OUTER HOUSE, COURT OF SESSION

[2018] CSOH 99

P199/18

NOTE BY LADY WOLFFE

in the Judicial Review by

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Petitioner

against

THE INVESTIGATING COMMITTEE OF THE GENERAL DENTAL COUNCIL

Respondents

Petitioner: Duncan QC, Irvine; Clyde & Co
Respondents: Lindsay QC; Anderson Strathern LLP

18 October 2018

Introduction

[1] I am grateful to parties for making themselves available to enable me to provide my decision following the two-day judicial review. I should indicate that I do not propose to produce a full written opinion in this case. The facts, which are somewhat convoluted, are well known to parties; the matter was recently argued only a few weeks ago and the issues involved are not of wider or more general interest. Furthermore, I would imagine that both parties would wish an early resolution coupled with the court's determination of the substance of the dispute.

Background

[2] I do not propose to rehearse the background to these proceedings in any detail. It suffices for present purposes to note that this is the second judicial review brought by the petitioner against the Investigating Committee (" the Committee") of the General Dental Council ("the Council") in respect of a decision of the respondents to issue a warning following the petitioner's conviction for a road traffic offence. After having been convicted of a speeding offence, the petitioner reported this to the respondents. (Such a matter may be characterised in the rules as an "allegation" and which could give rise to questions of fitness to practice.) The Committee's determination on 19 September 2016 was confirmed on 19 January 2017, after the petitioner availed himself of an internal review. (Nothing turned on the distinction between these two separate decisions and I shall refer to them collectively as "the first determination"). The Committee's first determination was eventually reduced, following the petitioner's first judicial review, which the respondents did not oppose.

[3] Putting it neutrally, matters thereafter returned to the respondents. In due course a further decision was taken on 29 November 2017 (but not intimated until a letter dated 12 December 2017) to the effect that, while it was determined that the petitioner's fitness to practice was not impaired, the Committee decided it was nonetheless necessary to issue a warning. This is the decision under challenge in these proceedings ("the Decision"). It should be noted that in the period between the respondents' first determination and the second one, being the Decision challenged in these proceedings, certain transitional provisions were passed, namely the General Dental Council (Fitness to Practice) (Amendment) Rules Order of Council 2016 (S1 2016/902) ("the Transitional Provisions").

[4] The petitioner challenges the Decision. In addition to resisting the challenge on its merits, the respondents take two preliminary pleas.

Summary of issues

[5] In terms of the principal legal issues, the petitioner argued that the Decision was *ultra vires.* This argument was predicated on the Transitional Provisions, the contention being that the matter required to be referred to Case Examiners for investigation in terms of rule 3(2) of the Amended Rules Law (as after defined), and not, as had been done, to the Committee. In addition to this argument on the merits, the petitioner challenged as irrational the "sentencing" part of the Decision, which was to issue a written warning. Furthermore, on the hypothesis that the respondents' preliminary plea of time bar was well-founded, it was argued that the court should exercise its discretion in favour of the petitioner to enable his challenge to proceed.

[6] The respondents' two preliminary pleas were as follows. In respect of the *vires* challenge, they argued that the proceedings were time-barred. In respect of the petitioner's challenge to the imposition of a warning, they argued that these proceedings were premature and that the petitioner failed to avail himself of an alternative remedy (in respect of that part of the decision). Furthermore, on the merits, the respondents argued that on their interpretation of the Transitional Provisions, the case had properly been dealt with by the Committee and the petitioner's *vires* argument fell to be rejected.

Determination of the principal substantive issue: the proper interpretation of the Transitional Provisions

[7] One of the changes introduced by the Transitional Provisions, which amended the General Dental Council (Fitness to Practice) Rules Order of Council 2006 ("the Amended Rules"), was to introduce an intermediate step in the consideration of potential disciplinary matters in the form of a reference to Case Examiners (see Part 2A of the Amended Rules).

Parties agreed that this represented an additional safeguard in favour of the petitioner and, if the petitioner's substantive *vires* challenge was successful, it was a benefit of which he had been deprived. It is this feature which makes a difference in an otherwise technical argument about the proper interpretation and application of the Transitional Provisions.

[8] The *vires* issue turns on rule 9 of the Transitional Provisions. The Transitional Provisions came into effect on 1 November 2016. In broad terms, the purpose of rule 9 was to ensure that ongoing proceedings (namely, where the Committee "had begun their consideration of an allegation") would continue to be governed by the unamended rules. In other words, it would remain before the Committee. Whereas, in cases where the Committee had "not begun their consideration of the allegation under rule 5 of the Rules", then the allegation was to be referred to the Case Examiners in accordance with the Amended Rules.

[9] In the very unusual circumstances presented in this case, the Committee had concluded its consideration in respect of the petitioner before the Transitional Provisions came into effect. (There is documentation in the productions which stated in terms that the matter had concluded and, not surprisingly, Mr Duncan argued the Committee was now *functus*.) However, that determination was reduced following the first judicial review proceedings. That was not a circumstance for which any provision was made in the Transitional Provisions. The narrow question in this case is whether, in these unusual circumstances, the Committee had "begun their consideration" (in terms of rule 9(4) of the Transitional Process) of the allegation before the appointed day (i.e. 1 November 2016), as the respondents contend, or whether the Committee had "not begun their consideration of the allegation under rule 5 of the Rules" (in terms of rule 9(3) of the Transitional Provisions), as the petitioner contends. Neither party sought to lead evidence and that question

accordingly falls to be determined in the light of the chronology disclosed in the productions.

[10] For completeness, I should note that parties differed as to the effect of a decree of reduction although, ultimately, that argument does not affect the decision I have reached.

[11] The parties made reference to passages in the productions which supported their arguments. I do not propose to quote these passages. One of the matters that made the procedure before the Committee less than straightforward was the question of the effect, if any, on the difference in treatment in England and in Scotland of the subject matter which formed the relevant allegation. In England, it would appear that the offence of speeding would have amounted to no more than a fixed penalty notice and would therefore have fallen below the threshold for this to be an allegation referable to the Committee. By contrast, the subject matter of the allegation did have the status of a conviction in Scotland. The Committee sought advice on that question. The difference in treatment formed part of the basis of the petitioner's irrationality challenge to the sentencing part of the Decision. (This is to simplify matters somewhat, as there was a subsidiary argument about the proper interpretation of certain passages in the respondents' 2014 Guidance.)

[12] The obvious starting point is to consider whether the Committee which issued the Decision was the same as that which issued the first determination. Senior Counsel for the respondents, Mr Lindsay, appeared initially resistance to confirming whether the composition of the Committee in November 2017 was differently constituted from the Committee which issued the first determination. As a matter of fact, the later Committee was composed of different members entirely. None of the members had participated in the pre-reduction decision-making which resulted in the first determination. Mr Lindsay argued that this did not matter; the Committee was a statutory body with its own corporate entity that subsisted.

Accordingly, he argued that the Committee in November 2017 could be regarded (in corporate terms) as "continuing" the consideration begun by the earlier Committee (notwithstanding it was composed of entirely different members) for the purposes of rule 9(4) of the Transitional Provisions. (He characterised this as "the Frankenstein argument.") On this basis, he sought to rely on observations in the documentation predating reduction of the first determination, to the effect that the Committee was "considering" the allegation (see, e.g., the document at tab 4 of the joint bundle, dated 20 June 2016). This somewhat strained argument was advanced in order for the respondents to bring themselves within rule 9(4) of the Transitional Provisions. If they could not do so then it was not disputed that the allegation should have been referred to the Case Examiners.

[13] Against this, senior counsel for the petitioner, Mr Duncan, referred to the following: (1) the statement in the respondents' letter of 16 August 2017 (at tab 17 of the joint bundle), stating *inter alia* that the respondents "have <u>now</u> referred the case to the investigating committee"(emphasis added) and (2) the statement in the email of 11 September 2017 agreeing that the two decisions constituting what I have referred to as the first determination fell to be excluded from the bundle of papers to be passed to the Committee.

[14] In my view, on a fair reading of this documentation, the respondents' understanding at the time of these communications was that the allegation required to be considered afresh. At that point, they had apparently not turned their mind to the effect of the Transitional Provisions, but proceeded on the assumption that any consideration afresh was simply to be by the Committee. That is abundantly clear from the terms of the letter of 16 August 2017. The fact that the documents comprising the Committee's first determination were to be excluded from the bundle, as agreed in the email of 11 September, emphasised that the new Committee was excluding from their collective mind any knowledge of what had been done

by their predecessor Committee. In the context where the Committee's first determination had been reduced, this is an obvious step to take to ensure that any subsequent determination was not tainted by the errors which vitiated the first determination. This makes all the more surprising the respondents' reliance on communications pre-dating the reduction of the first determination to try to bring themselves within the savings provisions in rule 9 of the Transitional Provision in respect of the post-reduction proceedings.

[15] I have no hesitation in preferring the petitioner's submission on this point and in rejecting the respondents' submissions. I do so for three reasons.

(1) First, the policy rationale underlying the Transitional Provisions is to save those proceedings which had reached a certain stage but which are still ongoing at the time the transitional provisions take effect. The view I have come to accords entirely with that underlying rationale. By the time that the Transitional Provisions came into effect, the first determination had been made and those proceedings had concluded. In other words, there was nothing to be "saved" for the purposes of the Transitional Provisions.

(2) Secondly, judging matters at the time the Transitional Provisions took effect, on 1 November 2016, the first determination had been made and the Committee were *functus*. The effect of the reduction was to deprive the decisions comprising the first determination from having any legal effect. In practical terms, that takes matters back to the stage which preceded those decisions. In terms of the respondents' procedures, the anterior stage was the consideration by the registrar as to whether the complaint for information amounts to "an allegation". And, if it did constitute an allegation, to refer it to the appropriate body. Indeed, this appeared to be the respondents'

understanding at the time. As already noted, in their email of 11 September 2017, the respondents understood (in my view, correctly) that the registrar's decision survived the judicial review. Properly analysed, the registrar's decision was that the matter amounted to an allegation (as defined). The critical point, however, was that by September 2017, having done so, the next step in terms of the Amended Rules should have been to refer the matter to the Case Examiners as the correct body to consider the allegations in terms of the Amended Rules. This was not done.

(3) Thirdly, I do not accept Mr Lindsay's corporate entity argument ("the Frankenstein argument"). If that were the answer, there would be no need for a transitional provision framed by reference to whether or not a particular committee had begun *their* consideration. If Mr Lindsay were correct, then such a provision would be otiose. The purpose of the Transitional Provisions was to avoid the unnecessary restarting of proceedings and duplication of effort. Such provisions would be unnecessary if the Committee, as a corporate body, were omniscient in respect of all proceedings before all Committees and regardless of the actual knowledge acquired by individual members of any particular Committee. Furthermore, the purpose of the Transitional Provisions I have identified is not frustrated where, as here, proceedings were concluded by the Committee before the Transitional Provisions came into effect but were thereafter reduced.

[16] For completeness, it should record that I reject Mr Duncan's submission that the effect of a reduction was to wipe away the entirety of the proceedings before the respondents, if there were no formal order for remit back to the respondents made in the

first judicial review proceedings. As a fall back he accepted (correctly, in my view) that, for his purposes, it sufficed if the effect of the reduction was to take matters back to the point of the procedure immediately preceding the impugned decisions constituting the first determination. I have identified that stage in paragraph [15(2)], above.

[17] That suffices to determine the merits of the petition in favour of the petitioner.

The Respondents' preliminary pleas

[18] In the light of my decision on the substantive issue, I propose to deal shortly with the respondents' preliminary pleas. In relation to the respondents' plea of time bar, it seemed to me highly artificial to argue that time began to run, not from the Decision, but from a communication sent more than three months earlier advising that a fresh determination was to be made. In any event, I would readily have exercised my discretion to enable the petition to proceed, even if raised after the expiry of the three-month time limit. The following factors are relevant. First, the matter is a very significant one for the petitioner, as it concerns a matter of professional discipline and which will remain on his record for some time. Secondly, it would be highly undesirable for a decision which is otherwise *ultra vires* nonetheless to subsist. Thirdly, the respondents did not identify any prejudice. Their objection amounted to the conventional one about the impact on good administration if there is a delay in challenging such decisions. Fourthly, there is something deeply unattractive in enabling the respondents to rely on a time bar argument, where most of the time that passed (from the point they say time began to run) while the matter was in their hands and nothing done for some three months. (I accept Mr Lindsay's explanation that there was nothing sinister in this.) In the light of all of these factors, I would have granted the petitioner permission to proceed notwithstanding time bar, if it had applied.

[19] In respect of the respondents' plea that the petitioner has failed to exhaust an alternative remedy in the form of an appeal against the "sentence" part of the Decision, I also reject this. In this particular case, it would have been artificial and unsatisfactory to separate out this part of the Decision from the substantive issue argued before me. This chapter of the case did not take up much time. I also accept Mr Duncan's submissions, that the arguments advanced to challenge the "sentence" part of the decision were unusual. These included consideration of the proper interpretation of the respondents' Guidance. This was further complicated by the fact that an earlier stage the respondents had themselves taken legal advice about the "proportionality" of relying on a road traffic offence which was below the threshold in England but not in Scotland. These features would take this case out of the normal kind to be taken to the statutory body. For all these reasons, I reject the respondent's plea. However, I reserve my opinion, if the petitioner's challenge in these proceedings had been confined to the irrationality challenge to the "sentence" part of the Decision.

The irrationality challenge to the sentence part of the Decision

[20] The foregoing suffices to determine the substantive dispute between the parties, as the Decision falls to be reduced. What follows is therefore *obiter*. Nonetheless, parties may find it of assistance to know that I also would have upheld the petitioner's challenge on the grounds of irrationality to the imposition of a warning. While I accept the observations in the case law about the deference due to specialist or professional decision-making bodies such as the respondents, I do note that there is less reticence on the part of the courts when what is concerned is familiar to it. That is the circumstance here, involving as it does a minor road traffic conviction. It respectfully seems to me that there were weighty factors

against the imposition of any warning. The petitioner self-referred the subject matter of what came to be treated as an "allegation" for the purposes of the rules. The petitioner was full of remorse. This was a first offence. In the scale of things it was not a serious road traffic offence and it resulted in one of the lowest disposals in a criminal context (i.e., apart from an admonishment). Apart from the conviction itself, all other factors were mitigatory. Furthermore, having regard to the parity of treatment of professionals within the different jurisdictions over which the respondents preside, and which was referred to in the documentation as the "proportionality" issue, it is difficult to find a rational explanation for the imposition of the warning, given that no dentist in England could be at risk of any similar disposal. In the light of this disparity as between the two jurisdictions, the absence of some additional factor to justify the differential disposal (when compared to the position of an English dentist who would have committed the same offence in England) is in my view irrational. Nor did the respondents appear to take into account the effect of delay resulting from the first, flawed procedure resulting in reduction of the first determination. The only adjustment, as it were, for that circumstance was not to re-publish the warning if imposed.

Final comments

[21] It emerged in the course of the two day hearing before me, that the respondents had proceeded to publish the warning imposed following the first determination notwithstanding that the petitioner had challenged that decision. In doing so, there was a risk that the respondents prejudged that review or, in practical terms rendered nugatory the effect of overturning that sentence. At the very least, any successful overturning of that sentence would be a pyrrhic victory, given that the sentence had been completed. A published warning

could not be unpublished. This is an unattractive feature of the respondents' procedure which might be worthy of review.

[22] I shall respect the anonymity of the petitioner, in accordance with an earlier decision of this court.

Coda

[23] This case called before me for a one day hearing (albeit two days were required). One feature of the case was that the preliminary pleas were not argued separately at an earlier hearing. (Neither preliminary plea would, on its own, have disposed the case but both in combination, if upheld, would have). As it happened, those preliminary pleas could be resolved together with the merits. However, this necessitated two days of court time. It respectfully seems to me that where a party wishes to insist on a preliminary plea, this should be notified to the court well in advance, to enable appropriate case management and timetabling. Normally, this could be addressed at the procedural hearing. This was not possible in this case, because parties consented to that hearing being dispensed with. As a consequence, it was not possible at that stage to confirm the respondents' position in respect of the preliminary pleas or for the court to invite parties to reconsider their estimate of the duration of the hearing. In this instance, the court was in a position to enable the hearing to spill to the following day (albeit at the cost of judicial writing time). Given the protracted history, including the fact that this is the second set of proceedings between the parties, and having regard to the subject matter (concerning, as it does, professional reputation), it would have been most unfortunate had the matter required to be postponed to a two day hearing several months hence. That risk is best avoided if, as I suggest, parties advise the court of

the intention to take a preliminary plea, and use the opportunity offered by the procedural hearing to do so, and to enable appropriate case management.

[24] Finally, I have issued this Note, provided to parties shortly after the hearing, at the petitioner's request.