



CONSTRUCTION OF CHARGES IN PROFESSIONAL CONDUCT CASES
'AND', 'OR' OR 'AND/OR'? THAT IS THE QUESTION

Diarmuid Bunting

Barrister

St John's Buildings

I recently defended a healthcare professional in a case before the Conduct and Competence Committee of the Health and Care Professions Council ('the HCPC'). After the HCPC's evidence, we made a half time submission of no case to answer, pursuant to *R v Galbraith*.

Before the panel would consider whether the facts proven amounted to misconduct, and/or whether that misconduct gave rise to an impairment in fitness to practise, it had to determine 3 factual charges. (We recall the sequential test set out in *GMC v Cohen*).

In our case, the first and second allegations were what you might call ordinary factual charges, like:

1. On X date, you did a bad thing – *we admitted this charge, but denied the others*;
2. On Y date, you did another, related, bad thing.
(*In the interests of maintaining the registrant's anonymity, the details of the charges are omitted, but I am sure you get the point*).

The third allegation was:

3. The actions described in allegations 1 and 2 were dishonest.

We admitted allegation 1, but denied 2 and 3. After the HCPC's evidence, it was clear that allegation 2 was very unlikely to be upheld. So we made a half time submission. One of the points we made was that, due to the wording of allegation 3, if allegation 2 fell away (as we said it must, based on the HCPC's evidence taken at its highest), allegation 3 could not be found proven. Therefore the regulator's case must fail.

In dishonesty cases, the regulator is obliged to particularise the charge in a manner that is clear and unambiguous. As a matter of construction, based on the strict wording of allegation 3, for it to be upheld, both allegations 1 *and* 2 must be upheld. Allegation 3 was, literally, 1+2=3. There was no 'and/or' in there. Our submission was simple: 1+0 does not equal 3.

Although the submission of no case to answer was successful, perhaps unsurprisingly, our contention that allegation 3 automatically fell with allegation 2 was rejected. The panel accepted that there was some power in our submission, but felt that the overarching objective of protecting the public effectively required the 'and/or' interpretation to prevail.

Another case, another panel, on another day, or before another regulatory body? Who knows – our technical knock-out defence might have just worked.

I hear you ask, 'Why are you telling me this, the TKO defence did not work and you got the case kicked out at half time anyway?'

My point:

- Have a serious think about the construction of the charges if you are defending a professional conduct case. The few minutes it will take you might just be very worthwhile.

I offer my thanks to Glenn Jaques at BRM Law in Chesterfield for his well-prepared instructions and my best wishes to our client, who can now get back to her career.

Diarmuid Bunting

June 2017

clerk@stjohnsbldings.co.uk