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How They Do Things Across the Pond

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Since the establishment of the Professional Standards Authority (PSA), Canadian regulators have been monitoring professional regulation developments in the United Kingdom. Some, but certainly not all, of the approaches taken in the UK have been adapted by some Canadian jurisdictions and regulators. Most notable was the enactment of the *Health Professions and Occupations Act* in British Columbia.

However, the evolution of administrative law for professional regulators has diverged somewhat between the UK and Canada. Some of these differences and similarities are apparent from the recent UK court decision in *Professional Standards Authority for Health and Social Care v Social Work England & Anor* [2023] EWHC 2125 (Admin) (18 August 2023).

There, a social worker was disciplined for abusing and neglecting her children (e.g., by making demeaning and disturbing comments to them and by overdosing in their presence), which resulted in the intervention of the child welfare authorities, and for dishonestly denying during a job interview that she was or had been under investigation by her regulator.

The discipline panel found that her fitness to practise was impaired in that she failed to promote and maintain public confidence in the social work profession and that she failed to promote and maintain proper professional standards. However, the panel "concluded that a finding of impairment was not necessary to protect, promote and maintain the health, safety and wellbeing of the public." As a result, it only imposed a warning.

The oversight body, the PSA, appealed the decision. It argued that the factual determinations of the discipline panel supported a finding of impairment in the third category (i.e., the health, safety and wellbeing of the public). It also argued that a suspension was necessary in the circumstances.

Some Differences

The first major difference between the UK process and most Canadian ones is that an oversight body can initiate appeals to the courts regarding discipline findings that it believes are unacceptable. While such appeals are relatively rare, the PSA has had a remarkable record of success with respect to appeals it has brought. [Interestingly, the regulator was also a party to the appeal. Initially it opposed the PSA's position but then changed its position to support the appeal.]

Another major difference is that what most Canadian regulators call "discipline" hearings are called "fitness to practise" hearings in the UK. In Canada, the term "fitness to practise" usually refers to incapacity issues rather than conduct concerns. This is not just a matter of semantics. The UK approach focusses more on the potential for future misbehaviour than on sanctioning past misconduct. The UK approach is analogous to those relatively few Canadian professional regulators whose ambit is largely confined to addressing whether the person will act with honesty, integrity and in accordance with the law.

This non-punitive approach is particularly important when it comes to the issue of sanction. Following the leading decision in Bolton v Law Society [1994] 1 WLR 512, the Court noted that "it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of a regulatory jurisdiction than on the ordinary run of sentences imposed in criminal cases." In Canada, courts often apply some criminal sentencing concepts, especially mitigating factors, to discipline sanctions (e.g., *College of Physicians and Surgeons of Ontario v McIntyre*, 2017 ONSC 116 (CanLII)).

Rather, consequences for the individual registrant are generally motivated by ensuring that their future behaviour is acceptable and, to a lesser degree, to ensure public confidence in the regulator. However, the Court did say: "The reputation of the profession is more important than the fortunes of any individual member."

Many Similarities

Many other aspects of the decision would be familiar to Canadian regulators. For example, in this case, the social worker was self-represented, not an unusual occurrence in Canada.

The Court also expressed the need to afford deference to the disciplinary panel. For instance, on the issue of sanction, the Court said:

> Given that the Panel usually has greater expertise in the social work field than the court, an appeal court should only interfere with such an evaluative decision if (1) there was an error of principle in carrying out the evaluation; or (2) for any other reason, the evaluation was wrong, that is to say that it was an evaluative decision which fell outside the bounds of what the Panel could properly and reasonably decide….

Similarly, the Court allowed that regulators should be cautious when scrutinizing the private life of registrants:

> I accept that, to some degree, a social worker may be able to rely on a division between her private and professional lives. A social worker who has a transient personal crisis may not have impaired judgment in relation to his or her professional caseload. If all that the Panel had found was that MDR had used inappropriate language or displayed undue melancholy to her children during an isolated and stressful part of her life, this appeal would be unfounded.

However, the Court agreed with the discipline panel that this sort of conduct, by a social worker, was relevant to her fitness to practise the profession. A pattern of abuse, to the point of requiring intervention by child welfare authorities, reflected on both her ability to provide those sorts of services in the future and on public confidence in the regulator and the profession as a whole. With respect to her dishonesty during her job interview, the Court said:

> The recruitment of social workers has at its centre the objective of keeping safe vulnerable adults and children. By being dishonest in her interview, MDR placed her own interests above the protection of the health, safety and well-being of the public contrary to the overarching objective.

When it came to sanction, the Court found that the discipline panel had made an irrational decision given its evidentiary findings. The social worker had not demonstrated insight into the seriousness of her conduct or its impact on her practise of the profession. Having found that the social worker's conduct was "attitudinal and behavioural" … "it ought to have been plain to the Panel that her attitudes could not reasonably be regarded as having changed."

Also similar to Canadian courts, the UK Court affirmed that the social worker's contesting of the allegations, even after the finding was made by the discipline panel, should not be treated as an aggravating factor. However, the Court treated the inconsistent assertions of the social worker (e.g., about whether she knowingly made false statements during the job interview) and her calling her daughter to give testimony contrary to the daughter's previous written statement, as rebutting the social worker's assertion of insight.

On this point, the Court said that the social worker":

> was entitled to mount a vigorous defence to the charges against her; but her decision to call her daughter to give untruthful evidence to the Panel went significantly beyond offering an alternative account of past events and went beyond "a failed attempt to tell the story in a better light than eventually proved warranted"…. It demonstrated a lack of honesty. MDR's decision to place dishonest evidence before the Panel fatally undermines the Panel's conclusion that there was no risk of repetition of the dishonesty shown to DCC.

Outcome

The Court said: "the Panel erred in concluding that a finding of impairment was not necessary on grounds of risk to the protection of the health, safety and well-being of the public…." While the Court was tempted to impose a one-year suspension, it, like many Canadian courts, deferred to the expertise of the regulator. The Court remitted the matter to the regulator to make a fresh finding on sanction.

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