

Chapter 11

PUBLIC HEARINGS

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Part I:
Disciplinary and Regulatory
Proceedings

11.01 The genius of our age is inimical to secrecy. For good or ill, every organisation is under pressure to be as open about its affairs as is consistent with the proper discharge of its functions. Historically, the disciplinary proceedings of private organisations, such as trade associations and the professional bodies, were conducted in private on the ground that their affairs concerned no one but themselves. The disciplinary proceedings of some statutory regulators on the other hand have long been open to the public. Since the enactment of HRA 1998, however, all public authorities have been compelled to offer defendants the right to public hearings of disciplinary proceedings. The legal position of non-public authorities remains unchanged, but the HRA has strengthened the existing trend towards greater openness.

11.02 This Chapter explores the requirements concerning and the arguments for and against open hearings, as well as their legal and practical problems and how they may be overcome.

1 PUBLIC HEARINGS

11.03 For the purposes of this book, a public hearing is one which, subject only to space and good behaviour, all members of the public are entitled to attend. It is immaterial whether any member of the public is actually present or not.¹ By comparison, a private hearing is one at which neither party has a right to have present anyone other than the parties themselves, their legal advisers and witnesses and any other persons admitted by special direction of the tribunal.

11.04 Lord Diplock explained the justification for public hearings in the courts of law as follows:

¹ Per Lord Blanesburgh in *McPherson v McPherson* [1935] All ER Rep 105.

'... as a general rule the English system of administering justice does require that it be done in public: *Scott v Scott*.² If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly.³

11.05 The purpose of the open hearing rule is to serve the interests of justice. A private hearing may be therefore justified where it serves those interests better than a public hearing.

The disciplinary hearings of private bodies

11.06 Most private disciplinary tribunals still keep their hearings private. This is because disciplinary proceedings are not judicial proceedings; they differ from them in many ways which may make public hearings inappropriate. Most obviously, the members of a private body, such as a club, submit voluntarily to the discipline of their peers and expect that discipline to be conducted as privately as their other affairs. Unlike the courts, moreover, most disciplinary tribunals cannot compel the attendance of a witness or the answering of questions; nor can they, save with lawful authority, administer an oath. Finally, domestic tribunals cannot protect the integrity of their proceedings by exercise of the power to punish for contempt. Different rules apply to public authorities; and these days many private bodies are public authorities when undertaking certain functions. For that reason, if for no other, the trend has been toward greater openness.

The disciplinary hearings of public authorities

11.07 So far as public authorities are concerned, Art 6(1) of the ECHR, as applied by HRA 1998, s 6(1), provides that:

'... in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
(*Emphasis added*)

11.08 The ECtHR has said that the holding of court hearings in public constitutes a fundamental principle enshrined in Art 6(1) of the ECHR. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained. By rendering the administration of justice

² *Scott v Scott* [1913] AC 417.

³ *Attorney General v Leveller Magazine Ltd* [1979] 1 All ER 745, 749. Also see para 4 of Lord Woolf's judgment in *R v Legal Aid Board, ex parte Kaim Todner (A Firm)* [1998] 3 All ER 541 (see para 11.14 below), and that of Henry LJ in *Storer v British Gas plc* [2000] 2 All ER 440.

transparent, publicity contributes to the achievement of the aim of Art 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the ECHR (*Gautrin and Others v France*⁴).

11.09 The ECtHR has said that, where a public hearing has been held at first instance by a public authority, the absence of such a hearing may be justified at the appeal stage by the special features of the proceedings at issue, having regard to the nature of the domestic appeal system, the scope of the appellate court's powers and to the manner in which the applicant's interests were actually presented and protected before the Court of Appeal, particularly in the light of the nature of the issues to be decided by it (*Sigourthor Arnasson v Iceland*⁵). According to the court's case law, leave-to-appeal proceedings involving only questions of law, as opposed to questions of fact, may comply with the requirements of Art 6(1), although the appellant was not given an opportunity of being heard in person by the appeal or cassation court. Moreover, even if the Court of Appeal has full jurisdiction to examine both points of law and fact, Art 6(1) does not always require a right to a public hearing or, if a hearing takes place, a right to be present in person.⁶

Public at what stage?

11.10 The requirement for an open hearing of a public authority is capable of being met either at first instance or on appeal, provided that the appeal is before a tribunal that hears the merits of the case. See further para 2.44 *et seq.*

Waiver of right to a public hearing

11.11 It has been held that the ECHR does not require public hearings as such, merely that the defendant should have the right to insist upon such a hearing. Thus, the right to an open hearing, like certain other Art 6 rights, may be waived (*Albert and Le Compte v Belgium*⁷). It is not sufficient for the accused to have a right to a public hearing if he has not been made aware of that right. In *H v Belgium*⁸ non-compliance with Art 6 was established where a barrister

⁴ *Gautrin and Others v France* (1999) 28 EHRR 196. Also see *Guisset v France* (2002) 34 EHRR 47.

⁵ *Sigourthor Arnasson v Iceland* (2004) 39 EHRR 20.

⁶ Hearings can, however, be held in private where:

⁶ (i) it can be shown to be necessary and proportionate and in the interest of morals, public order or national security, or

⁶ (ii) it is in the best interests of a person connected with the proceedings (eg a child); or

⁶ (iii) it is required for the protection of the private life of the parties; or

⁶ (iv) it is strictly necessary in special circumstances where publicity, in the court's opinion, would prejudice the interests of justice.

⁷ Compare Article 6.1 of the European Convention on Human Rights.

⁷ *Albert and Le Compte v Belgium* (1983) 5 EHRR 533.

⁸ *H v Belgium* (1988) 10 EHRR 339.

Chapter 4

THE GROUNDS FOR DISCIPLINARY ACTION

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4.01 It is vital that the grounds on which disciplinary proceedings may be brought should be clearly spelled out by the regulator. In practice the grounds for bringing disciplinary proceedings fall into five broad categories, epithet misconduct (or misconduct broadly defined), breach of rules (including breach of principles), criminal conduct and bad work.

1 EPITHET MISCONDUCT (OR MISCONDUCT BROADLY DEFINED)

4.02 The oldest and perhaps still the most widely used form of misconduct is 'epithet misconduct', that is to say a broad formula that leaves it to the disciplinary tribunal to decide its ambit in any particular case, as opposed to individual offences of narrowly defined scope. Epithet misconduct has the advantage of being able to reflect current market standards. (What may not have amounted to discreditable conduct 10 years ago may well do so today.)

Epithet misconduct arose from the practice of the professional bodies who were the first organisations to claim to exercise a disciplinary function. Because, at first, the sole sanction was exclusion from membership the nature of the offence was defined in correspondingly serious terms of a broad nature, such as 'infamous and disgraceful conduct'. Such terms have fallen into disuse. For the old cases see the footnote.¹

¹ Guidance on these old terms was given in the cases of *Felix v General Dental Council*. Hughes

Serious professional misconduct²

4.03 The term, 'serious professional misconduct' has in recent years tended to replace archaic formulae such as 'disgraceful' and 'infamous misconduct'. It brings with it, however, the problem of defining what exactly amounts to 'misconduct'.

It has been said that 'misconduct' is a word of general effect, involving some act or omission which falls short of what would be proper in the circumstances. The standard of propriety may often be found by reference to the rules and standards ordinarily required to be followed by a medical practitioner in the particular circumstances, per Lord Clyde in *Roylance v General Medical Council*.³

For bad work as serious professional misconduct see para 4.40 *et seq.*

Note: Serious Professional Misconduct in the medical regulators (GMC) has now been replaced by fitness to practise criteria following the report by Dame Janet Smith. SPM or similar epithets may survive elsewhere but the term is now, at least in amongst the GMC, defunct save for misconduct that is alleged to have taken place at a time when the former arrangements were in place.

4.04 Lord Justice Clark in the Scottish Court of Session gave the following helpful summary of the meaning of the term 'serious' in this context in the case of *Mallon v General Medical Council*.⁴

'The statute does not lay down any criterion of seriousness; nor does the case law. Descriptions of serious professional misconduct such as "conduct which would be regarded as deplorable by fellow practitioners" (*Nandi v GMC*,⁵ Collins J, quoted in *Meadow v GMC*,⁶ Auld LJ at paras [200]–[201]) tend, we think, to obscure rather than assist our understanding. In view of the infinite varieties of professional misconduct, and the infinite range of circumstances in which it can

² *v Architects Registration Council of the United Kingdom*. See also *Le Scoog v General Optical Council*; *Plenderleith v Royal College of Veterinary Surgeons* and *Collier v Council for Professions Supplementary to Medicine*.

³ *Historical note:* The Medical Act 1969 and, subsequently, the Dentists Act 1983 substituted the term 'infamous or disgraceful conduct' for the term 'serious professional misconduct' as the basis for disciplinary proceedings against medical practitioners. General Medical Council literature at the time reported that 'the Council intended that the phrases should have the same significance'. As Lord Mackay pointed out in *Doughty v General Dental Council* [1987] 3 All ER 843, the change coincided with the conferring upon the dentists' disciplinary tribunal of the less severe power of suspension of registration for up to 12 months, and it is reasonable to read the earlier cases on infamous and disgraceful conduct in light of the fact that the only penalty then available for such conduct was exclusion from the professional body.

⁴ *Roylance v General Medical Council* [1999] Lloyd's Rep Med 139, 149, [1999] UKPC 16. In this case, Dr Roylance was district manager of a health authority who had been found guilty of failing over the years to take action when concerns were being raised about the excessive mortality of infants.

⁵ *Mallon v General Medical Council* [2007] ScotCS CSH17.

⁶ *Nandi v GMC* [2004] All ER (D) 25.

⁷ *Meadow v GMC* [2007] 1 All ER 1.

occur, it is better, in our opinion, not to pursue a definitional chimera. The decision in every case as to whether the misconduct is serious has to be made by the Panel in the exercise of its own skilled judgment on the facts and circumstances and in the light of the evidence (*Roylance v GMC*, *supra*, Lord Clyde at p 330f; *Preiss v GDC*,⁷ Lord Cooke of Thorndon at para 28). Misconduct that the Panel might otherwise consider to be serious may be held not to be in the special circumstances of the case' (*R (Campbell) v GMC*⁸ Judge LJ at para [19]).

4.05 It has been said that:

'The question of what is serious or not in the context of medical practice is not a technical legal exercise. The word "serious" is an ordinary English word, not a term of art. The presence of two well qualified medical practitioners on the panel was quite sufficient to ensure a fair and proper hearing of the issue, whether or not either of them had had to apply that precise test in the past. The presence of an experienced lay Chairman who had decided the point in the past lent weight to the panel.'

Per Gibbs J in *Biswas. R (on the application of) v The General Medical Council*.⁹

Misconduct in a professional respect

4.06 Some professional bodies restrict the definition of punishable misconduct by use of the qualifiers 'professional misconduct' or 'misconduct in a professional respect'. What is the effect of such words? In *Balfour v Occupational Therapists Board*¹⁰ the Privy Council said that it had been 'settled law for more than a century that if it is shown that a medical man, in the course of his profession, has acted in a way which would reasonably be regarded as disgraceful and dishonourable by his professional brethren of good repute and competency, it is open to his disciplinary body to find him guilty of infamous conduct in a professional respect. Such a finding involves questions of fact and degree'.

4.07 But what is 'professional misconduct' and how far does it extend beyond professional work? In the case of *Roylance v General Medical Council*,¹¹ the Privy Council expressed the view that:

'Professional misconduct extends further than [clinical conduct]. So it is not simply misconduct in the carrying out of medical work which may qualify as professional misconduct. But there must be a link with the profession of medicine. Precisely what that link may be and how it may occur is a matter of circumstances. The closest link is where the practitioner is actually engaged on his practice with a patient. Cases here may occur of a serious failure to meet the necessary standards

⁷ *Preiss v GDC*, [2001] 1 WLR 1926.

⁸ *R (Campbell) v GMC* [2005] 2 All ER 970.

⁹ *Biswas, R (on the application of) v The General Medical Council* [2007] EWHC 1644 (Admin), [2007] All ER (D) 313 (May).

¹⁰ *Balfour v Occupational Therapists Board* [1999] UKPC 33.

¹¹ *Roylance v General Medical Council* [1999] 3 WLR 541, [1999] UKPC 16.

of practice, such as gross neglect of patients or culpable carelessness in their treatment, or the taking advantage of a professional relationship for personal gratification ... [S]erious professional misconduct may arise where the conduct is quite removed from the practice of medicine, but is of a sufficiently immoral or outrageous or disgraceful character.'

4.08 The earlier comments of Devlin J in the case of *Hughes v Architects Registration Council of the United Kingdom*¹² are also helpful. Observing that the term 'disgraceful' was qualified by the phrase 'in his capacity as an architect', he pointed out that:

'The effect of that qualification is two-fold. First, the conduct must be not only what would ordinarily be considered disgraceful, but it must also be a disgrace which affects him professionally; to that extent the qualification diminishes the term. Secondly conduct which is not disgraceful for an ordinary man may be disgraceful for a professional man: to that extent the qualification amplifies the term. The amplification does not, however, require that disgraceful is to be given any technical meaning: it requires only that the ordinary meaning of the word should be applied in relation to the special obligations and duties of a professional man.'

Conduct outwith professional practice

4.09 Conduct outwith professional practice can constitute misconduct in a professional respect. Thus, in *Marten v Royal College of Veterinary Surgeons Disciplinary Committee*,¹³ a farmer who was also a veterinary surgeon was found to have failed to give adequate care for animals on his farm. He was not guilty of any moral turpitude, but his conduct was held to constitute conduct disgraceful to him in a professional respect. Lord Parker CJ observed:

'But if the conduct, though reprehensible in anyone is in the case of the professional man so much more reprehensible as to be defined as disgraceful, it may, depending on the circumstances, amount to conduct disgraceful of him in a professional respect in the sense that it tends to bring disgrace on the profession which he practises. It seems to me, although I do not put this forward in any sense as a definition, that the conception of conduct which is disgraceful to a man in his professional capacity is conduct disgraceful to him as reflecting on his profession, or, in the present case, conduct disgraceful to him as a practising veterinary surgeon.'

Expert witnesses

4.10 Important guidance on the standards expected of expert witnesses was given by the Court of Appeal in the case of *General Medical Council v Meadow*.¹⁴ Professor Meadows, who lacked a sufficient statistical background, incorrectly applied probability theory to the death of a child in such a way as to

¹² *Hughes v Architects Registration Council of the United Kingdom* [1957] 2 All ER 436.

¹³ *Marten v Royal College of Veterinary Surgeons Disciplinary Committee* [1966] 1 QB 1, [1965] 1 All ER 49.

¹⁴ *General Medical Council v Meadow* [2006] EWCA Civ 1390.

make it almost impossible for the jury in a murder trial to conclude that the child had died naturally by what is called sudden infant death syndrome. He made the situation worse by his use of a striking, but incorrect analogy from horse race betting.

4.11 The court also held that it would be wrong in principle for the court to cut across or impliedly to limit the powers of a Fitness to Practise Panel by extending the immunity from civil suit to FTP proceedings.

4.12 As to the substance of the appeal, the Master of the Rolls, accepted that Professor Meadows did not intend to mislead the jury and commented. 'It will be a rare case in which a person should be held to be guilty of serious professional misconduct in the absence of bad faith.' Auld LJ, in a judgment with which Thorpe LJ agreed, accepted that Professor Meadows was guilty of professional misconduct, but not serious professional misconduct. He quoted Sir Louis Blom Cooper to the effect that the adjudication that Sir Roy was guilty of serious professional misconduct – and hence struck off the register of medical practitioners – 'was not just a disproportionate finding and/or penalty. It was fundamentally flawed, since it perceived Sir Roy's error as part of his professional service; whereas his mistake or misjudgement had properly to be viewed in the context of the criminal trial ...'

Comment: As the Court observed, the question of whether professional misconduct is 'serious' or not is 'a value judgement upon which differently constituted panels might reasonably differ'. In this case three judges (one at first instance and two appeal judges) held that the doctor's misconduct was not 'serious', while the Master of the Rolls (the most senior of the judges involved) and the doctor's professional body, to whose judgement the courts so often defer in such matters, held that it was. It was a close thing.

'Discreditable conduct'

4.13 The concept of discredit is used by the accountancy bodies in their definition of misconduct. The bye-laws of the Institute of Chartered Accountants in England and Wales, for example, refer to a member being liable to disciplinary action if 'in the course of carrying out professional work or otherwise, he has committed any act or default likely to bring discredit to himself, the Institute or the profession of accountancy'.

4.14 The Society of Lloyd's also uses the term 'discreditable conduct' and its Appeal Tribunal has determined in various cases that it includes the following propositions:

- (i) discreditable involves an estimate of the views of right thinking persons and is an objective test;
- (ii) the acts or omissions complained of must be of a serious nature;
- (iii) the conduct complained of must be such as to be capable of damaging the reputation of that person and the trust which others have in him;