



The Bar Tribunals and Adjudication Service Newsletter, Edition 1

Introduction to Newsletters

This is the first edition in a series of newsletters for the Bar Tribunals and Adjudication Service panel members. It is intended that these will be circulated regularly and shall address either cutting-edge developments in regulatory law or matters that require greater explanation than the guidance currently provided for you. The COIC team has always valued your feedback and if you feel that you require greater information on a topic, or that an issue is of particular importance, then please let us know and we may include it in future. Please also provide us with comments on this edition, which will explore the right to reasoned decisions.

The Right to Reasoned Decisions

This subject is briefly referred to in your purple Information and Guidance Pack¹ and was also discussed by one of the speakers at your Induction Training. However, such is its fundamental importance to due process of Disciplinary Tribunals, that it will be considered in more detail now. This Newsletter will be divided into three sections. First, the legal background and underlying principles of the right to reasoned decisions will be discussed. Second, key provisions within the Disciplinary Tribunals Regulations 2009 (DTRs) relating to this right and leading cases in this area are summarised. Many of these are healthcare fitness to practise cases,² which have, in general, been more fertile territory for regulatory law developments than COIC Disciplinary Tribunals. Third, bullet-pointed practical advice is offered for your assistance.

Legal Background and Underlying Principles

The move towards a common law duty for professional regulatory bodies to provide clear reasons for decisions has gathered apace in regulatory law, although perhaps surprisingly, this did not occur until relatively recently. Indeed, as late as 1999, the Privy Council held in *Dad v. General Dental Council* [2000] 1 WLR 1538 that *as a general rule*, a Professional Conduct Committee is under no obligation to give reasons for its determination.

The impetus for change derives from the introduction of the Human Rights Act 1998 (HRA 1998) and the resultant incorporation of the European Convention of Human Rights (ECHR) and its jurisprudence into English law. Under Article 6(1) of the ECHR, which provides for the right to a fair and public hearing, it has long been the case that the decision-maker must give a reasoned judgment in relation to any civil right (in this case, the right to practise his or her chosen profession unencumbered). In *Hadjianastassiou v. Greece* [1992] 16 EHRR it was explained that this was so that *the public in a democratic society may know the reasons for judicial decisions, and to enable (the individual affected) to decide whether to appeal.* These principles apply as much now as they did twenty one years ago.

¹ Paras 10.34-35 (as of 30.01.2013)

² These are not analogous to "Fitness to Practise" hearings for barristers, which are purely concerned with the medical capacity of a barrister to practise.



Given the powerful sentiments expressed in *Hadjianastassiou* and the fact that the case now formed part of English jurisprudence, it became increasingly clear that the position taken in common law by *Dad* was untenable. This was recognised in *Selvanathan v. GMC* [2001] Lloyd's Rep. Med. 1, PC, which represented something of a watershed moment in this area. There it was stated that ~~in~~ practice, reasons should now always be given by the Professional Committee for their determination. This applied both to findings on serious professional misconduct and penalties to be imposed, although it was made clear that detailed reasons for findings of fact were not needed.

The case of *Gupta v. GMC* [2002] 1 WLR 1691 expanded upon this. The Privy Council found whilst no general duty existed to give reasons on matters of fact, particularly where this related to the resolution of questions of credibility of witnesses, fairness dictated that in ~~exceptional circumstances~~, reasons may be required. Somewhat unhelpfully, the Board declined to answer the question of what these ~~exceptional circumstances~~ were.

Selvanathan and *Gupta* undoubtedly progressed regulatory law towards a duty to provide reasons for decisions. However, as will be demonstrated below, these principles have been significantly refined over the last twelve years.

DTRs and Leading Cases

Whilst the question of the existence of a common law duty to provide reasons for decisions is not completely settled, the DTRs expressly provide in Regulations 18 that reasons for findings must be ~~set~~ set down in writing and signed by the Chairman and all members of the Tribunal. Under the same provision, the Chairman of the Tribunal should also state, at the end of the hearing, the Tribunal's finding on the charge or charges, and whether this was found unanimously or by a majority. Regulation 19 provides for broadly the same procedure to be adopted in relation to the sentence passed by the Tribunal. Compliance with these stipulations is of such importance to due process that failure to do so could result in the decision being successfully appealed and potentially re-heard. This is a waste of time and money and is not in the public interest.

Much assistance with the interpretation of these stipulations (particularly on the issue of whether reasons are adequate) is found in a number of leading cases on the subject. They are summarised below:

***Madan v. GMC* [2001] Lloyd's Rep. Med. 539 (*Madan No. 2*)**

Dr. Sudesh Madan applied to terminate an interim suspension order which had been imposed upon her, pending a hearing concerning allegations that she had irresponsibly supplied appetite suppressants. Madan claimed, amongst other things, that the failure of the Interim Orders Committee (~~IOC~~) of the GMC to provide adequate reasons for the interim suspension breached her Article 6 rights to a fair trial.

It must be emphasised that the rules applicable to the initial hearing only required brief, oral reasons at the end of the hearing and the case was not argued on the basis that these rules were themselves deficient. However, notwithstanding this, important guidance as to the essential characteristics of an ~~adequate reason~~ adequate reason was laid down, in that they should inform the recipient of the basis for the decision. As such, a mere conclusion will frequently not



disclose the underlying basis for the decision. The recipient might, in some circumstances, be entitled to expect illumination as to why [a] particular argument had been rejected.+

English v. Emery Reimbold & Strick Ltd [2002] 1 WLR 2409

English involved three conjoined appeals, all alleging that the relevant decision-maker had failed to adequately explain the reasons for their decisions. Notably Lord Phillips MR argued that put simply, justice will not be done if it is not apparent to the parties why one has won and the other has lost.+Also important were his observations that the adequacy of reasons will depend on the nature of the case and that there was no duty to deal with every argument advanced by the parties.

Needham v. The Nursing and Midwifery Council [2003] EWHC 1141 (Admin)

Needham was convicted of six counts of misconduct and removed from the register of nurses after a hearing in front of the Professional Conduct Committee (PCC) of the Nursing and Midwifery Council. She appealed this decision, arguing, amongst other things, that the PCC failed to give her adequate reasons for their decision. It was not disputed in the case that reasons were required, but rather whether they were sufficiently detailed. Significantly, Newman J held that the following four propositions accurately summarised the law:

- i) Whether sufficient reasons have been given will depend upon the particular circumstances of the case.
- ii) That resort may be had to the transcript of the hearing particularly where the transcript will reveal which evidence the committee accepted and which it rejected.
- iii) That a general explanation of the basis for the determination on the questions of serious professional misconduct and of penalty will normally be sufficient.
- iv) That the fact that an appellant had not been prejudiced by the failure to give reasons was irrelevant.

Newman J criticised the PCC for their failure to provide reasons to Needham when finding against her on a central issue. He further noted that where cases involved a number of issues, the PCC should draw up a list of the specific issues to which it must give consideration and identify the material which has been presented to it in connection with each of those issues.+ Such a structured approach was necessary for due and proper consideration of cases, save in the most obvious and simple instances. Here deliberate effort was made by the PCC to give reasons for their sentence, but they had passed no comment, even in broad terms, on why they had chosen to reject evidence and material when coming to certain key conclusions.

Needham's removal from the register was quashed and a full re-hearing was ordered.

Phipps v GMC [2006] EWCA Civ 397

The Professional Conduct Committee (PCC) of the GMC found, as a matter of fact, that Phipps had misrepresented the nature of a number of posts he had held in order to gain accreditation to qualify as a consultant surgeon in the NHS. As such, he was guilty of serious professional misconduct. Phipps lost his appeal against this decision and sought permission to appeal that. Amongst other things, he argued that neither the PCC nor the judge at appeal had given any or sufficient reasons for their decisions. Although Phipps was denied permission on other grounds, the Court of Appeal did make a number of relevant, albeit



strictly non-binding comments on the adequacy of the reasons that had been given to him by the PCC.

Wall LJ undertook a detailed analysis of *Gupta*, where it was held that whilst there was not a general duty to give reasons for findings on matters of fact, there may be exceptional cases where the principle of fairness would impose such a duty. Significantly, he remarked that the common law does not stand still – thus, it seems to me that what was exceptional in 2001 may well have become commonplace in 2006.

He added plainly, the need to give reasons for findings of fact will vary from case to case, and will depend on the subject matter under consideration. There may be cases where such reasons are unnecessary because they emerge clearly from the court's findings: there may be cases where the expression of such reasons is essential. Ultimately, the foremost thought in a Tribunal's mind should be the test in *English* that the reasons should be apparent to the parties why one has won and the other has lost.

Given this, it was incumbent upon every Tribunal, in every case to ask itself whether what it had decided was clear and whether the decision had been explained in such a way that the parties could understand clearly why they had won or lost. Wall LJ further added that very grave outcomes are at stake. Respondents to proceedings before the PCC of the GMC are liable to be found guilty of serious professional misconduct and struck off the Register. They are entitled to know in clear terms why such findings have been made.

Southall v. GMC [2010] EWCA Civ 407

Southall appealed against a decision to uphold a finding by a Fitness to Practise Panel (FTP) that he was guilty of serious professional misconduct and should be removed from the register of medical practitioners. Southall was a consultant paediatrician who had been instructed by his local authority to provide an independent expert report in relation to a child whose older brother had died by hanging at the age of 10, around two years earlier. The coroner had not been satisfied that he had intended to kill himself and an open verdict had been returned. Whilst interviewing the boy's mother, it was alleged that Southall had accused her of drugging and murdering her older son. Southall admitted that he had probed the circumstances of the boy's death and accepted that this might be perceived by the mother that he was accusing her of murder, but maintained that he did not do so. He was supported by the evidence of a social worker present at the time.

The FTP Panel preferred the mother's evidence to Southall's and the social worker's and found that the doctor had acted in manner which was inappropriate, had caused distress and was an abuse of his professional position. Consequently he was removed from the register of medical practitioners. Southall appealed against this decision, partly on the basis that the panel had given virtually no reasons for their rejection of his evidence and that of the social worker and he was entitled to know why he had lost.

Delivering the leading judgment, Leveson LJ held, following *Phipps*, that in straight-forward cases involving comparatively simple conflicts of factual evidence, it would frequently be obvious whose evidence had been rejected and why. Thus setting out the facts to be proved and finding them proved or not proved would generally be sufficient to demonstrate to



parties why they had won or lost and explain the facts found to any appellate Tribunal. However, where the case was not straightforward and was thus exceptional, the position was different. *Southall* was a complex case and involved difficult questions of evidence. Given this, a lengthy judgment would not have been required, but certainly a few sentences dealing with all of the salient issues were essential. Here, the FTP Panel had failed to properly record their decisions on key arguments in the case. Additionally, the question of Southall's credibility was not addressed. He had given evidence for some days and if the FTP Panel disbelieved him, in the context of the case and his defence, then he was entitled to know why, even if only by reference to his demeanour, his attitude or his approach to specific questions. In the circumstances the FTP Panel's reasons were inadequate and the appeal was allowed.

Practical Guidance

In view of the breadth of case law on the subject, the following tips may prove useful when you come to draft your decisions on findings and sentences:

Findings

- Make a list of all key issues in the case, both factual and legal, throughout proceedings and ensure that they are all addressed.
- In your written determinations, summarise each of the key issues in the case individually and do not conflate matters where possible, even where some overlap may occur.
- Consider whether the reasoning behind a conclusion has been unambiguously explained.
- Consider whether, standing in the shoes of either of the parties, it is absolutely clear why they have won or lost on each point.
- Where the evidential issues are complex and it is not immediately obvious why the Tribunal may favour the credibility of certain witnesses over others, ensure that this is properly explained. A detailed exposition is unnecessary but a paragraph may be desirable.
- Use plain English and avoid unnecessary legal jargon.
- State that you are applying the criminal standard of proof.

Sentencing

- Summarise the submissions of each party on sentencing and the Panel's position on them.
- Summarise the evidence offered on sentencing and the Panel's position on them.
- Explain the Panel's duty to act in the public interest.
- State the Panel's decision and the reasons for that decision.
- If conditions or suspension have been imposed on the barrister, explain the reason(s) for their duration.
- Explain any significant departure from the Sentencing Guidance

Any comments or feedback on this newsletter would be much appreciated. Please send these to tab@graysinn.org.uk.