

Appeals Circular A03/24

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Learning points from recent appeals PART A: Substantive hearings

Facts

- ▶ Legal frameworks, whether in the criminal or in the regulatory sphere, must be interpreted and applied so as to avoid the "chilling" of legitimate¹ political speech, which attracts the highest level of protection under Article 10 ECHR (as given effect in this jurisdiction by the Human Rights Act 1998). [Professional Standards Authority for Health and Social Care v General Pharmaceutical Council \(Ali\) \[2024\] EWHC 577 \(Admin\)](#)
- ▶ [Gleeson v Social Work England \[2024\] EWHC 3 \(Admin\)](#) provided a reiteration of the warning in *Hutchinson v General Dental Council [2008] EWHC 2896 (Admin)*: the tribunal should reach its finding with the risk of possible prejudice to the practitioner caused by delay [eg dealing with allegations dating from over 10 years earlier] and lack of specificity [in the allegation] firmly in mind.
- ▶ Some general reminders in relation to evidence:
 - ▶ In cases where there is no certificate of conviction, police reports should be scrutinised with particular care to see what reliance could fairly be placed upon them (being careful, for example, to distinguish between what the police reported as having been told and what the police reported as having

¹ However note the case of *Adil v GMC [2023] EWHC Civ 1261 Appeals Circular A02/23 - Opinions expressed by a doctor which are baseless and dangerous, invoking their status and experience to engender trust in them, are not 'legitimate' in the sense of enjoying absolute immunity under Article 10 rights of freedom of expression or being incapable of amounting to misconduct.*

themselves seen, heard and done). The tribunal should also adopt the same careful approach when it comes to considering any other relevant contemporaneous documentary evidence [Gleeson v Social Work England \[2024\] EWHC 3 \(Admin\)](#);

- ▶ the fact that a witness's (A's) evidence is inconsistent with the key witness (B's) evidence on minor or more tangential matters does not mean that the tribunal cannot accept the witness A's evidence as being reliable, and therefore corroborative [Pandian v General Medical Council \[2024\] EWHC 629 \(Admin\)](#);
- ▶ when the Regulator loses evidence, it does not necessarily mean that disciplinary proceedings are to be stayed as a result of abuse of process; prejudice or unfairness needs to be shown and that the registrant cannot receive a fair hearing without that evidence. Where a decision is made to proceed, the absence of evidence should be taken properly into account and given the weight it deserves when coming to conclusions on inferences of fact;
- ▶ tribunals must analyse evidence given by the registrant, ie if a registrant provides an explanation for a particular issue, the tribunal should engage with this/mention it in their determination.

[Balachandra v The General Dental Council \[2024\] EWHC 18 \(Admin\)](#)

- ▶ [Ibrahim v General Medical Council \[2024\] EWHC 131 \(Admin\)](#) provided a reminder of some key case law principles relating to dishonesty:
 - ▶ It is an allegation (a) that should not be made without good reason, (b) when it is made it should be clearly particularised so that the person against whom it is made knows how the allegation is put and (c) that when a hearing takes place at which the allegation is tested, the person against whom it is made should have the allegation fairly and squarely put to him so that he can seek to answer it (*Fish v General Medical Council [2012] EWHC 1269 (Admin)*);
 - ▶ if a regulator is going to hold a registrant to a rule, that rule must (a) be established in the first place; and (b) be known to the registrant (if there is a dishonesty element to the charge) (*Williams v General Dental Council [2022] EWHC 1380 (Admin)*).

Impairment and Sanction

- ▶ In cases where a practitioner has been convicted of a criminal offence:
 - ▶ The fact that they had received a severe punishment in the criminal court is not in itself a reason to consider applying a lesser sanction; this is in fact a

reason for, not against, imposing a suspension coterminous with the criminal sentence;

- ▶ a reiteration of *Council for the Regulation of Health Care Professionals v GDC v Fleischmann [2005] EWHC 87*:
 - ▶ as a general principle, where a practitioner has been convicted of a serious criminal offence or offences they should not be permitted to resume their practice until they have satisfactorily completed their sentence. Only circumstances which plainly justify a different course should permit otherwise;
 - ▶ however, this general principle can bow to the circumstances of a particular case and cannot be applied as if it were a rule. It must bend to the overarching requirement to impose a sanction which is just, proportionate and only that which is necessary to maintain public confidence;
 - ▶ equally, *Fleischmann* does not suggest that suspension falls away as an available sanction just because a criminal sentence has been "completed" nor that the date of completion of a sentence necessarily sets a cap on the period of suspension.

[Professional Standards Authority for Health and Social Care v General Dental Council \(Patel\) \[2024\] EWHC 243 \(Admin\)](#)

- ▶ [Professional Standards Authority for Health and Social Care v NMC \(Jalloh\) \[2023\] EWHC 3331 \(Admin\)](#) set out some key reminders in relation to sanction:
 - ▶ Tribunals should be cautious of duplicating mitigating factors ie, a 30 year unblemished career in healthcare, no previous regulatory history and working with the same employer for a year with no concerns raised all amount to effectively the same thing - 'previous good character';
 - ▶ when considering a suspension order, tribunals should first consider whether this is a case of fundamental incompatibility with continued registration;
 - ▶ if a tribunal rejects an order of erasure, it must give clear reasons for its conclusion that striking off would be disproportionate. A generalised assertion that erasure or striking off would be disproportionate and that the conduct was not incompatible with continued registration will be inadequate and will justify the conclusion that the tribunal has not properly understood the gravity of the case before it (*GMC v Khetyar [2018] EWHC 813 (Admin)*);
 - ▶ an express reliance on the "overly punitive" effect on the registrant of striking off runs contrary to the proper approach identified in *Bolton v Law Society [1994] 1 WLR 512*; The reputation of the profession is more important than the fortunes of any individual member. The essential issue remains maintaining public confidence in the professions and matters of personal mitigation (which do not concern the seriousness of the underlying conduct or its impact upon public confidence) are of less weight.

Kind regards
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