The Council of the Inns of Court

The Bar Tribunals & Adjudication Service

SUMMER 2014 NEWSLETTER

Contents

Introduction from – and to – the new Registrar

Welcome to the Summer 2014 edition of the Bar Tribunals and Adjudication Service Newsletter. The following few pages are intended to keep all those involved with, or interested in, the work of BTAS up to date with some of our recent activity, and provide further information and commentary on the latest developments in regulatory law.

On 2nd June this year Andy Russell started work as the new Registrar of BTAS, taking over from Wendy Harris who left at the end of March. Most recently Andy was Head of Operations at the Membership Exam Department of the Royal College of Physicians; prior to that he was Assistant Registrar at Imperial College London. Andy continues to be ably supported by the other members of the BTAS team, Margaret Hilson (Disciplinary Tribunals) and Hayley Addison (Inns' Conduct Committee).

On 1st July the Council of the Inns of Court ('COIC'), of which BTAS is a part, came into being as an independent legal entity. Prior to this it was in effect jointly run by the four Inns of Court. In practical terms those involved with the work of BTAS will see little or no real change.

Focus on the Disciplinary Tribunal Regulations – Rule E181

After a Tribunal earlier this year, members of the Panel commented that they felt that the conduct of another individual (other than the defendant) may have been worthy of disciplinary action itself, but they had to acknowledge they had no power or mandate to consider this under the Rules. In the light of this it may be helpful to issue a reminder about DTR E181. This allows, at the discretion of the Chairman, the Hearing Report to also "*refer to matters which, in the light of the evidence given to the Disciplinary Tribunal, appear to require investigation or comment*". This Report is sent to the Bar Standards Board who can then determine whether any further action is required, if necessary even bringing the matter to the attention of other Regulators.

Regulatory and Professional Discipline Case Law Update

The following articles review a number of cases heard over the last year which raise interesting issues of law relating to professional discipline. A prominent feature is natural justice: can the proceedings against the professional be said to have been fair? Issues of absent tribunal members, disclosure, and anonymous hearsay evidence are considered, as well as the "no difference rule". Finally, wider principles of justice come into play as an application for anonymisation and redaction is examined.

Natural justice – can tribunal members be absent for part of a hearing?

Yes (a surprising answer some might say, but as always, depending on the circumstances of the case), according to the Court of Appeal in *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* [2013] EWCA Civ 555. Mr Hill was a member of the Defendant professional body, facing disciplinary proceedings before a Tribunal. It was not possible to hold the six day hearing on consecutive days, and on the fourth day, when Mr Hill was giving oral evidence, a lay member of the panel stated that they could not sit later than 5pm. The parties, including the defendant member, gave their consent to the panel member leaving at 5pm and subsequently being given a copy of the transcript when it became apparent that the hearing would continue beyond this time. The hearing resumed at a later date, and the Tribunal found the charges proved.

Mr Hill subsequently sought judicial review of the decision on the grounds that there had been a breach of the rule of natural justice "that he who decides must hear", that the breach was so serious that it could not be waived, and that the rules did not permit for a panel member to be absent and then return. The High Court found that the rules did permit for the member to be absent and then return, and that although there had been a breach of the rules of natural justice, these had been waived by consent.

The Court of Appeal agreed that the rules permitted the absence and return of the member, cautioning against construing the rules over rigidly. The right question to ask of procedures adopted in relation to regulations of professional disciplinary bodies should be not whether it is permitted but whether it is prohibited (provided it is fair).

Given this conclusion, it could not be said that the Tribunal did not have "constitutive jurisdiction" (the power given to a judicial body to decide certain classes of issue). Unlike issues going to "adjudicative jurisdiction" (the entitlement of such a body to reach a decision within its constitutive jurisdiction), an act outside the constitutive jurisdiction of a tribunal is an act which cannot be agreed to by the parties and cannot, therefore, be waived by them. However, in this case, Longmore LJ found that there was no breach of natural justice at all: it would be odd to say that the tribunal acted in breach of natural justice when all parties agreed to the course that was to be taken. "Waiver" is more naturally used in respect of something that was definitely a breach when it occurred but is later agreed not to matter.

This case provides some useful guidance on natural justice in disciplinary hearings, although it must be stressed that it does not currently apply to the Disciplinary Tribunals, where the Rules (E141) make clear that a member who has been absent for any time during a hearing shall take no further part in proceedings. Nonetheless it is an indication that Tribunals must act fairly and according to their rules, and where they have done so, the courts will not be sympathetic to legalistic arguments designed to avoid an adverse decision (not least where the claimant has agreed to the course of action complained of).

Disclosure obligations in disciplinary hearings and the "no difference" rule

In *McCarthy v Visitors to the Inns of Court* [2013] EWHC 3253 (Admin), on the other hand, the requirements of natural justice were breached. In the event, the breach would not have made a difference to the outcome of the case, and so the High Court did not order the decision to be quashed.

Mr McCarthy was accused of failing to send a letter of engagement to a direct access client (ie he was instructed directly, rather than through a solicitor) in breach of the relevant rules. The Disciplinary Tribunal concluded that the letters Mr McCarthy produced to refute the allegation had in fact been created subsequently. The Visitors to the Inns of Court upheld this decision, but expressed some concerns about a breach of natural justice.

Mr McCarthy appealed on the basis of this breach, which concerned a draft witness statement from the complainant's husband (TA). The Bar Standards Board had deliberately waited to serve TA's statement until after Mr McCarthy had filed his evidence, fearing that otherwise, Mr McCarthy would doctor his evidence. The draft version was dated June 2010, but the final version was not served until October 2010 (after Mr McCarthy had submitted his evidence). Upon learning of the draft statement, McCarthy argued that the failure to disclosure the draft statement was a breach of natural justice, depriving him of the opportunity to cross examine the witness on the differences between the drafts.

The court found that in disciplinary proceedings with the potential for grave consequences, it was "beyond question" that draft statements capable of being used to discredit a witness should be disclosed. This was regardless of whether there were inconsistencies between the two versions. As in criminal cases, there was an obligation to disclose statements which might reasonably be considered capable of undermining the case for the prosecution or of assisting the case for the accused. The failure to do so was unfair: both statements should have been available to Mr McCarthy to undermine, if he could, the precision and the weight of the witness' evidence.

It was open to the court to quash the decision of the Visitors on the grounds of the error of law which led to unfairness on their part (failing to recognise the Bar Standard Board's duty of disclosure). However, having regard to the evidence identified by the Visitors (notably the almost complete failure of Mr McCarthy to refer to the existence of the letters in early correspondence, when their content would have resolved many issues in dispute), there was no real possibility that a re-trial with disclosure of the draft witness statement would have produced any alternative result (ie it would have made no difference). It should be noted that if clause 64 of the Criminal Justice and Courts Bill is passed as currently drafted, the threshold for the no difference test will be lowered so relief will be refused if it is "highly likely" that the outcome would not have been substantially different if the conduct complained of had not occurred. Clause 64 will apply to applications for judicial review (such as this case), including permission hearings, though whether it will have any application by analogy in relation to disciplinary proceedings is not yet clear.

The Bar Standards Board now has a policy in place such that this particular situation is unlikely to arise again, but this case serves as a reminder of the importance of regulators being aware of their disclosure obligations and the practical effect of the "no difference" rule.

When will anonymous hearsay evidence be admissible in disciplinary proceedings?

In *White v Nursing and Midwifery Council; Turner v Nursing And Midwifery Council* [2014] EWHC 520 (Admin), two nurses had disciplinary proceedings brought against them by the Defendant. The Conduct and Competence Committee found that the ability of both to practise was impaired by reason of serious misconduct and both were struck off. Evidence was given on behalf of the NMC by a number of witnesses. The NMC also relied on three anonymous letters of complaint. The claimants argued that these letters were inadmissible, and given that the committee's judgment on critical questions was, or may have been, influenced by these anonymous statements, their decision must be quashed.

Mitting J set out the relevant principles on anonymous hearsay evidence. Article 6(1) ECHR (right to a fair and public hearing within a reasonable time by an independent and impartial tribunal) applies to disciplinary proceedings of which the outcome can be the removal, temporarily or permanently, of a person's right to conduct professional practice. Article 6(3), on the other hand, does not apply to disciplinary proceedings so that there is no express right for a person "to examine or have examined witnesses against him" as in criminal proceedings. However, whilst the Fitness to Practice Rules granted wide discretion to admit evidence, this was subject to the requirements of relevance and, crucially, fairness.

There is no reason of principle why anonymous or hearsay evidence should not be admitted. However, where the evidence goes to the attitude and conduct of a registrant (rather than more objective evidence, for example, an unsigned entry in a patient's records), it is difficult to conceive of circumstances where its admission would not breach the requirements of fairness. The claimant could not cross examine the complainant, and without knowing their identity, cannot suggest any reason why the informant might be critical of her attitude and conduct.

In the event, it was clear from the committee's detailed findings that the committee did not rely on the anonymous hearsay evidence to reach its findings, but rather on the admissible evidence of live witnesses. The anonymous statements were referred to only after the committee had stated its conclusion on the basis of the admissible evidence and then only referred to it as supporting a finding already made. The appeals were dismissed, save to the very limited extent that those few findings which depended in part upon the anonymous statements should be quashed.

This case highlights that anonymous hearsay evidence will only be admissible in very limited circumstances and even then must be treated with great caution.

Open justice in the disciplinary context

Disciplinary proceedings inevitably have the potential to damage an individual's professional reputation. However, private proceedings and anonymised judgments undermine the principle of open justice. The Court of Appeal considered this issue in *R (on the application of Willford) v Financial Services Authority* [2013] EWCA Civ 674.

Mr Willford sought judicial review of the decision of the (now defunct) Financial Services Authority (FSA) to issue him with a decision notice. The High Court hearing was conducted in private and the judgment was published in a redacted and anonymised form so that Mr Willford's identity would not be disclosed. He appealed the refusal to quash the FSA decision, and asked the Court of Appeal to hear the matter in private. They refused, but made an order prohibiting his identification until

further notice. The Court invited submissions as to whether judgment should be published in a redacted and anonymised form.

The Court found that they should not. The starting point when deciding such issues is the principle of open justice: the principle that proceedings are to be conducted and determined in public. This generally requires that judgments are published in full without concealing the identity of the parties or others involved. This principle is not absolute, and in certain cases the requirements of justice and other public interest considerations will mean that anonymisation or redaction is necessary (for example, anonymising judgments in criminal proceedings to protect the identities of children). However, in civil cases between adult parties, "the public interest in open justice will usually outweigh other considerations, except where publication would significantly undermine the effectiveness of any relief the court might grant." The Court continued:

"Anonymisation and the redaction of judgments both represent derogations from [the principle of open justice] which must be justified, on the basis of cogent evidence, as strictly necessary in order to secure the proper administration of justice."

The Court acknowledged the current proceedings, based on disciplinary action, may be embarrassing and cause some damage to Mr Willford's professional reputation (though this would be limited if his substantive appeal was ultimately successful). However, these would not be sufficient grounds to protect his identity were he facing criminal charges, which would have a similar effect. No positive evidence had been offered to show he would suffer significant harm if the existence of the proceedings was disclosed. Though the FSA proceedings were private, Mr Willford's appeals brought the matter into the public forum where the principle of open justice applies. Nor were anonymisation and redaction of the judgment necessary to enable the court to grant effective relief. The application for anonymisation and redaction was therefore refused.

This case provides useful guidance on the correct approach to applications for the anonymisation or redaction of judgments. The first port of call, as always, will be the disciplinary body's own rules on this issue, but the underlying principles arising as they do from common law and human rights, will in most circumstances take precedence.

Future Changes to the Disciplinary Tribunal Regulations

The Bar Standards Board has recently informed BTAS that over the coming months it will be considering making a number of amendments, improvements and updates to the current Disciplinary Tribunal Regulations in the light of feedback they've received since they were launched in January 2014.

The BSB has said it would welcome any and all suggestions from BTAS, its Chairs, Panellists and Clerks. So, if you would like to comment please do so via the Registrar (andy.russell@tbtas.org.uk) who will collate and forward your comments.

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