



## The Bar Tribunals and Adjudication Service Newsletter, Edition 3

### Introduction to newsletters

This is the third 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 BTAS team values your feedback and if you require greater information on a topic, or identify an issue of particular importance, then please let us know and we may include it in future. Please also provide us with comments on this edition, for which we are indebted to David Bennett, Hailsham Chambers.

### **The Admissibility of Evidence**

Tribunals in regulatory proceedings are often provided with a wide discretion to admit evidence and are rarely bound by the strict rules of evidence in criminal or civil jurisdictions.

The same is true of this Tribunal. In the Disciplinary Tribunal Regulations the Tribunal is specifically provided with a wide discretion to admit evidence, in that the Tribunal may: *“...admit any evidence, whether oral or written, whether direct or hearsay, and whether or not the same would be admissible in a court of law.”* Therefore because the Tribunal is not bound by the strict rules of evidence, it does not necessarily need to admit evidence in the form of a witness statement, and a letter, for example, may be sufficient.

### Hearsay

Although the discretion is wide, in respect of hearsay evidence there is a particular need to exercise caution, and the Regulations provide the Tribunal with discretion to: *“...exclude any evidence it is not satisfied that reasonable steps have been taken to obtain direct evidence of the facts sought to be proved by the hearsay evidence.”*

As with all evidence, the Tribunal will need to assess what weight, if any, should be given to hearsay evidence, if it is admitted. It should be noted that hearsay evidence is not uncommon in disciplinary proceedings but the respondent may, however, seek to challenge the admissibility of hearsay evidence on the basis that the witness is required to attend in person so that he or she can be cross-examined. In some circumstances, it may be difficult or even impossible for the regulator to secure the attendance of a witness and the Tribunal will then need to give careful consideration as to how to deal with that evidence. This may be a particularly contentious issue where the hearsay evidence is the *“sole and decisive”* evidence [see *R v Horncastle* [2009] UKSC 14; [2010 2 W.L.R 47].

When considering the reasonableness of the steps taken to obtain direct evidence of the facts, it is important to remember that the Bar Standards Board has no power to compel witnesses to provide evidence or attend disciplinary hearings. The Code of Conduct (paragraph 905(e)) does require barrister witnesses to co-operate with proceedings but other witnesses are under no such obligation.



Guidance on how to approach such issues was laid down in the case of *R (Bonhoeffer) v General Medical Council* [2011] EWHC 1585, at paragraph 108 of the judgment. Stadlen J set out a number of propositions from his review of the authorities which may be of assistance, and which include the following:

- Disciplinary proceedings against a professional person, although not classified as criminal, may still bring into play some of the requirements of a fair trial spelt out in Article 6(2) and (3) of the ECHR, including in particular the right to cross-examine witnesses whose evidence is relied on against them.
- The issue of what is entailed by the requirements of a fair trial in disciplinary proceedings is one that must be considered in the round having regard to all relevant factors.
- In disciplinary proceedings which raise serious allegations amounting in effect to criminal offences which, if proved, are likely to have grave adverse effects on the career and reputation of the accused party, where reliance is sought to be placed on evidence of an accuser between whom and the accused party there is an important conflict of evidence as to whether the misconduct alleged took place, there would, if that evidence constituted a critical part of the evidence against the accused party and if there were no problems with securing the attendance of the accuser, need to be compelling reasons why the requirement of fairness and the right to a fair hearing did not entitle the accused party to cross-examine the accuser.

It is important to remember, however, that in order to determine issues properly of the admissibility of evidence, careful regard must be had to the specific facts of the case before the Tribunal.

#### Can a witness statement be read out?

One example of an issue that can arise was considered in *Nursing and Midwifery Council v Eunice Ogbonna* [2010] EWCA Civ 1216 where it was held that a decision to permit witness statements to be read in the absence of a witness is a case sensitive issue. If the allegation to which the evidence related was considered by the NMC to be important, the Court found that it could and should have sought to make arrangements to enable such cross-examination to take place, through travel arrangements or video link. If the NMC had made all reasonable efforts to afford the registrant the opportunity to cross-examine the witness, but without success, it was held that the NMC's application to admit the hearsay evidence would have had a stronger basis. Lord Justice Pill stated that the concept of 'fairness' as referred to in NMC's rules included the conduct of the parties in their approach to producing evidence.

#### Documentary evidence

Another example is *R (Johnson and Maggs) v Professional Conduct Committee of the Nursing and Midwifery Council* [2008] EWHC (Admin) where the High Court considered the extent to which a regulator was under a duty to obtain documents and other evidential material in favour of the accused's case, as well as against them. Beatson J held that Article



6(3)(b) of the European Convention on Human Rights entitled the accused to facilities for preparing their defence, but there was no free-standing positive duty on those bringing disciplinary proceedings to gather such evidence.

Tribunals will also have to consider the extent to which documentary evidence alone is sufficient to prove an allegation. Where, for example, the allegations before a Tribunal concern a criminal conviction, proof of the conviction is usually provided by a certificate of conviction from a court of competent jurisdiction, together with evidence associating it with the accused. In *Shepherd v The Law Society* [1996] EWCA Civ 977 the Court of Appeal approved the statement that, save in exceptional circumstances, a challenge to a criminal conviction should not be entertained by a disciplinary tribunal. Furthermore, in *Michael Stannard v General Council of the Bar* [2006] LTL 30/1/2006 it was held that a tribunal is entitled to refuse to hear evidence that seeks to go behind the conviction unless there are exceptional circumstances.

That is not to say that the decision of the Tribunal cannot be revisited in the event that a conviction is quashed. In *R. (on the application of Jenkinson) v Nursing and Midwifery Council* [2009] EWHC 1111 (Admin) the claimant applied for judicial review of a decision of the Professional Conduct Committee of the NMC to strike her off the nursing register. Following her conviction for causing grievous bodily harm with intent, the Registrant had been found guilty of misconduct by the committee and struck off the nursing register. The claimant's conviction was subsequently quashed when it became clear that the expert evidence founding the conviction was erroneous. Thereafter, the claimant sought to have the committee's decision to strike her off set aside. The Court held that the Nursing and Midwifery Council had the power to review findings of professional misconduct where its decision had been based on a slip, accidental mistake or miscarriage of justice.

Where the allegations before a Tribunal concern adverse findings by another regulatory or disciplinary body, proof of the findings is usually provided by way of a copy of the order made by that disciplinary body.

#### The accused's evidence

Importantly, the Tribunal will also need to consider the accused's own evidence. In *Iqbal v Solicitors Regulation Authority* [2012] All ER (D) 217 the Divisional Court considered a case in which the appellant solicitor had not given evidence before the Solicitors Disciplinary Tribunal, despite serious charges being brought against him. In respect of that issue, the Divisional Court said that although the practice of the SDT had been not to take into account the failure to give evidence by a solicitor, the ordinary public would expect a profession to give account of his or her actions and it would be appropriate for the SDT to review this practice.

There may be circumstances in which the Tribunal will need to consider factual matters asserted by the accused's representative. It will usually be fair to admit information in this way, depending on the circumstances of the case, but the Tribunal should be mindful that the Bar Standards Board may be denied any opportunity to test that information, if it is not formally given as evidence under oath.



### Character evidence

Finally, the Tribunal may also have to consider character evidence submitted by the accused. In *Donkin v Law Society* [2007] EWHC 414 Admin the Divisional Court (Maurice Kay LJ and Goldring J) held that, where a professional was accused of acting dishonestly, the panel should have taken account of testimonials about his previous good character, and dealt with them in their reasons. At paragraph 23-25, the court said:

*“It is the context which determines whether material which would be relevant to personal mitigation is also relevant to ‘the prior question’. The mischief which was the concern of the Court in Campbell was the situation where personal mitigation might be misused to downgrade what would otherwise amount to serious professional misconduct to some lesser form of misconduct.*

*In my judgment the evidence of good character in this case was relevant to the issue of dishonesty. As in a criminal trial, it cannot afford a defence in itself. Moreover, the weight to be attached to it is in the last resort a matter for the Tribunal. In the present case, the reasons stated by the Tribunal do not disclose that it gave any consideration at all to this evidence in this context. I am not satisfied from the text of the stated Reasons that it played any part of its consideration of dishonesty. I find that to be a significant legal error.”*

Furthermore, in *Vaidya v General Medical Council* [2007] EWHC 1497 (Admin) the High Court (Bennett J) held that a registrant who failed to attend a hearing that properly proceeded in his absence, was entitled to expect that all testimonials he had submitted would be placed before the panel when it considered sanction. When assessing character evidence, particular written references and testimonials, the Tribunal will need to determine what weight should be attached to them. In so doing, it may be helpful to consider whether the author was fully aware of the nature of the allegation faced by the accused at the time of writing the reference. A key consideration may be to what extent, if any, the author is qualified to comment on the matters that have formed the basis of the allegations. References will often have been provided in advance of the hearing and may not stand as a wholly accurate picture.

Any comments or feedback on this newsletter would be much appreciated. Please send these to [info@tbtas.org.uk](mailto:info@tbtas.org.uk).

### **Consultation on Sentencing Guidance**

This newsletter coincides with the current consultation on Sentencing Guidance. To access the consultation please visit: [www.tbtas.org.uk](http://www.tbtas.org.uk).

If you would like to discuss and/or formally respond to the consultation in person please visit at our office (the address below) **Tuesday 30th July 2013 between 8.30am -7pm.**