



The Bar Tribunals & Adjudication Service

The Council of the Inns of Court

Report of Finding and Sanction

Case reference: PC 2018/0115/D3

Bernadette McGurk

The Director-General of the Bar Standards Board

The Chair of the Bar Standards Board

The Treasurer of the Honourable Society of Lincoln's Inn

Disciplinary Tribunal

Bernadette McGurk

1. In accordance with an appointment made by the President of the Council of the Inns of Court contained in a Convening Order dated 12 March 2019, I sat as Chairman of a Disciplinary Tribunal on 22 May 2019 to hear and determine three charges of professional misconduct contrary to the Code of Conduct of the Bar of England and Wales against Bernadette McGurk, barrister of the Honourable Society of Lincoln's Inn.

Panel Members

2. The other members of the Disciplinary Tribunal were:
John Lyon (Lay Member)
Naomi Davey (Barrister Member)

Parties Present and Representation

3. The Bar Standards Board ("BSB") was represented by Alison Padfield QC. The Respondent did not attend and was not represented.

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Charges

4. The Respondent faced three charges:

Charge 1

Statement of Offence

Professional misconduct contrary to paragraph 202A and paragraph 901.4 and 901.7 of the Code of Conduct of the Bar of England and Wales (8th edition).

Particulars of Offence

Between 1 August 2012 and 5 January 2014 Bernadette McGurk did not have a practising certificate that had been issued by the Bar Council. Consequently, she was not permitted to carry out any reserved legal activity between those dates. However, she did so. Between those dates Bernadette McGurk carried out reserved legal activities on behalf of the Crown Prosecution Service. Her actions were contrary to rule 202A.

Charge 2

Statement of Offence

Professional misconduct contrary to rule rS6 and/or rS8 of the Code of Conduct of the Bar of England and Wales (9th edition).

Particulars of Offence

Between 6 January 2014 and 11 February 2018 Bernadette McGurk practised as a barrister and/or carried out reserved legal activity when not authorised to do so; in particular on behalf of the Crown Prosecution Service. Her actions were contrary to rule rS6 and/or rS8.

Charge 3

Statement of Offence

Professional misconduct contrary to Core Duty 10 of the Code of Conduct of the Bar of England and Wales (9th edition).

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Particulars of Offence

Between 6 January 2014 and 11 February 2018 Bernadette McGurk, a barrister, failed to take reasonable steps to manage her practice so as to achieve compliance with her legal and regulatory obligations in that she did not hold a practising certificate and so was not authorised by the Bar Standards Board to carry out any reserved legal activity.

Application to amend charge 1

5. In the skeleton argument of Ms Padfield, an application was made on behalf of the BSB to amend charge 1. The unamended charge read as follows. The BSB applied to omit the underlined words ‘901.4 and’.

Charge 1

Statement of Offence

Professional misconduct contrary to paragraph 202A and paragraph 901.4 and 901.7 of the Code of Conduct of the Bar of England and Wales (8th edition).

Particulars of Offence

Between 1 August 2012 and 5 January 2014 Bernadette McGurk did not have a practising certificate that had been issued by the Bar Council. Consequently, she was not permitted to carry out any reserved legal activity between those dates. However, she did so. Between those dates Bernadette McGurk carried out reserved legal activities on behalf of the Crown Prosecution Service. Her actions were contrary to rule 202A.

6. Ms Padfield submitted in her skeleton argument that paragraph 901.4 was not relevant because it referred to paragraph 202 of the Code, whereas in fact charge 1 alleged conduct contrary to paragraph 202A of the Code. Paragraph 202A is already referred to in charge 1 as drafted. Therefore, it was submitted that there would be no prejudice to the Respondent as a result of any amendment.
7. We decided to permit the amendment at the outset of the hearing, for the reasons given by Ms Padfield.

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Application for an adjournment

8. Ms Padfield provided us with a copy of an email from the Respondent sent early on the morning of 22 May 2019. Although the email was not entirely clear, Ms Padfield invited us to treat the email as an application for an adjournment. We agreed that it was appropriate to do so. Ms Padfield provided us with the proceeding in absence bundle, addressed us on r.E183 and r.E249, and the cases of *GMC v Adeogba* [2016] EWCA Civ 162 and *GMC v Hayat* [2018] EWCA Civ 2796.
9. We were satisfied both that the relevant procedure had been complied with and that it was just to proceed in the absence of the Respondent. We considered the case law cited and the balance between the public interest and the Respondent. We noted that there was no evidence of any medical reason for an adjournment and no indication that the position in relation to the Respondent's attendance would be different on a different day. We considered that an adjournment would raise significant complications as identified in *Adeogba*, not least the inconvenience for the witness who attended for the BSB. Therefore, we decided that it was just for the hearing to proceed on 22 May 2019 in any event.
10. We then decided to adjourn until 2pm in order to allow to allow more time for the BSB to try and contact the Respondent and for the Respondent to make any representations. We took into account the fact that the witness for the BSB was in attendance but considered that, as he had set today aside to attending the hearing, a short adjournment until the afternoon would not greatly inconvenience him.

Response to Charges

11. The hearing resumed at 2pm on 22 May 2019. We considered emails sent by the Respondent on 22 May 2019 together with the Respondent's email of 26 March 2019. As a result, the following charges were taken to be admitted:

Charge 1

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Professional misconduct contrary to paragraph 202A and paragraph 901.7 of the Code of Conduct of the Bar of England and Wales (8th edition).

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Particulars of Offence

Between 1 August 2012 and 5 January 2014 Bernadette McGurk did not have a practising certificate that had been issued by the Bar Council. Consequently, she was not permitted to carry out any reserved legal activity between those dates. However, she did so. Between those dates Bernadette McGurk carried out reserved legal activities on behalf of the Crown Prosecution Service. Her actions were contrary to rule 202A.

Charge 2

Statement of Offence

Professional misconduct contrary to rule rS6 and/or rS8 of the Code of Conduct of the Bar of England and Wales (9th edition).

Particulars of Offence

Between 6 January 2014 and 11 February 2018 Bernadette McGurk practised as a barrister and/or carried out reserved legal activity when not authorised to do so; in particular on behalf of the Crown Prosecution Service. Her actions were contrary to rule rS6 and/or rS8.

12. The following charge was taken to be denied:

Charge 3

Statement of Offence

Professional misconduct contrary to Core Duty 10 of the Code of Conduct of the Bar of England and Wales (9th edition).

Particulars of Offence

Between 6 January 2014 and 11 February 2018 Bernadette McGurk, a barrister, failed to take reasonable steps to manage her practice so as to achieve compliance with her legal and regulatory obligations in that she did not hold a practising certificate and so was not authorised by the Bar Standards Board to carry out any reserved legal activity.

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Evidence

13. We read the documents contained in the substantive bundle of the BSB, the proceeding in absence bundle of the BSB and the emails sent by the Respondent on 22 May 2019. We heard live evidence from one witness from the CPS.
14. We also had the benefit of oral submissions from Ms Padfield, for which we are grateful.

Factual background

15. The BSB's evidence shows that, between approximately November 2012 and October 2017, the Respondent practised as a barrister and/or carried out reserved legal activity when not authorised to do so; in particular on behalf of the Crown Prosecution Service.

Findings of Fact

16. Charge 3 was not admitted. We consider it is made out to the criminal standard. In reaching that conclusion we have considered the material that was provided on 22 May 2019 by the Respondent and we consider that none of that amounts to a defence in relation to Charge 3.
17. We consider it is made out for two reasons. First, as charges 1 and 2 are made out, the Respondent clearly did not comply with her obligations herself and failed to keep control over her practice as required by Core Duty 10.
18. Secondly, that leaves the question of whether she has taken reasonable steps. We accept the BSB's submission that, on any view, she has failed to take reasonable steps. It is a barrister's responsibility to be authorised. It is not, in our view, reasonable to rely – as the Respondent suggested in an email – on assurances given by an individual at the CPS. Moreover, the explanation that she was given such assurances in the context of events around Christmas 2012 is, we note, contrary to the evidence given by the witness from the CPS that she first received agent's payments in November 2012. Therefore, we do not feel any confidence in the Respondent's explanation as to how things came about.

Sanction

19. We imposed the following sanctions:

Charge 1: 6 months' suspension

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Charge 2: 6 months' suspension (concurrent)

Charge 3: 6 months' suspension (concurrent)

Judgment

20. The Respondent has been charged with three offences.
21. Directions provided that the Respondent should respond to the charges by 7 January 2019. She did not do that but in an email of 26 March 2019 she said this (and I just read the relevant parts). The third point was, "Whilst I do not agree with the entirety of the witness statements, I do not require their attendance." The fourth point was, "I can confirm that I will be pleading guilty to Charge 1. Charge 2 seems to be a repetition of Charge 1 and, in my opinion, superfluous and as I am pleading guilty to Charge 1, I do not see the purpose in doing so to Charge 2. I will be pleading not guilty to Charge 3 on a factual basis that I was led to believe by an employee of the CPS that if I was a sole agent of the CPS I did not have to achieve compliance."
22. She further sent an email on the morning of on 22 May 2019 in response to an email from the Bar Standards Board. In that she said this: "I am not going to attend the hearing today [...] I am pleading guilty in any event. I wish to put forward mitigating circumstances if possible, either in person or in writing."
23. In the light of those emails we indicated on the morning of 22 May 2019 that we would treat the first two charges as admitted. The logic of what she said, especially bearing in mind that the second charge is essentially the same as the first but simply refers to a later version of the Bar Standards Board Handbook, is that we can be sufficiently satisfied she admits the second charge. But, as a matter of prudence, the third charge should be treated as not admitted.
24. In view of the email sent on the morning of 22 May 2019 we thought it right (for reasons given in a short interlocutory judgment this morning) to stand the hearing to 2pm to allow the Respondent the opportunity to put in written mitigation and submissions in relation to charge 3. Barring unforeseen circumstances arising, we considered the hearing should definitely proceed at 2pm and this should be communicated to the Respondent.

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25. Prior to 2pm, in response to communications, two emails were received from the Respondent: first, a copy of a letter from June 2015 from a Chief Crown Prosecutor commending her for her work; and, secondly, an email chain from which we concluded that Charge 3 should be treated as not admitted. We will come back to both these documents in due course in our decision.
26. To deal briefly with some procedural matters, the BSB served statements from three witnesses. The Respondent served no evidence of her own and she served no cross-examination notice as was a requirement according to the directions. The BSB understandably indicated that it would not, in those circumstances, be producing two of their witnesses as their evidence was unchallenged. It nevertheless said it would produce one witness for cross-examination and to answer questions from the Bench.
27. Ms Padfield produced a very helpful skeleton argument which set out the relevant law at paragraphs 9 to 29. None of that is challenged and we do not propose to repeat it here.
28. Moving on to the charges, submissions were helpfully made by Ms Padfield at paragraphs 30 forward in her skeleton argument. To pick up on one or two points in that, in relation to charge 1 she pointed out at paragraph 33 that the Respondent carried out reserved legal activities during the period at issue by exercising a right of audience in the Magistrates' Court in cases in which she was instructed by the CPS. She particularly drew our attention to the fact that the earliest date of payment in respect of agency work was 27th November 2012. In the same paragraph she drew attention to the fact that the last instructions were in 2017 thereby overlapping with the second charge. The second charge, as already indicated, essentially simply represented the continuation of the previous activity but during the currency of a new edition of the Code of Conduct. There is nothing further I need to raise from Ms Padfield's skeleton as to those issues.
29. As I have said those two charges in effect represent a continuous breach, the distinction being the change from the 8th to 9th edition of the Code of Conduct. The only thing to add is it seems that throughout this period the Respondent acted as if she was entitled to carry out reserved legal activities. The witness from the CPS who attended told the Bench that the CPS had received 259 invoices from the Respondent for the period from November 2012 to October 2017. He further explained it was likely that these, or many of them at least, covered

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a week's work and so essentially a number of cases were dealt with in each one. So, there is a substantial amount of activity involved.

30. Moving to the third allegation, we had already indicated in the course of the hearing, that we consider this made out. We consider it is made out to the criminal standard as required. There are essentially two reasons: first, as indicated, the fact that Charges 1 and 2 are admitted demonstrates that she did not comply with her obligations of itself. Secondly, the remaining element is that we consider that she did not take reasonable steps to comply with her obligations on any footing. To expand on this latter point, it is a barrister's responsibility to be authorised. It is not, in the Tribunal's view, reasonable to rely – as the Respondent suggested in an email – on assurances given by an individual at the CPS. Moreover, the explanation that she did receive such assurances in the context of events around Christmas 2012 is, we note, contrary to the evidence given by the witness from the CPS (to which he deposed today) that she first received agent's payments in November 2012. So, we record that we do not feel any confidence in her explanation as to how things came about.
31. We do not have the benefit of the Respondent's attendance today to judge from her the extent to which the failure to obtain a practising certificate began as a deliberate course or accidentally. We conclude that she was, or should have been, aware that she should have checked the position at the very least and she clearly did not do so.
32. We consider that her practising for such a lengthy period without proper authorisation and, as a consequence, without insurance, is a very serious matter in terms of public trust in the legal profession. This is a point quite properly made in the evidence of Ms P (who had made a complaint against the Respondent). However, we should note at this point that much of Ms P's evidence concerned a complaint as to services provided by the Respondent for the benefit of the complainant. We are not asked to adjudicate on that, and we do not do so. However, to amplify the point regarding insurance, it is, as Ms Padfield accepted, in practical terms, a necessary consequence of not being authorised. So, on one level it does not add to the seriousness of the charge. But it is important to bear in mind that it would leave members of the public potentially without financial redress, so the potential consequences could be very serious. We consider that Ms Padfield was right to draw this to our attention as indicative of the seriousness of the charge as put.

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33. Turing to aggravating and mitigating factors, Ms Padfield in particular drew attention to the following aggravating features. She submitted, first, that there was a lack of remorse on the part of the Respondent. Certainly, there is no clear indication, at least until today, of such remorse. She indicated there was a lack of insight by the Respondent into the seriousness of the situation. Again, we accept that submission. She further made the submission that there were attempts to hide the misconduct or wrongly lay the blame elsewhere. On that third point we had our attention drawn to an email of 2 October 2017 which Ms Padfield characterised as “misleading and evasive” and, moreover, under questioning from the Tribunal, went so far as to describe as “deliberately dishonest”, though she stressed that was not a factor which was relevant to whether or not the charge was made out. She stressed that it was to be drawn into consideration as a matter of hiding misconduct or wrongly laying blame elsewhere.
34. I quote some extracts from the email of 2 October 2017 to give an indication of what it said. This was from the Respondent to an individual at the CPS in respect of a complaint that had been received. She said, “The Bar operated in two ways previously, employed Bar and the self-employed Bar. It now has an additional section which covers the directly-instructed Bar. We do not get practising certificates each year. We have our original Call to the Bar Certificate and Membership of an Inn. It is different to how the Law Society works. If the complainant made a search for me at the bar and did not find the details she required ... you can make a request to the Bar telling them details such as being employed by the CPS.” The email went on.
35. We readily conclude that the email – which is, at times, difficult to follow – was intended to say all was fine in circumstances where the Respondent, at the very least, should have checked and should have known of her duties. To that extent we consider the submission as put in relation to the aggravating factor is made out. However, we do not feel we could conclude that it was deliberately dishonest. We also bear in mind that it was never put in that way in the run-up to this hearing. Had we considered *prima facie* that it was made out that it was deliberately dishonest, we would have wanted to give the Respondent the opportunity to respond given the seriousness of such an allegation. As I say, we do accept that the submission as put is one we can accept.
36. At the request of the Tribunal, Ms Padfield helpfully addressed what might be said by way of mitigation. She pointed out that in March this year (quoted above) there was at least a

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partial admission in relation to Charge 1 certainly and in effect in relation to Charge 2, bearing in mind the factual circumstances underlying Charge 2 were simply the change of Code.

37. Secondly, Ms Padfield pointed out that it could be said there was some indication of remorse as regards the complainant's position in the email sent on 22 May 2019 ["I feel terrible about how [Ms P] describes the impact this has had upon her and I would never have intended for her to ever have to feel that way due to anything I have done, or not done"]. We agree though at the same time we see that that cannot be pushed too far. It also has to be weighed against the wider submission that Ms Padfield made on behalf of the BSB as to lack of remorse which we consider also continues to hold good, certainly throughout the period up to the hearing on 22 May 2019.
38. Thirdly – and again we express our gratitude for Ms Padfield being prepared to put these points this way – she noted that it can be said there was a measure of co-operation by the Respondent. Again, we would consider that point cannot be taken too far because the co-operation during the course of the investigations and during the course of these proceedings has been sporadic. There has been some co-operation. To the extent that it was possible to rectify the position by seeking registration, that was done. It does seem to us that is somewhat two-edged because it simply confirms that for a very long period she was without such registration. Of course, in practice, since then it does not appear she has been doing work for the CPS or indeed anybody else.
39. Fourthly, as to what one might loosely call "previous good character", I mentioned earlier the letter from June 2015. I should perhaps draw specific attention to the wording of that. As I mentioned before, this is from a Chief Crown Prosecutor: "Dear Ms McGurk, I am writing to commend you on your work with victims and witnesses when prosecuting our cases at court. You are highly thought of by your CJS" – I believe that is Criminal Justice Service – "colleagues, in particular the witness service volunteers at Nottingham and Boston Magistrates' Courts. Your approach has been described as direct and honest, and it is clear that victims and witnesses respond well to you. It has been noticed that you make the time to reassure victims and witnesses even when you are extremely busy. The rapport you develop with victims and witnesses helps us demonstrate the importance we place upon providing the best possible service to them. We are very appreciative of the efforts you make in this regard."

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40. Fifthly, there is no suggestion that there is anything about that which is untrue or not to be relied on. It is perhaps appropriate to add, of course, that it does also, at the same time, tend to reinforce the fact that the Respondent was doing a substantial amount of work for a very long period, because the reference is to what appears to be a great deal of work for the CPS.
41. Sixthly, it was mentioned that there were no previous disciplinary findings in relation to the Respondent. We note that.
42. Seventhly, the Respondent's personal circumstances might be possible to allude to. She had drawn attention in today's email to various things and did refer in greater detail to personal circumstances. On behalf of the Tribunal I express our sympathy in respect of the matters raised, but we do not consider they amount to reasonable explanation for the breach of the Code that has taken place in the way it has. Certainly, in terms of timing, the matters complained of began at a time ante-dating the matters she refers to. So, ultimately, we do not consider we are in a position to place great weight on those.
43. Independently of all the above points, we should perhaps add this. We note that although the Respondent did not make this point, it might arguably be said on her part that this was a single ongoing default based on a misunderstanding in 2012. It is not our job to assess how it was that the CPS did not check on her status for such a long period. The witness from the CPS told us that the CPS would rely on barrister agents to meet their own responsibilities although he did go on to say that since this matter has arisen, they have had investigations done and an assurance check of advocates in the East Midlands. It certainly strikes us that consideration should be given to having a more systematic arrangement in place at the CPS to catch the possibility of future cases like this at a much earlier stage.
44. However, having raised this point, the important point for today is that we do not consider it is of particular assistance in our deciding on the overall position, because the obligation remained that of the Respondent throughout. It was both an annual obligation to have a practising certificate and also a continuing obligation which she was in breach of throughout the period. It was not one that, in our view, could be properly characterised as a single once-for-all default.
45. In the light of that we consider it is appropriate for there to be sanction in relation to these matters. They are interrelated so in effect it is a single sanction in our view across the three

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charges. I bear in mind that I must formally record in accordance with Annex 2 of the Sanctions Guidance that “the relevant procedure under rE183 has been complied with, and that the finding and the sanction were made in the absence of the respondent in accordance with rE183”.

46. In terms of the appropriate sanction, Ms Padfield has helpfully referred us to the relevant parts of the Guidance, particularly in Section E. The matters as alleged do not fit perfectly with the way the headings work within Section E. We accept Ms Padfield’s submission that within the charges as put and found made out there is certainly a strong flavour of the “Holding out” provisions where are found on page 60. So without tying ourselves exclusively to those, but bearing in mind the particular facts of this case, we have considered the Guidance and we do see that this is a matter which, certainly to the extent there is holding out, falls prima facie as a starting point within the third category, “c” on E.2, “Providing legal service for financial gain in circumstances where the client is misled into believing the barrister is entitled to practise.” The starting point for that is described as being a “Medium level fine to suspension dependent on the extent of the financial gain (disbarment could be considered where there is a clear risk to the public and the barrister may be likely to persist in the behaviour).”
47. Ms Padfield rightly pointed out that we could take notice of the fact that somebody practising in the Magistrates’ Court in the current straightened circumstances of the CPS is unlikely to be making a significant financial gain. We accept that submission. Nevertheless, it is the case that for a lengthy period she has been making a living practising without the appropriate authorisation as we have found in relation to the charges.
48. In terms of aggravating and mitigating factors, we have considered particular points already. It is not that easy to draw particular conclusions based on the examples identified on page 60 which could be shoehorned into the situation, but are less apt perhaps than the matters we have already considered. As we have already indicated, we do regard this matter as a serious one which went on for a lengthy period. It clearly has an impact on members of the public because it tends to reduce the confidence the public can have in the profession. That is one of the key matters which is recorded, for instance, in the opening of the Guidance itself, which is a quote from Sir Thomas Bingham MR in *Bolton v Law Society* [1994] 1 WLR 512:

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“It is required of lawyers in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness ... A profession’s most valuable asset is its collective reputation and the confidence which that inspires ...”

49. In the circumstances we consider the aggravating factors – and it is not a mathematical exercise – are rather more heavily weighted than the mitigating factors. The limit on our sentencing powers has also been drawn to our attention by Ms Padfield. We are a three-person Tribunal rather than a five-person Tribunal, so the maximum we can do by way of suspension – which is what we consider is the appropriate response to the gravity of these matters – is 12 months. We consider that that is more than would be appropriate: but the principle of suspension we do consider is important to send the appropriate message.
50. In all the circumstances we consider the period of suspension should be for six months. That is our decision and sanction.

Ancillary Application

51. The BSB applied for the travel costs of the CPS witness’s attendance today. We exercised our discretion by refusing this application, in particular on the basis that the Respondent had not served a notice requiring his attendance.

Approved: 03 June 2019

Michael Gibbon QC
Chairman of the Tribunal

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