How not to run a professional disciplinary case

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Corporate Crime analysis: As counsel for the claimants in Johnson v Nursing and Midwifery Council, Mary O'Rourke QC and Nadia Motraghi, barristers at Old Square Chambers, offer their insight into the case, which even the judge made clear was a textbook example of how a professional disciplinary case should not be run.

Original news

Johnson v Nursing and Midwifery Council [2013] EWHC 2140 (Admin), [2013] All ER (D) 234 (Jul)

The claimant nurses were found guilty of misconduct by the defendant Nursing and Midwifery Council (NMC). They applied for judicial review of that finding. The Administrative Court allowed the application, holding that the evidence had not rationally supported the committee's findings of fact and there had not been evidence that was reasonably capable of supporting a finding of misconduct.

What were the key failures of the disciplinary proceedings identified by Leggatt J?

Mary O'Rourke QC (MOR): Because the proceedings were by way of judicial review and not a statutory appeal from the disciplinary proceedings Leggatt J was not actually being asked to look in any detail at the conduct of the disciplinary proceedings but rather whether there were errors made in the committee's decisions which could justify the quashing of the findings of misconduct. In doing that he did identify failings of assessment and consideration of the evidence by the panel--matters that should not have arisen had the committee properly approached its task on the evidence before it.

Nadia Motraghi (NM): The time taken for the disciplinary proceedings was described as 'disgraceful'. The delays in the conduct of the proceedings violated the claimants' rights under art 6 European Convention on Human Rights to a hearing within a reasonable time--a matter accepted by the NMC. Leggatt J's judgment recorded that by the time the committee made its decisions, the subject matter of the charges had taken place between 13 and 9 years previously, the claimants had been first notified of the proceedings 8 years previously and the hearing had taken place over 86 days spread over 2 years and 9 months.

The judge concluded that the charges (wrongly) found proven against the claimants as showing their negligence, would not in any event on the evidence have amounted to misconduct, ie gross professional negligence or deplorable conduct in the eyes of fellow practitioners. There was also a finding that the committee had failed to understand the wording of the charges and equated a failure to ensure a safe system for the administration of medication with a failure to ensure medication was consumed by certain individuals on particular occasions. The individual instances of non-compliance did not mean a system was unsafe, much less that a manager was at fault in respect of it.

This case highlights a procedural issue regarding the right of appeal to the High Court--what problems does this raise?

MOR: This situation arises with the statutory schemes of a number of the healthcare regulators--where the right of statutory appeal is only provided where a sanction has been imposed which affects the registration of that individual (eg suspension of registration or erasure or conditional registration). If there is no statutory appeal then the only means of challenging an adverse finding of misconduct (as here) is by way of the more restricted remedy of judicial review which involves more procedural hurdles (such as the need to obtain permission) and can be more time-consuming, costly, lengthy (in terms of awaiting a court hearing etc) and offers a more limited area for argument (as it is not a 're-hearing' as an appeal is and effectively requires errors of law to have been made).

What procedure must the NMC follow when considering findings of misconduct?

MOR: It is not so much a matter of what procedure as what test must the NMC apply. The decision on 'misconduct' is a matter of judgment for the professional panel but the test is one of seriousness and essentially 'deplorable conduct' which would merit the opprobrium of other reasonable members of the same profession. In many cases where the 'misconduct' derives from omissions or negligent failures or actions the *Bolam* test (*Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118) is applicable--ie whether the professional has according to the standards of the time and in all the relevant circumstances fallen seriously short of the standard to be expected of an ordinarily competent person holding his/her same position and not any higher standard.

NM: *Bolam* was relevant in this case and Leggatt J found that the Panel had failed to understand that if a matron/manager of a home was to be found guilty of misconduct for failing to keep particular records, it was necessary to show as a first step that it was negligent for a nurse responsible for a resident's care not to have kept a record. Once that was established then it would need to be considered whether the matron or manager was negligent in failing to ensure such a record was made and, if so, whether the negligence was so serious as to amount to misconduct. On the evidence, Leggatt J found that the NMC's expert evidence did not support the finding that it was negligent even for a nurse responsible for a resident's care to have compiled the particular records under consideration (para [51]).

When will the court interfere with a decision of the NMC?

MOR: In the judicial review context (as was the case here) the court will interfere only where:

- an error of law or jurisdiction is demonstrated, or
- there is a material procedural or jurisdictional error, or
- the decision is irrational and perverse in terms of outcomes or core findings

Here in essence the judge found serious errors by the committee in the findings they purported to make and the reasons they gave for making them and finding them to amount to misconduct and effectively found irrationality.

NM: Leggatt J explained that before a court will interfere with findings of fact made by a tribunal there is a high hurdle to be reached but it is not a requirement of 'perversity'. The standard of review is one of 'reasonableness'. A tribunal is not acting lawfully if it makes a finding of fact which has no reasonable evidential basis. The court will intervene if the evidence is not reasonably capable of supporting the tribunal's finding or where the reasons do not rationally support the finding (para [40]).

Interestingly, although it is well known that considerable deference is given by the courts to specialist panels in determining whether an matter found proven amounts to misconduct, this decision highlights that the court will interfere in appropriate cases, where it considers, as here, that the findings of misconduct were not ones which the committee could reasonably have reached being 'so far out of proportion to the nature of the failure found' (para [105]).

What avenues are available to individuals found guilty of misconduct by the NMC? Is this position similar to other professional bodies?

MOR: Where a sanction has been applied then the individual has a statutory appeal to the Administrative Court by way of 're-hearing'. However, if there has been no sanction which triggers a statutory appeal but nonetheless a disturbing and potentially significant finding of misconduct (as here) then the only remedy is one of judicial review if errors of law or procedure can be identified or the finding is such as to be irrational/perverse.

NM: However, not all professional bodies are susceptible to judicial review--they must be 'public' or statutory bodies. Most healthcare regulators are susceptible to judicial review but many professional regulators are not (eg accountants).

It is also worth remembering that judicial review is a remedy of last resort, so if an individual does have another avenue for redress, such as a statutory appeal, that should be used.

What should lawyers take from this case? Does it highlight any wider problems in regulatory procedures?

MOR: Well the judge himself makes clear this case is a textbook example of how a professional disciplinary case should not be run and lawyers can learn lessons not only from reading the judgment but also from considering what happened in the disciplinary hearing itself. It does highlight wider problems in terms of the training of panel members, the selection of panel members in bigger more complex cases, of regulators managing cases that they cannot properly particularise and where they do not have access to all the relevant documents and of their need to obtain appropriate expert evidence from a competent witness actually working in the relevant environment. Had these matters been considered hopeless, charges would never have been pursued and the case would have been shorter in days and overall duration.

NM: The take home points demonstrate the need for panels to fully understand the scope of the charge, carefully and systematically evaluate the evidence before them and appropriately apply the facts to the law.

Mary O'Rourke QC specialises in professional discipline, clinical negligence and employment law. She has vast experience of public law (particularly judicial review) work relating to the NHS and healthcare profession regulators. In Johnson and another v Nursing and Midwifery Council, Mary was leading counsel for the claimants.

Nadia Motraghi specialises in employment and discrimination law and professional discipline. She represents clients at all levels of Tribunal and Court, including the Supreme Court. In Johnson and another v Nursing and Midwifery Council, Nadia was junior counsel for the claimants.

Interviewed by Kate Beaumont.

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