence of any concerns about her clinical competency either before or after the offence, that on the day of the incident she had recently returned from maternity leave, this was her first shift in an acute setting and that a Trust investigation had identified multiple systemic failures. The aggravating factors included the fact that her failings were numerous and continued over a period of hours and there was no evidence that she had apologised to the parents. The panel noted that Dr Bawa-Garba's actions had taken place in the context of wider failings at the Trust. The panel also referred to the case of *Bijl v GMC* (2001), in which the Privy Council said that a fitness to practise panel's proper concern with public confidence in the profession should "not be carried to the extent of feeling it necessary to sacrifice the career of an otherwise competent and useful doctor who presents no danger to the public in order to satisfy a demand for blame and punishment". The panel imposed a sanction of 12 months suspension with a review.

The GMC appealed against the sanction on the basis that the panel should have ordered that Dr Bawa-Garba be erased from the register. The High Court agreed that the panel's decision on sanction was wrong. The High Court allowed the GMC's appeal and substituted the sanction of erasure for that of suspension. Dr Bawa-Garba appealed against this ruling to the Court of Appeal. The British Medical Association, the Professional Standards Authority for Health and Social Care and the British Association of Physicians of Indian Origin all intervened in the appeal.

The Court of Appeal noted that the decision of the panel that suspension rather than erasure was an appropriate sanction for Dr Bawa-Garba's failings was an evaluative decision based on many factors, commonly referred to as a "multi-factorial decision". This type of decision, which is a mixture of fact and law, is sometimes described as a "kind of jury question"; about which reasonable people may reasonably disagree. Drawing on case law, the Court of Appeal confirmed that there is limited scope for an appeal court to overturn such a decision and it should only do so where 1) there was an error of principle in carrying out the evaluation or 2) for any other reason the evaluation was wrong. The addition of "plainly" or "clearly" to the word "wrong" did not, the Court of Appeal, add anything in this context.

The Court of Appeal also noted that the High Court had identified an error of principle by the panel in that it had not respected the true force of the jury's verdict, which had found that the failings of Dr Bawa-Garba were "truly exceptionally bad". The High Court found that the panel had considered systemic failings or failings of others and personal mitigation, which had already been considered by the jury, and come to its own, unstated, view that she was less culpable than the verdict of the jury had established. The High Court had also considered that the only sanction properly and reasonably open to the panel was erasure.

The Court of Appeal also noted the GMC's argument, which they had raised before both the High Court and the Court of Appeal, namely that the panel had reduced the level of Dr Bawa-Garba's culpability to below that which had been found by the jury and established by her conviction because it had wrongly taken into account, in Dr Bawa-Garba's favour, the systemic failings at the Trust and failings of others. Most of these matters, the GMC said, had been taken into account by the jury and found insufficient to reduce her level of culpability below that required for a conviction for gross negligence manslaughter. The GMC did not say that such matters could not be taken into account in deciding impairment and sanction, but they could not reduce the culpability established by the jury.

The Court of Appeal rejected the GMC's contention on this point. First, the criminal court Judge had made clear that systemic failures were only ever of peripheral relevance to the question of Dr Bawa-Garba's guilt. The Trust report into the systemic failings had not been placed before the jury. However, in his sentencing remarks, the criminal court Judge had taken into account the circumstances in which the offence had taken place.

Secondly, there was, the Court of Appeal held, a fundamental difference between the task of the jury, on the one hand, and that of the panel on the other. The task of the jury was, said the Court of Appeal, to decide on the guilt or absence of guilt of Dr Bawa-Garba having regard to her past conduct. The task of the panel, looking to the future, was to decide what sanction would most appropriately meet the statutory over-arching objective and the three-pronged pursuits of protecting, promoting and maintaining the health, safety and well-being of the public, promoting and maintaining public confidence in the profession, and promoting and maintaining proper professional standards and conduct. In summary, the Court of Appeal said the decisions of the crown court and the panel were taken by "different bodies, with different

functions, addressing different questions and at different times".

Thirdly, the Court of Appeal noted that the criminal court Judge had imposed a "conspicuously light sentence" on Dr Bawa-Garba, taking into account all the circumstances in which the offence took place. The Court of Appeal held that the panel was just as entitled to take into account the systemic failings on the part of the Trust as part of the context for the child's tragic death and Dr Bawa-Garba's role in it, as well as matters of personal mitigation when determining the correct sanction. Further, in taking those matters into account, the panel was not disrespecting the jury, as the High Court had held. Instead, it was conducting an evaluative exercise to determine what sanction was most appropriate to satisfy the over-arching objective.

The Court of Appeal then considered whether the sanction of suspension was a sanction properly and reasonably open to the panel. In arguing that erasure was the only sanction open to the panel, the GMC had placed considerable weight on the Sanctions Guidance. The Court of Appeal said that the Sanctions Guidance contained very useful guidance to help provide consistency in outcome and approach for panels and should always be consulted, but it did not have the force of statute. Moreover, the Court of Appeal did not consider that anything in the Sanctions Guidance required the sanction of erasure in Dr Bawa-Garba's case. What is an appropriate and proportionate sanction always depends on the facts of the particular case, the Court of Appeal said.

The Court of Appeal concluded that this was not a case in which erasure was the only proper and reasonable sanction. Once it had been understood that the panel could properly take into account the full context of the child's death, including the systemic failings of the Trust and the failings of others, and the fact that the panel plainly had in mind the over-arching objective, it was, the Court of Appeal held, impossible to say that suspension was not a sanction that was properly open to the panel. The Court of Appeal also agreed with the High Court that there is no presumption that a conviction for manslaughter by gross negligence should lead to erasure in the absence of exceptional or truly exceptional circumstances. However, the Court of Appeal said that the analysis the High Court had adopted in reaching the conclusion that the sanction of erasure be substituted for suspension had the effect of proceeding on precisely the approach which the High Court had rejected as illegitimate.

Finally, the Court of Appeal held that the panel had been entitled to accept the evidence that it had



regarding Dr Bawa-Garba's clinical competency and it was entitled to take into account, consistently with *Bijl*, that an important factor weighing in favour of Dr Bawa-Garba was that she is a competent and useful doctor, who presents no material danger to the public and can provide considerable useful future service to society. Accordingly, there was no basis for holding that the decision on sanction was wrong.

The Court of Appeal duly set aside the High Court decision, restored the panel's decision and remitted the matter to the panel for a review.

## Court of Appeal holds that GMC should exercise restraint before appealing against finding of fact in registrant's favour

We covered the case of *General Medical Council v Raychaudhuri [2017] EWHC 3216 (Admin)* in our January 2018 edition in which the High Court held that a decision by a panel that a doctor had not been dishonest was wrong and had to be quashed. The case has now been considered by the Court of Appeal and it has overturned the High Court decision (*Raychaudhuri v General Medical Council [2018] EWCA Civ 2027*).

Dr Raychaudhuri faced various charges before a fitness to practise panel of the Medical Practitioners Tribunal Service arising from an incident that occurred whilst he was working as a registrar in an emergency paediatric department. A child (Patient A) with significant health issues arrived in the department. Dr Raychaudhuri reviewed Patient A's previous medical records and a letter from a referring GP letter. He used these to make a number of entries in the history section of an assessment form without seeing Patient A. This was unobjectionable. However, he also used the same records and GP letter to begin filling in part of the examination section of the form. This was wrong and Dr Raychaudhuri accepted that he should not have done this. He was then called away to see another patient, leaving the assessment form in the doctors' office. Another doctor was asked to see Patient A. He found the partially completed assessment form and assumed that Patient A had already been seen by a doctor.

Dr Raychaudhuri was asked by two nurses whether he had seen Patient A. There was conflicting evidence about what was said but the panel accepted that he had not

been dishonest in his communication with the nurses. A consultant in the department, Dr N, then called a meeting with the two nurses and Dr Raychaudhuri at which, the panel held, Dr Raychaudhuri gave a full account of his conduct. Dr N later had a telephone conversation with the on-call consultant, Dr D, who then telephoned Dr Raychaudhuri. Precisely what was said in this conversation was a matter of dispute. However, the GMC alleged that Dr Raychaudhuri had dishonestly denied to Dr D making entries in the examination section of the assessment form before seeing Patient A. Dr Raychaudhuri maintained that Dr D's principal concern was that he had finalised the examination section without ever intending to see Patient A at all, which he explained to Dr D was something he would never do. Dr Raychaudhuri did eventually see Patient A, finalised the assessment form and there was no adverse outcome for Patient A.

The panel found that in his conversation with Dr D, first Dr Raychaudhuri had denied writing examination findings on the assessment form before seeing Patient A (charge 5a), and secondly that he had maintained that he had only made entries in the history section by reference to the letter and not in the examination section (charge 5b). The panel also found that each of those statements had been false, but only found that the first statement had been made with the knowledge that it had been false. The panel acquitted Dr Raychaudhuri of any dishonesty in relation to the two statements. The panel concluded that Dr Raychaudhuri's conduct amounted to serious misconduct, but his misconduct fell just short of a finding of impairment. It imposed a warning on his registration for a period of five years. The GMC appealed. The GMC argued that the panel had been wrong in not finding that Dr Raychaudhuri's first statement to Dr D had been dishonest (charge 5a). The High Court agreed. It substituted a finding of dishonesty and made a finding that, as a consequence, Dr Raychaudhuri's fitness to practise was impaired. It remitted the case to the panel for further consideration of sanction.

Dr Raychaudhuri appealed to the Court of Appeal. The first ground of appeal was that the High Court did not have jurisdiction under section 40A of the Medical Act 1983 to entertain an appeal against a finding of no impairment. The Court of Appeal swiftly dismissed this argument, and confirmed that section 40A does create a right for the GMC to appeal to the High Court against

a decision that a doctor's fitness to practise is not impaired.

However, the Court of Appeal found in favour of Dr Raychaudhuri in his appeal against the High Court's decision to find him dishonest. The Court of Appeal admitted that it did not find this part of the case "easy". However, it decided that the High Court had adopted an approach that was too "cut and dried", whereas it was a case which the panel had regarded as finely balanced, involving circumstances which required subtle but important and morally significant distinctions to be drawn. The Court of Appeal said that the panel had given "anxious consideration" as to whether Dr Raychaudhuri's behaviour could be regarded as dishonest and it thought there was an important moral distinction to be drawn in the particular circumstances of the case, with Dr Raychaudhuri falling on the right side of the line so far as the charge of dishonesty in relation to his comments to Dr D was concerned. The Court of Appeal said that the evaluative judgment made by the panel should have been given great weight. This was because it had had the advantage of seeing the doctor and witness, so that it was well placed to make an evaluative judgment regarding the nuances of their interactions and the nature and seriousness of what Dr Raychaudhuri had done and because of the practical expertise of the panel in being able to understand the precise context in which, and pressures under which, a doctor is acting in a case such as this.

The Court of Appeal acknowledged that the reasoning of the panel was not easy to understand and there were "points of tension" between different parts of its reasoning. However, read as a whole, the basic thrust of its findings was tolerably clear and its conclusion on the question of dishonesty as regards Dr Raychaudhuri's conversation with Dr D was "defensible and legitimate". The Court of Appeal also noted that the panel had given weight to the fact that Dr Raychaudhuri had given a full and honest account to two nurses and another consultant before his telephone call with Dr D and it said the High Court had been wrong to discount this. The Court of Appeal concluded that the just and appropriate course was to allow the appeal and to restore the panel's finding that Dr Raychaudhuri had not been dishonest in his conversation with Dr D. On that basis, the Court of Appeal said that the panel had been entitled to find that Dr Raychaudhuri's fitness to practise was not impaired.

Lord Justice Bean also commented that although he agreed that the High Court had jurisdiction to hear the

appeal, he expressed "regret" that the appeal had been brought. He said that it "should require a very strong case for a court to overturn a finding of the MPT (or any comparable tribunal) that a doctor has not acted dishonestly". He went on to say that, having heard the doctor, Dr D and other witnesses give evidence, the panel were "well-placed to make an evaluative judgment of how the various individuals had interacted and that judgment should have been accorded great weight, not only by the court but by the GMC in deciding whether to bring an appeal at all". Finally, he said that although the discretion to bring an appeal under section 40A was a wide one, it should be exercised "with restraint" where it involves a challenge to a finding of fact in the practitioner's favour.

## SDT wrong to impose restrictions on practice for an indefinite period without inviting submissions or giving reasons

In *Manak v Solicitors Regulation Authority* [2018] EWHC 1958 (Admin), the Court held that the Solicitors Disciplinary Tribunal had been wrong to impose restrictions on Mr Manak's practice for an indefinite period to come into force at the end of a period of suspension without inviting submissions or giving reasons.

A Solicitors Disciplinary Tribunal found various allegations proved against Mr Manak. It suspended him for two years, and ordered him to pay a contribution towards the costs of the case. The SDT also ordered that, upon the expiry of the two years suspension, he was to be subject to various conditions on his practice. The Tribunal had not raised the possibility of restrictions on practice before adjourning to consider its decision on sanction, nor invited any submissions on that possibility. Mr Manak appealed.

His arguments against the SDT's findings of fact were all dismissed. As regards sanction, Mr Manak submitted that the restrictions on practice, which took effect after the period of suspension and continued indefinitely, were unduly onerous and restrictive. He argued that the restrictions would limit his ability to practice and would affect his prospects of employment because they implied he had been involved in misappropriation of funds, when no such allegation had been proved against him.



The Court held that the sanction of a fixed term suspension was the appropriate sanction. However, it upheld Mr Manak's appeal against the order imposing continuing restrictions, which troubled the Court for a number of reasons. First, the SDT had given no reason for its decision that some continuing restrictions on practice were necessary and appropriate, and no reason for its decision that these particular restrictions were necessary and appropriate. Secondly, the Court held that a tribunal contemplating the imposition of continuing restrictions should hear submissions about that from the solicitor concerned or his representative. That had not happened in Mr Manak's case. Thirdly, the Court noted that the six restrictions imposed represented all six of the restrictions listed in the SDT's Guidance Note on Sanctions. The SDT, however, gave no reason why they were all considered necessary and appropriate. Finally, no explanation was given why the restrictions were imposed indefinitely as opposed to limited in time. The Court explained that without reasons being given as to why each restriction was necessary or appropriate, there was no "yardstick" against which anyone considering a future application to lift or vary the restriction could measure the subsequent conduct of the solicitor.

Accordingly, the Court concluded that the SDT had been wrong in law to impose such substantial restrictions without either inviting submissions or giving any reasons. It lifted those restrictions which were likely to be regarded by prospective employers as implying some form of misappropriation of funds and which would therefore make it very difficult for Mr Manak to find employment as a solicitor, as they went beyond what was necessary and appropriate in the circumstances. It left the remaining restrictions in place indefinitely.

## Judicial comment on length of fitness to practise hearings

In *Hill v General Medical Council* [2018] EWHC 1660 (*Admin*), the Court dismissed a wide ranging appeal by a doctor against the decisions of a panel of the Medical Practitioners Tribunal Service on dishonesty, performance, impairment and sanction. In its concluding remarks, the Court said that it very much hoped that the GMC and MPTS would find a way in future to limit the length of tribunal hearings such as Dr Hill's, which had lasted 62 days. It acknowledged that

for doctors whose careers might be at stake, the importance of the issues was very high. However it also said that there was a need for proportionality in conducting a process that "consumes substantial public resources". It said that in Dr Hill's case, the parties could have been invited to select five test issues, rather than litigating 50 as they did. The Court did not seek to criticise the GMC, MPTS, the defence representatives, or even the rules, but said that thought ought to be given to ways of containing contested cases within acceptable limits.

*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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