39 Essex Chambers' Autumn Disciplinary Conference

15th November 2022

Chaired by:
Vikram Sachdeva KC

Speakers:
Fenella Morris KC
Rory Dunlop KC
Peter Mant
Katherine Apps

LATE AMENDMENTS AND PREJUDICE

15 November 2022

Rory Dunlop KC

A Tale of Two Approaches

- Little or no guidance on overarching principles in all professional disciplinary tribunals
- Strict approach in some caselaw
- Permissive approach in other caselaw

STRICT APPROACH

- BACP v X – '*You suggested to Y that you and she should have an affair*'. Late application to plead sexual motivation refused.

- *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 at [38] & *Nesbit Law Group v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 – 'heavy burden' if late application would jeopardise trial date

THE PERMISSIVE APPROACH

- *Health Care Professionals v NMC & Kingdom* [2007] EWHC 1806 (Admin): '*I reject the submission that the Committee could not reconsider or amend the charge once the facts were proved. … One of the purposes of this jurisdiction is to deal with a perception that professional regulatory bodies may sometimes undercharge or impose lenient penalties*."

- PSA v (1) HCPC; (2) Doree [2017] EWCA Civ 319 '*A professional disciplinary committee is entitled to make necessary amendments to the allegations before it, so as to avoid "undercharging"*'

BRIDGING THE GAP

- The test, whatever the legal context, is fairness and the interests of justice

- The prejudice to the registrant and to listing, in granting the amendment, is always a relevant consideration.

- In tribunals under the jurisdiction of the PSA, the prejudice of an adjournment to the registrant and to listing is likely to be less weighty, especially if there might otherwise be an undercharging appeal.

Role of Policies and Guidance in Professional Discipline

Katherine Apps

15 November 2022

Policies in the disciplinary landscape

1. What do I mean by “policies” or “guidance”?
2. The extent of “policies” and “guidance”?
3. Challenging policies through JR
4. Utility of policies in disciplinary proceedings
5. Wider utility of policies – workplace culture

What do I mean by “policies”?

1. An important question: *R(All the Citizens) v Secretary of State for Culture Media and Sport* [2022] EWHC 960 (Admin) (Div Ct) at [115]

2. Policy, Guidance, directions, enforcement principles, warnings, compliance notes, codes….

3. “policies are not law” *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 at [3] Lord Sales and Lord Burnett

Extent of policies and guidance

A case study

- SRA website (unscientific search conducted 30 Oct 2022)
  - “Guidance” on misconduct (approx. 50 hits)
  - narrowed to “directed at solicitors” (approx. 20 hits)
  - each deep linked at least 5 other links

Challenging policies

1. Case law:
    1. *R (Bayer plc) v NHS Darlington Clinical Commissioning Group [2020] EWCA Civ 449; [2020] PTSR 1153*
    2. *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 Lord Sales and Lord Burnett LCJ
    3. *All the Citizens* Singh LJ

2. The Gillick/ Bayer approach: **is the policy capable of lawful implementation?**
    - Does it include a statement of law which is wrong and which will induce a person to act unlawfully (cat 1)
    - Does the authority have a duty to provide accurate advice, but misstates the law actively or by omission (cat 2)
    - Is there no duty, but does the policy appear comprehensive and does it mislead the reader on the law (cat 3)
3. An important exception "provision criterion or practice" under the Equality Act 2010

Utility of policies and guidance in disciplinary proceedings

1. Drafting charges
2. Establishing knowledge/ imputed knowledge
3. Establishing the standard of conduct expected
4. Sanctions
5. Procedurally
6. Consistency

Beware the Pirates of the Caribbean defence…..

What if the policy relied on is unlawful?

TN (Vietnam) [2021] UKSC 41

Wider utility of policies and guidance – workplace culture

Examples

1. SRA Guidance : February 2022:
    1. Workplace environment: risks of failing to protect and support colleagues – addressed to complaints based on "unsupportive, bullying or toxic working environment and culture."
    2. Workplace culture thematic review
2. GMC: May 2022 Conference – focus on workplace culture

- different approach.
- Guidance addressed at "Working with colleagues"

Some thoughts on what works (and what doesn't)

1. Processes are important but aren't everything
2. Awareness of whistleblowing law and psychology (see resources from Public Interest at Work: see *Jhuti v Royal Mail* [2019] UKSC 55)
3. Improving culture while avoiding discrimination
4. IICSA conclusions – mandatory reporting duties (and how they can help at a cultural level)
5. Addressing an established "crisis" mindset
6. Embedding culture: the less glamourous side of improving workplace culture

Any questions ?

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Freedom of Expression and Social Media

Peter Mant

39 Essex Chambers

Freedom of Expression v Public Interest - where should we draw the line?

- Forum in which statement is made
  - Private (e.g. Whatsapp) vs public (e.g. twitter)
- Capacity in which statement is made
  - Professional capacity vs private capacity
- The nature of the statement
  - Offensive vs harassment or discrimination
  - Opinion vs religious or philosophical belief
- The way in which views are expressed
  - Aggressive, deliberately offensive vs legitimate debate

Should the regulator intervene?

School parents' Whatsapp group

- Doctor calls another parent a c*** in heated exchange about sports day
- Does it make a difference if exchange was on Twitter?
- Does it make a difference if the subject matter was vaccination?
- Does it make a difference if the word used was a racial slur?

Proportionality is the key

- The fact that communications are private does not preclude regulatory action (see, e.g., *Fitjen*)
- Regulatory action more likely to be appropriate where person is speaking in professional capacity
- Offensive comments more likely to warrant regulatory action where discriminatory and/or harassing
- Blanket restrictions on expression of religious or philosophical beliefs unlawful (see, e.g., *Forstater*, *Ngole*)
- Proportionate interference with expression of religious or philosophical beliefs can be justified (see, e.g., *Mackereth*)

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Khan v BSB [2018] EWHC 2184 (Admin)

- Barrister speaking publicly in robing room of rape allegations against another barrister (knowledge of which derived from his professional involvement, at pre-charge stage, in a matter where no criminal charges were brought)

- Private LinkedIn correspondence with barrister's wife

- Article 10 engaged in respect of words spoken in robing room, but disciplinary proceedings (i) pursued legitimate aims of protecting the "reputation and rights of others" and "preventing the disclosure of information received in confidence" and (ii) proportionate to a "pressing social need"

- Article 8 engaged in respect of the correspondence but disciplinary proceedings (i) pursued legitimate aim, including protection rights of others and (ii) proportionate to a "pressing social need"

Diggins v BSB [2020] EWHC 467 (Admin)

- "Seriously offensive" tweet in response to open letter from young black female Cambridge University student to English Faculty regarding "decolonisation" of curriculum
- Court accepted that the appellant was not acting in a professional capacity or in a professional place; he was communicating as a private individual on a matter of public interest; and he did not target anyone, defame them, or intrude into their private lives in ways they had gone to law to prevent
- BUT "the public expects, and trusts, members of the profession to exercise judgment, restraint and proper awareness of the feelings of others"
- Panel not wrong to strike balance between appellant's rights and those of others in the way it did: reprimand and £1000 fine upheld

R (Ngole) v University of Sheffield [2019] EWCA Civ 1127

- Student social worker- a devout Christian- posted comments on social media expressing disapproval of same-sex marriage and homosexuality
- Expelled from course on grounds that conduct breached professional standards and brought profession into disrepute
- Regulations were sufficiently clear and pursued legitimate aim (maintenance of public confidence)
- Pursuit of that aim "cannot extend to preclude legitimate expression of views simply because many might disagree with those views" but "must extend so far as to seek to ensure that reasonable service users, of all kinds, perceive they will be treated with dignity and without discrimination"

Ngole (cont)

- "use of aggressive or offensive language in condemnation of homosexuality, or homosexual acts, would certainly be capable of undermining confidence and bringing the profession of social work into disrepute"
- **BUT** reliance on lack of insight not justified where (i) apparent intransigence was understandable reaction to being told he could never express his religious views on topics such as sexual morals in a public forum (*blanket ban*) and (ii) University did not make clear that it was the *manner and language* in which views were expressed that was the problem or discuss or offer guidance on how views could be expressed
- Sanction was disproportionate where no evidence of actual discrimination and expressed views were based on words in Bible

Forstater v CGD Europe [2021] I.C.R. 1

- An employee's "gender critical" beliefs, which included the belief that sex is immutable and not to be conflated with gender, were "philosophical beliefs" protected under Article 9 ECHR and s.10 EqA.

- A philosophical belief would only be excluded under Article 17 if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism or which incite hatred or violence.

- Tribunal was wrong to impose a requirement on C to refer to a trans woman as a woman to avoid harassment. In the absence of reference to specific circumstances in which harassment might arise, this was, in effect, a "blanket restriction" on C's freedom of expression related to her belief. The right applies to expression of views that might "offend, shock or disturb".

- Whilst C's belief, and her expression of them by refusing to refer to a trans person by their preferred pronoun, or by refusing to accept that a person is of the acquired gender stated on a GRC, could amount to unlawful harassment in some circumstances, it would not always have that effect.

Alison Bailey v Stonewall and Another [2022] UKET 2202172/2020

- Barrister member of LGB Alliance expressed gender critical beliefs on twitter
- Chambers upheld complaints against the barrister and made “response tweet”
- Held: Chambers actions amounted to direct discrimination

Mackereth v DWP [2022] EAT 99

- C was Christian doctor contracted to carry out assessments of disability-related benefit claims
- During induction C said he would refer to transgender people by the gender they were assigned at birth (contrary to DWP Policy on Gender)
- DWP decided it was not practicable to (a) give C non-consumer facing role, or (b) ensure he only assessed non-transgender service users
- After further discussion, C left his employment with DWP and brought discrimination claim against DWP
- Held: DWP's approach had a legitimate aim of ensuring service users were treated with respect and did not suffer discrimination. The interference with C's rights was proportionate.

White v GMC [2021] EWHC 3286 (Admin)

- Interim conditions requiring doctor (i) not to use social media to put forward or share views about the Covid-19 and (ii) to seek to remove existing posts
- HRA s.12(3) engaged by restraint of freedom of expression prior to final resolution of the issues in the case
- Prospects of success must be "sufficiently favourable"- general approach should be to ask whether applicant is "more likely than not" to succeed
- IOT's failure to apply this test was an error of law and misdirection
- Court did not rule on the substantive merits of IOT decision

Professional Discipline in a Recession

15 November 2022

Fenella Morris KC

Winter 2022

- Strikes
- Shortages – physical resources
- Shortages – human resources

Criminal barristers' strike

- Lord Chief Justice: may be professional misconduct
- BSB: look at regulatory objectives and impact on client and administration of justice

Professionals' rights are human rights?

Ezelin v France (1991)

Balancing individual rights against those of others

- A restriction
- Potentially justified by interests of others
- Balance to be struck – individuals/society
- Margin of discretion

Nurses' strike

- NMC: a right to strike but the Code applies
- Employers have an important role
- Context

A doctors' strike?

- GMC: a right to strike but the Code applies
- Employers have a vital role
- Work collaboratively to keep patients safe
- Stay within the limits of competence

Context

R (Campbell) v GMC (2005)

Shortages of clinicians

- Mitigation – special skills of one clinician?
- Mitigation – benefit to society of a qualified doctor continuing to practice?

The right approach?

- Keep in mind the regulatory objectives
- What is in the public interest?
- Impact on clients/victims?
- Patient safety?
- Confidence in the profession?

Part of the price?

Should professionals accept that restrictions on their individual rights are a consequence of their position in society?

Questions?