Regulatory Case Law – General Medical Council (GMC) & MPTS Law

Doctors Defence Service

GMC Case Law

Digest of Appeal Cases and GMC / MPTS Case Law

The following pages will walk you through many of the principles of regulatory, and professional disciplinary, law. Click through at the end of the article to view the next pages. These pages are updated from time to time, as case law is developed.

T***he GMC Registrar's Powers:***
GMC v R (Zia) [2011] EWCA Civ 743 – The Court of Appeal held that the GMC's Registrar has the power to refer a doctor's case for a Performance Assessment or Health Assessment without prior referral to the Case Examiners. Further, the Registrar may also refer a case to a Fitness to Practise hearing without referring the matter to the Case Examiners, where a doctor has refused to participate in a Performance or Health Assessment. [Read: Full Case Report] (May 2011)

Disclosure of GMC Documents to the Complainant:

DB v General Medical Council [2016] EWHC 2331 (QB) – *Claim brought by Part 8 Application for declaratory relief:* The GMC is required to balance the interests of a complainant and the interests of the doctor under investigation when considering whether to disclose certain data to a complainant under the Data Protection Act 1998. In relation to the disclosure of expert reports, the presumption was against disclosure and the proper course for any complainant was to pursue the issue through the civil claims process by way of Part 31 of the Civil Procedure Rules. The judge in the case stated that this case did not set firm rules and that each case must be assessed on its own merits. (September 2016)

Disclosure of GMC Documents to the Tribunal in the Absence of the Doctor:

In Sanusi v The General Medical Council [2019] EWCA Civ 1172 the Court of Appeal held that the GMC was under a general obligation to disclose relevant documents to a tribunal where a doctor has chosen not to participate in the proceedings. (July 2019)

When to initiate Judicial Review (JR) proceedings (a cautionary tale):

Colton v NMC [2010] NIQB 28 (Northern Ireland) – A nurse who lost her application to stay NMC proceedings, following argument before the NMC FTP panel, absented herself from the remainder of the proceedings while she pursued an application for permission to JR the NMC's decision. Permission to JR was not granted. During the period of her absence from the NMC, the panel made adverse findings against the nurse. The nurse subsequently used the statutory appeal procedure to appeal the NMC's various decisions. The High Court criticised the nurse and her lawyers' apparent approach – but adjourned the proceedings for further information to be obtained. Nevertheless, the law report makes interesting reading and is a cautionary tale about the need to fully consider the

appropriateness or otherwise of initiating JR proceedings during a substantive regulatory hearing.

Discussion: Great care must be taken in relation to substantive regulatory hearings that provide a statutory route of appeal at the conclusion of proceedings. To seek JR during proceedings, instead of seeing the case through and then appealing, could lead to a practitioner being unsuccessful on appeal. Non-attendance at a continuing FTP hearing (while JR proceedings are being progressed) can lead to a situation whereby a practitioner might be adversely affected because of their non-participation. [Read: Full Case Report] (Feb 2010)

Judicial Review

R (Mahfouz) v General Medical Council [2004] EWCA Civ 233 – The court opined that judicial review is not, generally speaking, the proper forum to bring a challenge to GMC proceedings, before the FTP hearing has been concluded, judicial review being a remedy of last resort. Per Carnwath LJ (para 44):

> *"There can be no inflexible rule. However I agree with …[the GMC] that in general it is preferable for proceedings to be allowed to take their course and a challenge to their validity to be taken by way of appeal. Consideration must also be given to the difficulty of organising such proceedings in a complex case and the potential inconvenience to witness who may have had to make special arrangements to attend the hearing, and may be reluctant to repeat the experience." (March 2004)*

Is Judicial Review available when there is a statutory right of appeal?

R (Squier) v GMC [2015] EWHC 299 (Admin) – Ouseley J held (paras 20-22):

> "20. There is, in my judgment, a general principle but not an exclusive rule that proceedings to challenge decisions of a tribunal should await the conclusion of the hearing and should be made by way of statutory appeal. After all, judicial review is a remedy of last resort. A tribunal should not find its case management decisions, its interlocutory rulings and other procedural decisions challenged until the effect of any adverse decision of that sort is made manifest through the final decision. Proceedings of the sort here are potentially wasteful and very disruptive to the integrity of tribunal proceedings. They have the potential to put this court in the position of running the procedures of tribunals with no benefit to the integrity of the tribunal or of the reviewing or appellate judicial process."
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> "21. It must be remembered that the tribunal has the benefit not just of specialist knowledge and experience, but has the advantage in most cases of knowing sufficient of the case and of the evidence to reach a rather more informed judgment than a judicial review court could. The tribunal is likely to be more familiar with the issues, how the case will evolve and the use to which it is likely to put material, and what safeguards it will employ. A judgment made at this stage of proceedings must recognise that the tribunal proceedings have yet to run their course, and unfairness in the outcome can still be remedied, even if in a less satisfactory manner. Unfairness may not be a necessary consequence of any procedural error made by the tribunal." (February 2015)

Judicial Review where No Impairment
In Dr Schodlok v The General Medical Council (GMC) [2015] EWCA Civ 769 – [at para 16] the Court of Appeal opined obiter that it was theoretically open to a doctor to bring proceedings by way of judicial review, where a MPTS panel has made findings of fact and misconduct but did not go on to find the doctor's

fitness to practise to be currently impaired. (July 2015) This is because the provisions of the Medical Act 1983 (as amended) only affords a registrant the right of a statutory appeal where a formal sanction has been imposed at a fitness to practise hearing. Findings of fact and findings of misconduct that are patently unlawful can therefore potentially be challenged by way of judicial review.

The Specialism of the Medical Member on the Tribunal:

In Southall v General Medical Council [2010] EWCA Civ 407 the Court of Appeal affirmed the principle that the Medical Member sitting on a tribunal does not have to be in the same speciality as the respondent doctor to the proceedings, as the Rules do not specify that it is required. Moreover, it was observed that in in Dzikowski v General Medical Council [2006] EWHC 2468 (Admin), Hodge J (at [24-5]) had rejected a complaint, made by an appellant doctor, that the hearing was unfair because the panel hearing his case were not specialists in the field of addiction; while in R (Biswas) v General Medical Council [2007] EWHC 1644 (Admin), Gibbs J took the same view

In Southall, (at para 67) it was further stated that: '*Far from it being appropriate to have an expert from the same field, I consider the converse to be the case: as [Counsel for the GMC] put it, any issues requiring particular specialist knowledge should be dealt with through the calling of expert evidence; neither the GMC nor the doctor would be in a position to challenge the opinion of a member of the panel and, if a professional in the same field, the risk would be that a decision would be made on the basis of an expert view that had not been the subject of evidence or argument.*' (April 2010)

The Role of a Legal Assessor

Fox v General Medical Council [1960] 3 All ER 225 – An old

case now but one that sets out the role of a legal assessor. The role has developed since this time. The role has some similarities to that of a Clerk to a Magistrates Court, in that the Legal Assessor advises the panel on law but does not adjudicate on matters of either fact or law. (No Case Law Link Available)

Yaacoub v General Medical Council (GMC) [2012] EWHC 2779 (Admin) – [at 64 to 70] the High Court set out the role and responsibilities of a Legal Assessor when giving legal advice to a MPTS fitness to practise panel. (October 2012)

Thorneycroft v. Nursing and Midwifery Council [2014] EWHC 1565 (Admin) – A decision on admissibility of evidence is a judgment for the panel to make, not a judgment for the legal assessor or the case presenter to make.

The Legal Assessor’s / Legal Chair’s Advice on Law – Opportunity for Parties to Comment on the Advice

Nwabueze v General Medical Council [2001] 1 WLR 1760 PC (April 2000) – Parties should be notified about the legal advice that has been given to a panel in private and must be allowed to comment on it. The same for publicly given advice. A Legal Assessor’s role is to give their opinion as to what they consider the law to be. They sometimes fall into error. Allowing the parties to comment on the evidence ensures fairness of proceedings and any error can be corrected*:*

“the reason why the legal assessor’s advice to the Committee must be given or made known to the parties afterwards in public is so that the parties may have an opportunity of correcting it or of asking for it to be supplemented as the circumstances may require. In this respect the requirements of the common law would appear to be at one with those of article 6 of the Convention, by which the Professional Conduct Committee will be bound when the Human Rights Act 1998 comes into force ” and “… consideration should now be given to

altering the practice so that, in the interests of fairness, the parties are made aware of the fact that they are entitled to comment on or to criticise the advice which has been given by the legal assessor at any stage in the proceedings so that he may consider, in the presence of the parties, whether his advice to the committee should be changed (per Lord Hope of Craighead [UKPC 54]). [Read Full Law Report]

In Dr Fish v General Medical Council [2012] ECHC 1269 (Admin) (May 2012) the court observed that it would be best practice for a Legal Assessor to provide the legal representatives (or doctor in person) a copy of the legal advice to be given, in advance, so that the parties can comment before hand. Such an approach would enable the Legal Assessor to be aware of the directions that are being requested by the parties (see para 65). [Read Full Law Report]

However, in R (British Medical Association) v. General Medical Council [2016] 4 WLR 89; EWHC 1015 (Admin) – it was held that a Legal Chair does not have to recall the parties to comment on each piece of legal advice given to the tribunal *in camera*. In many instances, referring to the legal advice in the tribunal's determination document will be sufficient. Where the parties have not had any real opportunity to comment within the hearing and the advice will be relevant to a decision, there will still be a need to recall the parties for the legal advice to be given in public, affording the parties an opportunity to comment. At [Para 56]:

> *"In any event, for the reasons I have given, I consider paragraph 6(b), as properly construed, does not require a legally qualified chair, when he has given advice to the other members of the tribunal panel in private and after their deliberations have begun, to make the parties privy to that advice and give them an opportunity to comment upon it, prior to the tribunal making a decision. It is sufficient for that advice to be incorporated into the tribunal's decision. There is an exception, where the legal chair*

considers it is necessary for the advice to be given to the parties, to enable them to comment upon it, before a decision is made. An example would be where a new material legal point arises during the panel's deliberations, upon which the parties have had no earlier opportunity to comment or challenge. In that event, he must give the parties that advice and that opportunity. Construed thus, paragraph 6(b) is neither contrary to the requirements of article 6 or common law fairness, nor otherwise unlawful." Per Hickinbottom, J (May 2016)

Service of Notice of Hearing

In R (Raheem) v Nursing and Midwifery Council [2010] EWHC 2549 (Admin) – service of a notice on a registrant which was later returned unopened was deemed to be effective service under the NMC Rules. (October 2010) The decision in the Court of Appeal case of Jatta v Nursing & Midwifery Council [2009] EWCA Civ 824 was followed.

The Retirement of a Doctor – Does a Hearing Need to Take Place?

A doctor who is genuinely retiring from UK registered practise and who is not intending to practice as a doctor overseas can apply for Voluntary Erasure (VE). However, the GMC will not always grant VE in circumstances where the public interest and legislation may require a finding of impairment be made, even where a doctor intends to retire and not practise again.

In the case of , the Court of Appeal held that retirement Clarke v General Optical Council [2018] EWCA 1463 did not obviate the need to make a finding that a clinician's fitness to practise was impaired. "The court determined that "*…the fact that Mr Clarke was not intending to resume practice could be of little or no consequence. Moreover, the fact that Mr Clarke had not undertaken CET [Continuing Education and Training] was, as I have said,*

something that could properly be taken into account." (para 31). (June 2018)

Charges
Particularisation

R (Squier) v GMC [2015] EWHC 299 (Admin) – Judicial Review was not, generally speaking, the appropriate forum to challenge the insufficieny of GMC charges at the commencement of a hearing. Challenges should be determined by the MPTS FTP panel at the substantive hearing, in most instances. Nevertheless, the court determined that there were deficiencies in the charges. Among other findings, the court held that one charge was 'hopelessly inadequately particularised. [And that..] No fair trial is possible on this allegation without further particular' (Ouseley J, para 55).

The Need to Charge Causation

In R (El-Baroudy) v General Medical Council [2013] EWHC 2894 (Admin) it was suggested that causation needs to be expressly pleaded in charges (August 2013)

Dishonesty
Charges of dishonesty are a regular feature of GMC/MPTS proceedings. Doctors Defence Service has a page dedicated to this subject matter: Dishonest Doctors

The GMC Offering No Evidence
PSA v NMC & X [2018] EWHC 70 (Admin) – Great caution must be adopted when a regulator considers that there is no case to answer. In NMC cases the approach on occasions was to place no evidence before the panel, without opening the case. This was found to an improper approach, by a High Court judge tasked with reviewing the NMC's processes, during an appeal brought by the Professional Standards Authority (See especially paragraphs 56, 57 and 58 of the judgment). The judgment also

has likely implications for the way the GMC brings its cases before the Medical Practitioners Tribunal (MPT).

Bias

R (Kaur) v ILEX Appeal Tribunal and ILEX [2011] EWCA Civ 116 – fair-minded observer test of apparent bias, automatic-disqualification, ban on officers of Council and certain other ILEX board members hearing a disciplinary case. {with Reference to Pinochet No.2 (2000), and Porter v Magill (2002)}. (October 2011).

Postponements / Adjournments of FTP Hearings –
Unrepresented Doctors

Dr Thiruvengadam v General Medical Council (GMC) [2010] NIQB 123 – Determinations of FTP panel were set aside. Held: the panel should have postponed the case so that the unrepresented doctor could prepare. (November 2010)

Part Heard Cases

In Southall v GMC [2010] EWCA Civ 407 the Court of Appeal held that a delay of one year, to reconvene a part-heart FTP hearing was "utterly unacceptable and should not be permitted to happen again" [para 65]. (April 2010)

Proceeding in the Absence of the Respondent:

Raheem v Nursing and Midwifery Council (NMC) [2010] EWHC 2549 (Admin) – Panel proceeded in absence of registrant without proper consideration. Decision set aside and re-hearing directed. Panel failed to give sufficient consideration to whether to proceed in absence. (October 2010)

Yusuf v The Royal Pharmaceutical Society of Great Britain (RPSGB) [2009] EWHC 867 (Admin) – (April 2009). Approval of the approach set out in Haywood (below), to be applied in

regulatory proceedings.

Tait v The Royal College of Veterinary Surgeons (RCVS) [2003] UKPC 34 – (March 2003) – Authority that the principles setting out the approach to be adopted when considering whether to proceed in absence as set out in R v Jones (below) should be applied in regulatory law cases.

R v Hayward [2001] EWCA Crim 168, [2001] 1 QB 862 Court of Appeal (January 2001) – approved by the HoL in R v Jones, as set out below (at para 22):-

> "In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles which should guide the English courts in relation to the trial of a defendant in his absence are these:

1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.

2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.

3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/or his legal representatives.

4. That discretion must be exercised with great care and it

is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.

5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

(i) the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

(ii) whether an adjournment might result in the defendant being caught or attending voluntarily and/or not disrupting the proceedings;

(iii) the likely length of such an adjournment;

(iv) whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;

(v) whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

(vi) the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to

the nature of the evidence against him;

(vii) the risk of the jury reaching an improper conclusion about the absence of the defendant;

(viii) the seriousness of the offence, which affects defendant, victim and public;

(ix) the general public interest and the particular interest of victims and witnesses that a trial should take place within a reasonable time of the events to which it relates;

(x) the effect of delay on the memories of witnesses;

(xi) where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the defendants who are present.

6. If the judge decides that a trial should take place or continue in the absence of an unrepresented defendant, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case."

R v Jones (Anthony) [2002] UKHL 5 (February 2002) – Set out the steps to follow before deciding to proceed in absence or grant an adjournment.

See also Norton v Bar Standards Board [2014] EWHC 2681 (Admin) in which a failure to consider the criteria in R v Jones led to the appeal court quashing the decision to proceed in absence. (July 2014)

In General Medical Council v Adeogba [2016] EWCA Civ 162 – the Court of Appeal analysed the case law on tribunal hearings proceeding in the absence of doctors. Distinctions between criminal law cases and regulatory cases were identified. The court held that the:

> *"fair, economical, expedition and efficient disposal of allegations made against medical practitioners is of very real importance" (para 17).*

Further (at para 23):

> *"Assuming that the Panel is satisfied about notice, discretion whether or not to proceed must then be exercised having regard to all the circumstances of which the Panel is aware with fairness to the practitioner being a prime consideration but fairness to the GMC and the interests of the public also taken into account; the criteria for criminal cases must be considered in the context of the different circumstances and different responsibilities of both the GMC and the practitioner." (March 2016)*

In Davies v Health And Care Professions Council [2016] EWHC 1593 (Admin) – it was held that (para 19):

> *"… the principles which apply to proceeding in the absence of a defendant in a criminal trial are a useful starting point. However, it should be borne in mind that there are important differences between a criminal trial and fitness to practise*

proceedings. The decision of a panel must be guided by the main statutory objective of the regulator; the protection, promotion and maintenance of health and safety of the public. Second, fair, economical, expeditious and efficient disposal of allegations made against a registrant is of very real importance. Third, fairness includes fairness to the practitioner and also fairness to the regulator. Importantly, unlike a criminal court, a panel does not have the power to compel the attendance of the registrant. Fourth, the regulator represents the public interest. Accordingly it would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. Fifth, there is a burden on registrants to engage with the regulator in relation to the investigation and resolution of allegations against them." (July 2016)

In Sanusi v General Medical Council [2018] EWHC 1388 (Admin) the court confirmed that once a tribunal had determined that it was appropriate to proceed in the absence of the respondent doctor, there was rarely any obligation to adjourn during later stages of the hearing, to enable the absent doctor to attend, say, the sanction stage. The decision was affirmed in the appeal of this case to the Court of Appeal: Sanusi v The General Medical Council [2019] EWCA Civ 1172 (July 2019)

"In Adeogba the court emphasised that fairness to the doctor is a "prime consideration". What fairness demands is a question of fact in each case. But in the context of the disciplinary jurisdiction exercised by MPTS tribunals in the case of doctors, it will rarely be unfair for a tribunal to proceed straight to the question of sanction, rather than pausing to invite attendance from a defendant who has, up to that point, hitherto voluntary absented himself," per Mr Justice Kerr (para 43).

(April 2018)

Medical Evidence in Support of Adjournment:
Discretion

In Decker v Hopcraft [2015] EWHC 1170 (QB) at [21 -30] Warby J determined that the court must exercise its discretion as to whether to adjourn in the light of then particular circumstances of the case, and should be hesitant to refuse the application. The decision nevertheless is always one for the court to make on a fact-specific basis.

Quality of Medical Evidence

In Levy v Ellis-Carr [2012] EWHC 63 at [33] Norris J observed:

> "Registrars, Masters and district judges are daily faced with cases coming on for hearing in which one party either writes to the court asking for an adjournment and then (without waiting for a reply) does not attend the hearing, or writes to the court simply to state that they will not be attending. Not infrequently "medical" grounds are advanced, often connected with the stress of litigation. Parties who think that they thereby compel the Court not to proceed with the hearing or that their non-attendance somehow strengthens the application for an adjournment are deeply mistaken. The decision whether or not to adjourn remains one for the judge."

At para 36, Norris J described the quality of evidence that would be helpful to the court:

> "Such evidence 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. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case)."

The above authority was cited as good law in regulatory proceedings, in Rehman v The Bar Standards Board [2016] EWHC 2023 (Admin) (April 2015). See also, Ogunlola v NMC [2016] EWHC 2919 (Admin) at para 12 in which it was noted with approval that the panel called the registrant's GP to give evidence about the registrant's fitness to attend. In Chaudhari v General Pharmaceutical Society of Great Britain [2011] EWHC 344 (Admin), at para 84, the appeal court confirmed that the burden was on the registrant to provide (July 2011).

Enabling Participation as an Alternative to Adjournment

In any event, there may be reasonable accommodations that can be made to enable the effective participation of the litigant. Evidence will be needed to see whether this can be done or not and, if so, how.

At para [28], Warby J, in Decker above, stated:

"the question of whether effective participation is possible depends not only on the medical condition of the applicant for an adjournment but also, and perhaps critically, on the nature of the hearing: the nature of the issues before the court, and what role the party concerned is called on to undertake. If the issues are straightforward and their merits have already been debated in correspondence, or on

previous occasions, or both there may be little more that can usefully be said. If the issues are more complex but the party concerned is capable, financially and otherwise, of instructing legal representatives in his or her place and of giving them adequate instructions their own ill-health may be of little or no consequence. All depends on the circumstances, as assessed by the court on the evidence put before it."

Quality of Evidence – Absence or Inability to Participate

A tribunal will ideally have cogent and persuasive, direct evidence to be able to make a decision.

In R (Mahmood) v GMC (2007) EWHC 474 (Admin) it was held that where there is evidence of involuntary absence, that should influence the panel to adjourn, applying R v Jones criteria. (February 2007)

In a High Court Appeal case: Hayat v General Medical Council [2017] EWHC 1899 (Admin) – the appeal court held (at para 54) that a tribunal ought to have given greater consideration to a GP certificate that the respondent had obtained: '*The Tribunal was not entitled to disregard the GP's certificate that the Appellant was unfit for work merely because it did not also say that he was unfit to attend the hearing. Whilst there may be occasions where a registrant is fit enough to attend a court hearing, even though he is certified unfit for work, that will depend upon an evaluation of the individual circumstances of the case. In my judgment, the Tribunal ought to have given careful consideration to the question* ***whether and to what extent the Appellant's condition would affect his ability to take part in the proceedings****. The fact that his GP had certified him as unfit for work should have prompted them to consider whether that could also mean that he was not well enough to conduct a lengthy disciplinary hearing, which would entail spending a week away from his London home, in Manchester. The Tribunal was aware from the postponement*

application that there was a real risk that he would not be able to afford to instruct a representative for the full hearing (as opposed to the initial adjournment application), in which case he would have to represent himself, making submissions and cross-examining witnesses. In any event, he would have to give oral evidence and be cross-examined. In a case where there were allegations of dishonesty, cross-examination by the GMC was likely to be vigorous. Conducting the hearing would be demanding and he would need to be well enough to do himself justice. In my view, the Tribunal did not give any or any proper consideration to these matters.' (per Mrs Justice Lang).

The decision was appealed: General Medical Council v Hayat [2018] EWCA Civ 2796 , and the Court of Appeal court held that a sick note should be examined in detail and would not automatically lead to an adjournment or postponement. A sick note should identify with proper particularity the individual's condition and explain why that condition prevents their participation. (December 2018)

See also a solicitor's appeal where the principles set out in Hyat (above) were followed: Parvez Akther v SRA [2019] 7 WLUK 387 – evidence that the registrant is unfit to take part in the hearing must be stated, with the appropriate evidence to justify such an opinion. The opinion should be sufficiently detailed and ad reasoned and written by a competent medical professional. (July 2019)

GMC's Duty of Candour in the Absence of the Respondent Doctor

The GMC is obliged to place before the tribunal certain defence (or other) documents when the doctor is absent from the hearing.

In Sanusi v General Medical Council [2018] EWHC 1388 (Admin) the court rejected the GMC's suggestion that, "*the GMC is under no duty at all to inform the tribunal about documents in*

its possession sent to it by the (voluntarily) absent doctor before the hearing. I do not accept … [the GMC's] suggestion that such a duty would be inconsistent with the statutory scheme or unduly onerous to the GMC, or indeed other regulators. There are a number of reasons why I take that view….” (para 52)

“It seems to me that the ordinary duties of counsel and other legal representatives in legal proceedings where one party is absent and the other present, applies in regulatory proceedings such as these, as in other proceedings. The content of the duty will vary from case to case and is fact sensitive. It is conditioned by factors such as the applicable procedural rules, the obligation to engage with the process, whether the absent party is aware of the proceedings, is engaging with them and is legally represented and any other relevant circumstances.” (para 56)

(April 2018)

The Approach of the Panel to the Hearing:

R (on the application of Hill) v Institute of Chartered Accountants of England & Wales (2012) EWHC 1731 (QB) – A panel member was absent from the proceedings for a period of time, leaving the other panelists to continue with the hearing. This approach was with the agreement of the parties. On appeal, the court held that there had been a breach of the rules of natural justice. However, as the appellant had consented to the approach the appellant had waived their right to challenge the breach. It was noted that, as a matter of law, by agreement parties can waive their right to object to irregularities in proceedings. (2012)

Hearings to be Held in Private or in Public?

In R (Miller) v General Medical Council [2013] EWHC 1934 (Admin) – the court held that a panel hearing a case should

not hold the whole of a doctor’s case in private, merely because a complainant insists on it. A panel should take steps to find ways to hold the hearing in public, such as anonymising the names of complainants, the use of screens or video-conferencing. (July 2013)

The Admissibility of Transcripts of Other Proceedings, as Evidence Against the Doctor

[R (Squier) v GMC [2015] EWHC 299 (Admin)](#) – In judicial review proceedings, the court summarised (at paras 27 to 52 of the judgment) the approach that FTP panels should adopt when determining which aspects of a transcript of proceedings would be fair and relevant to admit.

Further, the court identified that, on the issue of admissibility of evidence, “objective fairness” was, ordinarily, the legal test to be applied by way of judicial review, rather than whether the MPTS determination or GMC approach was *Wednesbury Unreasonable* (para 23).

However, at the stage that the case had reached (merely the very beginning of an FTP hearing) the reviewing court needed to leave the scope of the admissibility of evidence to the FTP hearing panel, unless the approach adopted had been wrong. Ouseley J stated (para 25), “The question, at this stage at least, in my view, is whether evidence is reasonably seen to be relevant; and at this stage the FTPP’s judgment is inevitably looking at the potential for evidence to be relevant, even if in its decision nothing is made of it and it falls into irrelevance. If it is capable of relevant use, the possibility that it may be put to irrelevant use should not lead to interference by a reviewing court at this stage. (February 2015)

Can you challenge the admissibility of Other Regulatory Body Decisions?

In Peckitt v GDC [2016] EWHC 1803 (Admin) – the court held that where regulatory disciplinary proceedings are based on the determination of another regulatory body, it would not be appropriate for another regulatory body to revisit the factual findings of the first body, except in wholly exceptional circumstances. (March 2018)

Reopening the Facts Stage

TZ v General Medical Council [2015] EWHC 1001 (Admin) – It is impermissible to reopen the facts stage of a hearing, once a determination has been made: (April 2015)

But see also the cases of:-

Fajemisin v GDC [2013] EWHC 3501 (Admin) (Nov 2013); and

Chaudhuri v GMC [2015] EWHC 6621 (Admin) (July 2015)

Double Jeopardy – Autrfois Acquit (Criminal Acquittals (Criminal Standard) and Regulatory Cases (Civil Standard):

Bhatt v GMC [2011] EWCA 783 (admin) – GMC is entitled to prosecute cases where there has been an acquittal in the criminal courts relating to the same allegation. [Read Full Law Report]. Read our DDS Article for more detailed analysis.

See also the divisional court case of: Ashraf v General Dental Council [2014] EWHC 2618 (Admin) in which it was held (para 35):

> 'It is therefore important to confirm that although it is not inherently unfair to bring misconduct charges against a professional who has already been acquitted in the criminal courts, this does not mean that there will not be circumstances in which it may well be unfair to proceed. Allegations of crime (which if leading to a conviction would justify erasure) may, in some circumstances, not justify further investigation by a regulator. Without seeking to be

determinative, it might be that no further investigation by the regulator is justified because the allegations do not, in any way, touch upon professional responsibilities either to patients or (as here) to the NHS (which is required to invest trust in the integrity of the professional to fulfil the terms of the funding contract honestly). This elaboration, however, is not intended to be definitive guidance: regulators must each determine how they go about achieving their regulatory objectives and, bearing those objectives in mind, faithfully apply the well known principles engaged within the concept of abuse of process.' per Sir Brian Leveson P, in Ashraf.

s.35C Medical Act 1983 As Amended:
Section 35C Medical Act 1983 brought into effect a single concept of "impaired fitness to practise". (see the Medical Act 1983 (Amendment) Order 2002, 2002 SI No 3135, article 13.

Section 35C of the Medical Act 1983 therefore reads:

"(2) A person's fitness to practise shall be regarded as "impaired" for the purposes of this Act by reason only of—

(a) misconduct;

(b) deficient professional performance;

(c) a conviction or caution in the British Islands for a criminal offence, or a conviction elsewhere for an offence which, if committed in England and Wales, would constitute a criminal offence;

(d) adverse physical or mental health; or

(e) a determination by a body in the United Kingdom

responsible under any enactment for the regulation of a health or social care profession to the effect that his fitness to practise as a member of that profession is impaired, or a determination by a regulatory body elsewhere to the same effect."

Good Character

In Wisson v Health Professions Council [2013] EWHC 1036 (Admin) – it was held that previous good character could be relevant at the facts stage, impairment stage, and sanction stage of fitness to practise proceedings. (March 2013). See also Campbell v General Medical Council [2005] EWCA Civ 250 *(*December 2017*) and* Donkin v Law Society [2007] EWHC 414 (Admin)*. Further reading:* Dishonest Doctors.

Facts Stage – Standard of Proof

The standard of proof in GMC cases at the **facts stage** is the **balance of probabilities**. In the cases of Re B (Children) [2009] AC 1; [2008] UKHL 35 [View Law Report] it was confirmed that there is no sliding scale, that the balance of probabilities test is just that: which scenario or version of events (advanced by the parties) more probably took place, taking the overall inherent probabilities into account. The ratio in In re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563; 1995 UKHL 16 [View Law Report] was approved in Re B, by Lord Hoffman. In Re H, Lord Nicholls stated:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger

should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

The application of this approach in GMC regulatory cases was confirmed in Dr Hosny v GMC [2011] EWHC 1355 (Admin) – [View Full Law Report]

A Doctor's Conduct at an MPTS Hearing, and Lying on Oath, can be Taken into Account by the Panel

Nicholas-Pillai v GMC (2009) EWHC 1048 (Admin) at (19 to 21): A doctor's general approach or attitude at an MPTS hearing can be taken into account by the MPTS panel. In particular, a doctor who is found to have lied on oath cannot readily object to that factor being taken into account. [Read Full Law Report]. See also Misra v GMC (2003) UKPC 7, relied upon [Read Full Law Report]. But contrast the case of Rehman v BSB PC2008/0235/A and PC2010/0012/A in which it was held by the Inn's Visitors (the appeal body at the time) that the lies of a barrister at a disciplinary hearing brought against them could not part of the circumstances that led to the charge, and a separate charge could be brought at a later date to deal

with such dishonesty.

Facts Stage – Determinations of Other Overseas Bodies

Alhy v GMC [2012] EWHC 2277 (Admin) – [View Full Law Report] A GMC (now MPTS) FTP adjudication panel could take into account the decision of a foreign tribunal, in this case the ODM, the French equivalent of the GMC, and the French criminal courts, which had made findings against Dr Alhy in relation to two patient's deaths (criminal convictions, but no interference with ability to practise in France as a doctor). A root and branch inquiry by the GMC FTP panel of the ODM's decision was not required, and not necessarily viable in any event, due to a lack of jurisdictional competence or knowledge about the foreign legal process (44). Criticism of the doctor by an overseas jurisdiction, coupled with a failure to disclose overseas convictions to the GMC could be sufficient to warrant erasure. The GMC strike off order would stand. The panel did not need to give reasons for imposing a sanction that differed from that in another jurisdiction. Appeal dismissed.

Nevertheless, there may still be an argument on certain issues. See the case law and statute below:-

- Ratnam v Law Society of Singapore [1976] 1 Mil 195
- Jeyaretnam v Law Society of Singapore [1989] 2 AER 193
- Evidence Act 1851, s 7
- R v Mauricia [2002] 2 Cr. App. R. 27
- In Re a Solicitor (1996)TheTimes, 18 March
- Shepherd v The Law Society [1996] EWCA Civ 977
- Stupple v Royal Insurance Co Ltd [1970] 3 AER 230
- Hunter v Chief Constable of the West Midlands Police & Another [1982] AC 529
- Phosphate Sewerage Company Ltd v Molleson [1879] 4 AC 801
- Smith v Linskills (A Firm) (1996) 2 AER 353

In Susan Lim Met Lee v GMC (2016) (unreported) the appeal court held that a registered medical practitioner must

promptly inform the GMC of a regulatory finding made by an overseas regulator. The fact that the outcome is the subject of an appeal does not negate such a duty of disclosure.

No Lack of Insight Where Denial at Criminal Trial

The judge in the Alhy appeal case [at para 47] also held that a practitioner was entitled to challenge criminal allegations during a criminal trial, and that in itself was not to be used against the practitioner at the GMC/MPTS FTP hearing stage as demonstrating a current lack of insight. (NB. The GMC has a specific process to deal with convictions.) By natural extrapolation, the principle could extend in some circumstances to criminal appeals that were unsuccessful.

See also previous case law: R (Singapore Medical Council) v General Medical Council [2006] EWHC 3277 (Admin)

Adverse Inferences from the Silence of a Doctor in MPT Proceedings

A tribunal may draw adverse inferences from the silence of a doctor, or from the doctor's refusal to answer a relevant question, unless it would be procedurally unfair to do so. Kuzmin, R (On the Application Of) v General Medical Council [2019] EWHC 2129 (Admin) (August 2019)

Misconduct and Impairment

Two-Stage Test

Cheatle v GMC [2009] EWHC 645 (Admin) – A two-stage test is required when considering the issues of Misconduct and Impairment. A panel must firstly consider whether a doctor's conduct (as admitted or found proved at the facts stage) constitutes 'misconduct'. If the panel finds that a doctor has committed misconduct, then the panel separately considers whether the misconduct that has been found leads to a finding that the doctor's fitness to practise is also impaired. The

same would apply in relation to deficient performance and ill-health, pursuant to Section 35 c of the Medical Act 1983 (as amended). [Read: GMC Appeal Case Report] (March 2009)

Misconduct must be Serious

Cheatle v GMC [2009] EWHC 645 (Admin) – Misconduct must be serious rather than mere misconduct. [Commentary: So a distinction is to be made and a notional threshold in each case, turning on its own facts, will have to be identified by the panel.] [Read: GMC Appeal Case Report] (March 2009)

Mallon v General Medical Council [2007] ScotCS CSIH_17 – the court stated that using words such as 'depolorable conduct' was unhelpful when seeking to describe 'serious misconduct':

'In a case such as this, "misconduct" denotes a wrongful or inadequate mode of performance of professional duty; or as Lord Clyde described it in *Roylance v GMC (No 2)* [2001] 1 AC 311, it is "a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances." The question raised in this appeal is whether the Panel was entitled to hold that the appellant's misconduct was "serious." The statute does not lay down any criterion of seriousness; nor does the case law. Descriptions of serious professional misconduct such as "conduct which would be regarded as deplorable by fellow practitioners" (*Nandi v GMC*[2004] All ER (D) 25, Collins J, quoted in *Meadow v GMC* [2007] 1 All ER 1, Auld LJ at paragraphs [200]-[201]) tend, we think, to obscure rather than assist our understanding. In view of the infinite varieties of professional misconduct, and the infinite range of circumstances in which it can occur, it is better, in our opinion, not to pursue a definitional chimera. The decision in every case as to whether the misconduct is serious has to be made by the Panel in the exercise of its own skilled judgment on the facts and circumstances and in the light of the evidence *(Roylance v GMC*, *supra*, Lord Clyde at p 330f; *Preiss v GDC*, [2001] 1 WLR

1926, Lord Cooke of Thorndon at para 28). Misconduct that the Panel might otherwise consider to be serious may be held not to be in the special circumstances of the case *(R (Campbell) v GMC* [2005] 2 All ER 970, Judge LJ (at paragraph [19]).' (March 2007)

R (Remedy UK Ltd) v GMC [2010] EWHC 1245 (Admin) – The conduct must be "sufficiently serious that it can properly be described as misconduct going to fitness to practise". [Read: GMC Judicial Review Case Report] (May 2010) [DDS Commentary: The case also determines the nature and scope of a GMC Misconduct Investigation and when and when not proceedings may be instituted. Not all acts and omissions of a doctor will be regulatory matters. Some will fall outside of the scope of the jurisdiction of regulatory law.]

Misconduct Generally

Calhaem v GMC [2007] EWHC 2606 (Admin) – Sets out five guiding principles which assist in determining the issue of whether a doctor has committed misconduct. They included the following propositions: Mere negligence does not constitute misconduct. However, negligent acts and omissions that are particularly serious may amount to misconduct. Further, a single negligent act or omission is less likely to cross the threshold of misconduct than multiple acts and omissions. A Single act or omission if particularly grave could be characterised as misconduct. Deficient performance is conceptually separate from negligence and misconduct. It is a standard of professional performance which is unacceptably low and which (save in exceptional circumstances) has been demonstrated by reference to a fair sample of the doctor's work. [Read: GMC Appeal Case] (October 2007)

Roylance v GMC (No.2) [2000] 1 AC 311 – "Misconduct is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the

rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances". [Commentary: The GMC's document *Good Medical Practice* may be referred to but national and local policies and procedures may also be relevant to the standard that the doctor should have worked to.] [Case Report:] ()

R (Aga) v GMC [2012] EWHC 782 (Admin) – Eady, J. observed (at para [2]) that: "Misconduct" is a word in common usage and, in this context [GMC Law], there is no statutory or judicial definition available. Whether to classify a doctor's acts or omissions as misconduct is a matter left to the judgment of those on the relevant Fitness to Practise Panel (FTPP) in the light of their experience. The [judicial review] court pays considerable deference to such decisions generally. On an application of this kind [to quash a misconduct finding of the FTPP], the essential question is whether it was irrational to apply the term to the relevant conduct, as either proved or admitted. The court surveyed the case law on the definition and scope of misconduct, including Calhaem, Mallon, and Meadow, at paragraphs [2] to [6]. Dr Aga was granted permission for judicial review where a finding had been made against him by the FTPP, that his conduct in not promptly recognising hypoglycaemia constituted misconduct. The FTPP had found that there was no impairment. The doctor sought to challenge the FTPP's finding of misconduct. The court overturned the FTPP's finding of misconduct in the GMC v Aga case, as other staff members had not drawn his attention to the patient or the patient's condition, prior to his involvement. He recognised and treated hypoglycaemia within a few minutes. The incident was a one off and did not meet the threshold in Calhaem. No act or omission had been established which adversely affected the patient [27]. Eady, J further stated (at para [29]): "I cannot see any rational basis for categorising what happened as "misconduct". I do not believe that a reasonable onlooker would apply that word to the events…I will therefore quash the decision accordingly."

[View: JR Law Report] (March 2012)

Impairment

Cohen v GMC [2008] EWCH 581 (Admin) Paragraph 63 – "The fact that stage 2 is separate from stage 1 shows that it was not intended that every case of misconduct found at stage 1 must also automatically mean that the practitioner's fitness to practise is impaired". [Read: GMC Appeal Case Report] (March 2008)

Shipman Inquiry [2004] Paragraph 25.50: Dame Janet (Lady Justice) Smith in the *5th Report to the Shipman Inquiry* identified four matters for consideration when considering whether a doctor's fitness to practise is impaired: "Do our findings of fact in respect of the doctor's misconduct {DDS Commentary: also insert here: deficient professional performance, adverse health, conviction, caution or determination} show that his/her fitness to practise is impaired in the sense that she (a) has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or (b) has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or (c) has in the past breached and/or is liable in the futBin the cases of:

Zygmunt v GMC [2008] EWCH 2643 (Admin) – [Read: GMC Appeal Case Report] (October 2008)

CHRE v NMC and Grant [2011] EWHC 927 (Admin) – [Read: GMC Appeal Case Report] (April 2010) – See also the commentary on the difference between regulators such as the NMC (which has no power to impose a warning) and the GMC (that does have the power to impose a warning). Public policy (upholding confidence in the professions) must be given significant precedence, even where a practitioner has apparently remedied any defective practice or failings, where to make such a finding would undermine public confidence. However, because

the GMC has a power to impose a warning, considerations of public confidence may have differences from other regulators that do not have such a power. The case of Yeong followed.

Martin v GMC [2011] EWHC 3204 (Admin) – A finding of misconduct did not automatically mean that a registrant's fitness to practise was impaired and that a sanction was needed. There was no blanket rule created in Grant. Each case turns on its own facts and an assessment must be made of the relevant factors in the case. The public interest requirements will differ from case to case.

Yeong v General Medical Council [2009] EWHC 1923 (Admin) – There will be occasions where Impairment of Fitness to Practise must be found as a matter of public policy, to uphold public confidence in the profession, where to make no such finding would have an adverse impact on public confidence in the profession and the GMC/MPTS. [Read: GMC Appeal Case Report] (July 2009)

PSA v NMC (SM) [2017] CSIH 29 – Scots Case – A finding of misconduct can be sufficient to demonstrate that the NMC has acted appropriately. A finding of impairment is not always required. Per Lord Malcolm (para 30): "we are of the view that the committee was entitled to conclude that, notwithstanding her admitted dishonesty, SM's fitness to practise was not impaired. If it is thought that the absence of any sanction leads to a decision which is insufficient for the protection of the public and fails to maintain confidence in the profession and its regulation, that can be attributed to the terms of the 2001 Order, which, unlike in the case of certain other health professionals, make a finding of current impairment a prerequisite to the imposition of a penalty. We do not agree with the submission that a perceived need for a penalty means that a finding of current impairment must be made. Whether to make such a finding is a discrete exercise to be addressed on its merits. In any event, in the circumstances of the present case, we would echo the comments

of the learned judge in *Uppal* to the effect that professional standards and public confidence have been upheld by a rigorous regulatory process which resulted in a finding of misconduct." (May 2017)

Future Risk

Cohen v GMC [2008] EWHC 581 (Admin) – Para 64, Silber J: "There must always be situations in which a panel can properly conclude that the act of misconduct was an isolated error on the part of the medical practitioner and that the chance of it being repeated in the future is so remote that his or her fitness [is*] not impaired. [DDS Commentary: *The word 'is' is substituted in place of 'has been' see Mitting J in R v (Zygmunt) v GMC [2008] EWCH 2643 (Admin): "The doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practise Panel could conclude that, looking forward, his or her fitness to practise is not impaired, despite the misconduct".

Cheatle v GMC [2009] EWHC 645 (Admin) – Cranston J stated, paragraph 22: "The doctor's misconduct may be such that, seen within the context of an otherwise unblemished record, a Fitness to Practise Panel could conclude that, looking forward, his or fitness to practise is not impaired, despite the misconduct." [Read: GMC Appeal Case Report] (March 2009)

Sanctions:
Whether Interim Order Period of Suspension Shall be Taken into Account at Sanction Stage

Chukwugozie Ujam v General Medical Council [2012] 683 (Admin) – Eady, J, observed, at para [5] that, "…It would be undoubtedly right that the suspension it [(the IOT panel, previously)] imposed should be borne in mind as part of the background circumstances, but it would certainly be inappropriate to regard it as analogous to a period of imprisonment served while on remand (which would normally be

deducted from any custodial term imposed by the sentencing court). This is reflected in the GMC *Indicative Sanctions Guidance, at paragraph 22…".* The doctor had been suspended (on an interim basis) for a short period during the GMC's investigation, and it was suggested by the Appellant's Counsel that the interim period was not sufficiently taken into account by the panel at the substantive hearing, when it considered final sanction. (March 2012)

Okeke v Nursing and Midwifery Council [2013] EWHC 714 (Admin) – a tribunal should take into account the length of an interim order when determining sanction (para 47). (February 2013)

Kamberova v Nursing and Midwifery Council [2016] EWHC 2955 (Admin) – The period of an interim order should be taken into account when determining sanction. (October 2016)

Determining the most suitable sanction

Giele v General Medical Council [2005] EWHC 2143 (Admin) – the tribunal should consider the least severe sanction first and work up incrementally through each sanction in turn until the most appropriate and proportionate sanction is reached. Reasons should be given. (October 2005)

Impact of Delay on Sanction of Suspension (also relevant impairment findings, where there has been delay in proceedings being brought)

Also in Chukwugozie Ujam v General Medical Council [2012] 683 (Admin) – Eady, J, at [16] observed that while there had been a significant passage of time between the matters of misconduct occurring and the date on which the GMC FTP panel determined impairment and imposed a period of suspension, nevertheless the public policy reason for doing so (namely, to maintain public confidence in the profession and uphold proper standards of conduct) was sound. Yeong v GMC [2008] EWHC 581 (Admin), followed. In summary, a doctor's conduct toward others – crossing boundaries – making female colleagues

uncomfortable, in a manner that was sexually motivated, might well require the GMC to "reaffirm clear standards of professional conduct so as to maintain public confidence in the practitioner and in the profession". Further, it may be appropriate to find impairment and impose a sanction to avoid the public being "left with the impression that no steps have been taken by the GMC to bring forcibly to his [(the doctor's)] attention the profound unacceptability of his behaviour and the importance of the rule he has violated". (Yeong [47] to [51]). In Chukwugozie, a period of about two years had passed since the period in which the misconduct had taken place, and the evidence at the fitness to practise hearing was that there had been no repetition, and some considerable learning and insight gained. The case illustrates how personal conduct may be seen as distinctly different from clinical competence, where remediation in the clinical sphere might lead to a finding that there is no current impairment, while in personal conduct cases remediation may be less relevant. (March 2012) See also the linked case of same name (judgment number 580) which summarises the background to the case, and describes the incidences of "inappropriate" and "sexually motivated" conduct. Commentary: The case illustrates the risk that the GMC will bring proceedings in cases of alleged sexual harassment in the workplace (in the above case, a previous workplace warning went unheeded) and that, where such allegations are found proved, a finding of impairment and the imposition of a sanction are likely to follow. (March 2012)

See also Ujam v General Medical Council [2012] EWHC 580 (Admin) for part one of the judgment. (March 2012)

Doctor with Lack of Skill and Knowledge, Where Remediation Unlikely, Erasure is Appropriate

In Luthra v General Medical Council (2013) EWHC (Admin) the appeal court held that the sanction of erasure was appropriate where the MPTS panel had found that the doctor's lack of skill

and knowledge was such that patients would be at risk if the doctor continued to practise. The doctor's knowledge was so insufficient that remediation opportunities from a suitable training course would not be available to remedy the core deficiencies that had been identified over a considerable period of time. The doctor had undergone and failed two GMC performance assessments, and various other multiple choice tests – which the doctor was required (by a Deanery) to pass in order to be enlisted on a course of remediation. The appeal court judge observed: "*I do not consider that the [GMC/MPTS panel] decision not to afford the appellant any further opportunity to address issues of remediation and insight at a further review hearing was unreasonable. The history demonstrates that the appellant had been offered manifold opportunities. It can fairly be said that the GMC bent over backwards to afford him these opportunities, but that on account of core deficiencies in his knowledge and competence he was not able to avail himself of them. Had his performance in the 2009 assessment been borderline then it might have been reasonable for the Deanery to have exercised its discretion to allow him to attempt once again the entry exam for the induction and refresher scheme. But his performance in the second assessment was nowhere near borderline*". [Read: Full Law Report] (February 2013)

A Doctor serving a suspended or other sentence should not normally be permitted to work for the duration of the sentence

In CRHP v GDC and Fleischmann [2005] EWHC 87 Admin – the court held that where a registered professional has been convicted of a serious criminal offence and is still serving their sentence, normally the tribunal should not allow them to return to practice until the sentence has concluded. (February 2005) [By way of example, this might apply where a practitioner is subject to a suspended sentence, or is undergoing supervision or is subject to a community punishment order, or is otherwise on licence.]

Warnings where no impairment found

In cases where exceptional circumstances have been found that lead to a finding that there is no current impairment, the tribunal should consider imposing a warning. In Professional Standards Authority for Health And Social Care v The General Medical Council & Anor [2019] EWHC 1638 (Admin) the court held that the tribunal should have imposed a warning in a case of established dishonesty, in order 'to uphold public confidence in the profession' and uphold the 'standards of the profession'. (28 June 2019)

Immediate Order

In Ashton v GMC [2013] EWHC 943 (Admin) the appeal court quashed the immediate order that had been imposed upon Dr A (paras 76 – 83). The court held that the imposition of the immediate order was wrong, that the justifications given by the panel were thin, and that such an order was neither necessary to protect the public or in the wider public interest (April 2013).

In Davey v General Dental Council [2015] WL the High Court held that a FTP panel had been wrong to impose an immediate order of suspension, where it had imposed a four month substantive suspension order, in light of the history of the case. The dentist has worked prior to the FTP hearing, albeit under restriction/supervision, and so it was difficult to see how the public interest test had been met in the given case.

See also the case of Moody, under the heading Appeals (above), which deals with challenges to Immediate Orders.

Panel Reasons in Health Cases and Publication / Voluntary Erasure (Presumption Against Publication of Confidential Health Matters):

X v GMC [2011] EWHC 3271 (Admin) – public interest does not require full medical condition to be disclosed in public, so

court quashed tribunal's publication of the words: "*severe depresssion not likely to be resolved in the near future*". The case was remitted back to the GMC for reconsideration as to what should be published. The doctor had argued that no more than the following words were necessary: "***the doctor is suffering from a medical condition or conditions***". The learned judge was of the view that "a serious health problem" or "serious illness" would suffice in meeting the public interest requirement of transparent proceedings, the health matters having been considered in private for understandable reasons concerning the doctor's right to confidentiality where personal health matters were being considered. [Read [Full Law Report]() (External Link)] (December 2011). Comment: Some tribunals appear to use Xs rather than refer to anything medical in a public document, for example: "The doctor was XXXXXX XXXXXXX". However, this does not give any indication as to the reasons for disposal, and may not be the best approach, except where the specific details of ill-health are removed from any published reasons. Xs in any event make it obvious that there is likely to have been a health element, so it seems odd not to expressly mention it in plain terms. A simple statement that the '*doctor is suffering from a medical condition'* as suggested by the appeal court judge in X v GMC, in our view, maintains confidentiality while providing the public with sufficient information to have confidence that due process has taken place.

Witnesses:
Witness Attendance at the GMC

R (Bonhoeffer) v GMC [2011] EWHC 1585 (Admin) – Circumstances in which witnesses might or might not be called to give evidence, where a registrant doctor wishes to challenge the prosecution witnesses' evidence [Read: [GMC Appeal Case]()] (June 2011)

Witness Attendance – Fairness to Registrant

Ogbonna v NMC 2010 EWCA Civ 1216 [Read Full Law Report (External Link)] (October 2010) See also: Victory for DDS Lawyer in relation to the case of Ogbonna. A regulator should call 'prosecution' witnesses to testify where a registrant wishes to challenge their evidence.

Which Witnesses Should the GMC Call?

The GMC also relies on criminal law precedents for determining which witnesses to call to give evidence on behalf of the GMC in fitness to practise proceedings: R v Russell Jones [1995] 1 Cr. App.R 538 and R v Richardson 98 Cr. App.r 174 CA

Evidence by Video Conference

The GMC may call witness evidence by way of video conference facility: Lawrence v The General Medical Council [2012] EWHC 464 (Admin) (March 2012)

Treating Witnesses as Vulnerable

The appeal court approved of the approach taken by the panel when assessing whether to treat a witness as vulnerable: Lawrence v The General Medical Council [2012] EWHC 464 (Admin) (March 2012)

Appeals:

Limitation – Strict Time Limit to Lodge an Appeal Notice – Save in Exceptional Circumstances

Harrison v General Medical Council [2011] EWHC 1741 (Admin) – Strict 28 Day Period to lodge an Appeal Notice in FTP Proceedings. Relying on Mucelli v Albania [2009] UKHL 2; and Mitchell v NMC [2009] EWHC 1045 (Admin) [Harrison Case Report Not Available]. (June 2011)

Naguib v General Medical Council [2013] EWHC 1766 (Admin) – A doctor appealed the erasure order. In lodging the appeal

notice within the 28 days she failed to lodge the full fee and the court returned all of her papers. She therefore lodged her appeal out of time. The court held that the failure to pay the prescribed court fee within the 28 days made her initial appeal notice defective. The court was not permitted to extend the time-frame; Harrison (above) applied. [Naguib case report not available]. (July 2013)

Ali v the General Medical Council. [2017] EWHC 741 (Admin) – a review of the case law led to the appeal judge determining that an appeal is not a re-sentencing exercise. (January 2017)

R (Adesina) v NMC [2013] EWCA Civ 818 – strict 28 day time limits apply save in 'exceptional circumstances'. The Court of Appeal have stated that there may be exceptional occasions where the courts must hear a case that is lodged out of time. There must be good reasons. (July 2013). [See also the case of Pomiechowski v Poland [2012] 1 WLR 1604, applied in The Nursing and Midwifery Council v Daniels [2015] EWCA Civ 225 – where the Court of Appeal quashed a High Court judge's three-day extension of time.]

In Estephane v Health And Care Professions Council [2017] EWHC 2146 (Admin) – the High Court clarified the time limits in bringing a statutory appeal. (September 2017)

Challenging an Immediate (Interim) Suspension Order, in addition to a Substantive Suspension Order

Moody v General Osteopathic Council [2007] EWCH 2518 (admin) – The court would assess the merits of the pending appeal where an appellant had been struck off, and where an immediate order of (interim) suspension had additionally been imposed (pending the appeal being heard – because the substantive GMC order would not come into effect where an appeal was lodged). The High Court (at an interlocutory appeal stage, prior to the appeal itself) would not interfere with an order of interim suspension unless the court was strongly of the opinion that

the appellant at the substantive appeal was certain to succeed, the High Court should be mindful of the public protection element and not interfere with the interim suspension as being wrong. [Read Full Law Report (External Link)](April 2004) – [see also Court of Appeal judgement [2008] EWCA Civ 513]

1) No Notice Given of Evidence that may be Relied Upon at FTP Hearing 2) Evidence from Appellant in Appeals

Sharp v Nursing and Midwifery Council (NMC) EWHC 2174 (admin) – Appeal court judge was critical of appellant for having not submitted a signed statement containing the 'new evidence' or new position of admissions and insight that he wished to advance on appeal, the substance of which had not been advanced before the NMC FTP panel previously [21]. The original grounds of appeal were in essence that the panel had acted disproportinately in imposing a period of suspension rather than Caution. (Practice Note Comment: It is not enough therefore for Counsel to advance their client's position by reference to the Grounds of Appeal set out in the Appeal Notice and the argument in the Skeleton Argument, alone, even if the appellant is in court. The judge's approach in this case is different from some other appeal court judges who have questioned the status of appellant witness statements submitted on appeal.) While the appeal judge did allow the appeal, it was on the basis that the panel had taken four other matters into account that had not been formally charged and had not been referred to in witness statements [44] – the panel had done its own detective work [41], when scrutinising the papers before them. The important point to note is that the registrant had not been given an opportunity to comment (-he had absented himself from the hearing-) and he had not been put on any notice that the 'new' matters would be dealt with. The case was remitted by the appeal judge back to the NMC with a direction that the NMC FTP panel should not take into account the four other matters unless they are formally

Charged, and, if denied, proved (to the required standard) fully and properly by evidence [46]. In relation to the original appeal grounds, the appeal judge stated that "I came in thinking this appeal was dead in the water" [82]. Counsel for the appellant raised for the first time, in oral argument, the ground of appeal concerning the panel having taken into account the other uncharged matters. The appeal was allowed on that newly identified ground alone. (July 2011) [Read Full Law Report (External link)]

CHRE Appeals – Unduly Lenient Sanctions / Approach

CHRE v GMC; CHRE v NMC [2004] EWCA Civ 1356 – the Court of Appeal defined the test for when the appellate court would interfere with a decision of a regulatory panel, pursuant to Section 29 of the NHS Reform and Healthcare Professions Act 2002 (External Link to Act 2007 C17): 1) the decision must be manifestly inappropriate, bearing in mind the conduct of the registrant and the public interest; 2) the decision failed to have regard to the protection of the public (public safety) and the reputation of the GMC; 3) there was a serious or other irregularity in the proceedings such that the sanction imposed was inappropriate. (October 2004) [Report]

CHRE v GMC (Saluja) [2006] EWHC 2784 (Admin) – GMC panel had stayed proceedings as an abuse of proceedings because of 'entrapment' by a journalist. Court held that panel had misdirected itself. (No case report link available)

Reasons

English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [20] – deals in significant detail with the common law requirement for reasons [15-21], the potential for obtaining an amplification of reasons from the first instance trial judge [22-25] at common law; and the jurisprudence of the ECtHR on reasons [8-14]. (external link)

Threlfall v General Optical Council [2004] EWHC 2683 (Admin) –

it was held that adequate reasons should be given to a registrant as a matter of common law and pursuant to Article 6. The appeal was allowed owing to the panel's defective reasons on material issues. (Read Full Law Report (external link))

Yaacoub v General Medical Council (GMC) [2012] EWHC 2779 (Admin) – [at 58 to 63, and 71] a panel's determination was set aside in a sexual allegations case. The complainant had changed her testimony over time and the reasons given by the panel were held to be inadequate. The case was an 'exceptional case' that required much more robust reasons, dealing with the discrepancies in the complainant's evidence over a period of time. (Read: Full Law Report (external link)) (October 2012)

Rejection of Expert Evidence – Panel Reasons

Where a panel rejects the evidence of an expert who has given coherent evidence, it should provide a coherent explanation for why it has rejected the evidence. See English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [20]; Phipps v General Medical Council [2006] EWCA Civ 397. To do otherwise could lead to deficient reasons. However, if the evidence provided is not particularly specialist, it may be that less detailed reasons need be given.

Failure to Respond to an Issue in Evidence

The silence of a party in the face of another party's evidence may be sufficient to take a view that the party could be expected to give evidence on a particular matter: *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283).

See also our **Recent Case Law** summaries page;

Our **Interim Orders (IOT) Case law** digests page;

And our **Employment Law Case Digests** page.

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