Neutral Citation Number: [2018] EWCA Civ 2796

Case No: C1/2017/2272

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Mrs Justice Lang
CO12762017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2018

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE MOYLAN
and
LORD JUSTICE COULSON

- -

Between:

General Medical Council	**Appellant**
- and -	
Ijaz Hayat	**Respondent**

- -
- -

Mr Rory Dunlop (instructed by **GMC Legal**) for the **Appellant**
Mr Al Mustakim & Mr Jayed Sarker (instructed by **Direct Access**) for the **Respondent**

Hearing date: Tuesday 20th November 2018

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Approved Judgment

Lord Justice Coulson:

1. Introduction

1. This appeal arises out of the decision of the Medical Practitioners Tribunal ("the Tribunal") of 7 November 2016, when they refused to adjourn disciplinary proceedings brought against Dr Hayat by the appellant ("GMC") and proceeded in his absence. The Tribunal subsequently made findings of dishonesty and misconduct against Dr Hayat and found that his fitness to practice was impaired. After a subsequent hearing, which Dr Hayat did attend, the sanction imposed was erasure from the register.

2. Dr Hayat sought to appeal the Tribunal's findings. At a hearing on 27 June 2017 before Lang J in the Administrative Court, a new submission was made that the Tribunal had erred in failing to have regard to the relevant medical evidence before permitting the hearing to continue in the absence of Dr Hayat (see paragraph 27 below). Lang J allowed the appeal on that ground and remitted the other, substantive grounds of appeal, for reconsideration by a fresh panel of the Tribunal.

3. The GMC appealed that decision, submitting that Lang J had erred in principle in her consideration and analysis of the Tribunal's decision not to adjourn the disciplinary hearing on 7 November 2016. Permission to appeal to this court was granted on that basis. The GMC accept that, even if this appeal is successful, the other substantive points – with which Lang J did not deal – will have to be remitted to the High Court in any event.

2. The Factual Background

4. The factual background is convoluted. I set out below only those elements which seem to me to be relevant to the Tribunal's decision not to adjourn the hearing on 7 November 2016.

5. Dr Hayat has admitted a number of instances of deceit in the past. For example, during a custody hearing in July 2003, he claimed to be suffering from chest pains and the hearing was adjourned so that he could be admitted to hospital. He later admitted in writing that he had faked the chest pains in an attempt to win sympathy from his wife. In another incident, in June 2010, Dr Hayat claimed on an insurance form that he was adopted, a claim which he subsequently accepted to be untrue.

6. In September 2012, Dr Hayat travelled to Pakistan. On his return to the UK he claimed to have suffered a heart attack whilst there, and chest pains on the return flight. When he was examined in the UK, the doctors who examined him thought it was very unlikely that he had suffered a heart attack. On 18 October 2012, Dr Hayat made a claim on his insurance policy with Friends Life.

7. The claim was investigated by Friends Life. For reasons which will become apparent below, it is not appropriate to go into the detail of what they found. Suffice to say that, as a result of these investigations, Friends Life declined Dr Hayat's claim and referred the matter to the GMC and the police. Thereafter, disciplinary proceedings were instituted by the GMC, and Dr Hayat was given written notice of the allegations against him. He denied them and provided a witness statement dated 21 February

2014. The witness statement did not provide any detailed response to the allegations made.

8. The Tribunal listed a fitness to practice hearing for 15 days starting on 31 October 2016. The lengthy time estimate was a reflection of the number of witnesses required for the hearing. On 3 October 2016, Dr Hayat applied to adjourn the hearing on the basis that he had had insufficient time to prepare, but his application to adjourn was refused.

9. On 22 October 2016 Dr Hayat made a second application to adjourn the forthcoming hearing, saying he did not have sufficient funds to pay for lawyers. Again, the application to adjourn was refused.

10. The hearing began on Monday 31 October 2016. Dr Hayat was represented by counsel who applied for an adjournment of the hearing – the third such attempt – on the basis of a handwritten letter dated 30 October 2016 from an A&E doctor at King George Hospital which said that Dr Hayat should be "off work for 7 days" due to back pain. In a written determination handed down on 31 October 2016, the Tribunal refused the application to adjourn and explained in some detail why the handwritten note was insufficient to justify an adjournment on medical grounds. From that determination, Dr Hayat would have known that any medical evidence on which he wanted to rely to justify an adjournment would need to explain what his condition was and why it prevented him from participating. He would also have known from their determination that the Tribunal was also alive to the public interest in ensuring, where possible, that hearings were not adjourned at the last minute.

11. On these issues, the Tribunal said:

> "12. The Tribunal has considered the additional material presented to it which included a letter from Dawn Solicitors dated 19 October 2016, email correspondence and the medical evidence referred to. It notes that the medical evidence does not contain the dosage levels of the medication which are being prescribed for Dr Hayat. The Tribunal also notes that the letter does not provide any detail to any potential impact, the pain and discomfort, or medication could have on Dr Hayat. The letter does not indicate that Dr Hayat was unfit to instruct a representative or participate in the hearings. The Tribunal is also aware that you have been able to take instructions today for the purposes of this application to adjourn proceedings from Dr Hayat.
>
> 13. The Tribunal took account of the matters which were raised in the previous two postponement applications and the material submitted today. The Tribunal is satisfied that Dr Hayat has been given sufficient time and opportunity to address the issues raised in the postponement applications and the letter dated 19 October 2016. Nevertheless, the Tribunal considers there is insufficient clarity as to the progress made addressing the outstanding issues…

> 14. The Tribunal has also considered the impact on the public interest of adjourning a hearing scheduled for 15 days and the inconvenience it would cause to witnesses.
>
> 15. In all the circumstances, the Tribunal is satisfied that it is in the interest of justice and in the public interest for the hearing to proceed as scheduled and for your application to be rejected."

12. Immediately after lunch on 31 October, after the determination had been read out, the Tribunal staff found Dr Hayat sitting in a chair presenting as unconscious. The emergency services were called, but when a paramedic attempted to pass a tube through his nose, Dr Hayat reacted and informed the paramedic that he was suffering chest pains. He was taken to Manchester Royal Infirmary ("MRI") and the hearing was adjourned.

3. The Medical Evidence and the Relevant Determinations by the Tribunal

13. On Tuesday 1 November 2016, the GMC was in contact with MRI and spoke to Dr Bright, then Dr Hayat's treating doctor. Dr Bright confirmed that it was his understanding that Dr Hayat had not been unconscious the previous day (a view apparently shared by the paramedic who attended him) and that there was no evidence of a cardiac event. Dr Bright said that Dr Hayat would be fit to attend a hearing on discharge, which at the time was set for the following morning.

14. On the morning of Wednesday 2 November, Dr Hayat underwent an angiogram, the result of which was described as "perfectly normal", again something that Dr Bright confirmed to the GMC. At some point that day, it appears that Dr Hayat indicated that he did not want Dr Bright to be involved in any further interactions with the GMC (although that prohibition was subsequently rescinded).

15. Dr Hayat stayed in hospital on 3 November because, as Dr Bright mentioned to the GMC in a telephone conversation that day, there was a 'pain complication' arising from the angiogram. In a letter dated 4 November, Dr Bright expanded on this, describing it as "a complication of pain associated with his arterial puncture site secondary to his angiography and as of yesterday he was awaiting a vascular ultrasound of his side".

16. On Friday 4 November, Dr Hayat was discharged. He did not attend the Tribunal. The GMC applied for proceedings to continue in his absence. The Tribunal refused that application. They again provided a detailed written determination. Referring to Dr Bright's reference to the "complication of pain" the Tribunal went on to say:

> "19. The Tribunal accepts that, save in exceptional cases where the public interest points strongly to the contrary, it would be wrong to proceed when there is unchallenged medical evidence that the doctor is not fit to attend and take a full part in the proceedings."

17. The hearing was adjourned until 7 November (the following Monday). The GMC immediately wrote to Dr Hayat to warn him that "in the absence of any medical

information that you are unfit to attend a hearing or any other good reason for your non-attendance, the GMC will now be inviting the tribunal to hear the case in your absence". The letter went on to say:

> "I would encourage you to make contact with the GMC as soon as possible to provide an update on your health and fitness to attend the hearing or provide written consent for your treating doctor to do so urgently. The onus is on you to ensure the Tribunal is kept abreast of your current health status in order for it to be able to take into account in determining how best to progress the hearing."

18. Breaking off from the narrative for a moment, I note that during the appeal hearing in this court, counsel appearing for Dr Hayat sought (for the first time) to rely on this letter, in order to say that it created a 'legitimate expectation' on the part of Dr Hayat that, if he either provided an update or gave consent for his treating doctors to do so, then the matter somehow became the responsibility of the GMC, with the implication being that, if he complied with this binary option, Dr Hayat would be granted an adjournment. I reject such an interpretation of the letter. All the GMC was doing, quite properly, was making plain that the onus was and remained on Dr Hayat to provide proper evidence as to his health, if he was relying on that to seek a further adjournment of the hearing. That evidence could either be provided directly or via his treating doctors. There was no more to the letter of 4 November than that.

19. On Saturday 5 November, Dr Hayat wrote to the GMC dealing with a variety of matters and giving the necessary written consent. His list included doctors at MRI, Whipps Cross Hospital, London E11, and doctors from his GP surgery, the Allum Medical Centre in E11. The letter did not give any update on his medical condition following his discharge from MRI the day before. Neither does it make any mention of an alleged visit to Whipps Cross Hospital on 5 November.

20. This is important because, although it was not raised before the Tribunal, nor before Lang J, in the original skeleton argument provided on Dr Hayat's behalf for the purposes of this appeal, it was expressly stated that Dr Hayat had had a second angiogram at Whipps Cross Hospital on 5 November. Indeed, reliance was placed on a discharge information sheet ("DIS") dealing with the effects of an angiogram, in support of this potentially important new case.

21. Mr Mustakim, when asked about this, said that this assertion was a 'misunderstanding', and he withdrew it. Although pressed, he did not explain how this misunderstanding could have arisen. The reliance on the DIS in this respect was plainly misplaced: it was a document relating to the Manchester angiogram, because the telephone numbers on it were all 0161 numbers. Speaking for myself, I was extremely troubled that this misleading claim was made in a skeleton argument, prepared and provided by counsel to the Court of Appeal. However, at least by the time of the hearing, it was common ground that there was no evidence that Dr Hayat had been to any hospital over the weekend of the 5-6 November for any purpose whatsoever.

22. On 7 November Dr Bright wrote to the Tribunal to say:

> "Post operatively he had complications of pain at the vena puncture site and there is no evidence of aneurysm or false aneurysm at the site of puncture on vascular Dopplers.
>
> Dr Hayat specifically asked me not to comment on his fitness to undergo proceedings as he is not under my direct care.
>
> However I can comment on similar cases and if there is no evidence of flow rate limiting disease and no evidence of significant arrhythmia I would assume in similar cases patients would be safe to undergo court proceedings."

In a further email, also dated 7 November, Dr Cunnington, the respondent's treating consultant at the time of discharge from MRI, dealt with Dr Hayat;s condition and said that:

> "We found no significant cardiac pathology which would stop the GMC proceedings from continuing."

At the resumed hearing on Monday 7 November, Dr Hayat failed to attend. The GMC relied on the emails from Dr Bright and Dr Cunnington to make a further application for the proceedings to continue in his absence.

23. Early that morning, the Tribunal was sent by or on behalf of Dr Hayat a pre-printed form dated 7 November and entitled "Statement for Fitness for Work for Social Security or Statutory Sick Pay". This document was referred to during the appeal as "the sicknote". It was not entirely clear who completed it, although it was issued by the Allum Medical Centre (see paragraph 19 above). The sick note advised that Dr Hayat was not fit for work. The box setting out his condition was in the following form:

> "Dizziness (syncopal episodes) and chest pains.
>
> Admitted to Manchester Royal Infirmary – had nocturnal pauses on 24 ECG
>
> Advised repeat 24 ECG and cardiology review.
>
> Developed post angiography right arm bruising +/- infection."

There was also a reference to "continue with antibiotics". There was no other information.

24. The Tribunal considered the application to continue in Dr Hayat's absence on the basis of these three pieces of medical evidence (paragraphs 22 and 23 above). The relevant part of their determination is at paragraphs 15-19, in these terms:

> "15. The Tribunal notes that there is a burden on medical practitioners subject to a regulatory regime to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them.

> 16. It follows that where a medical practitioner seeks an adjournment of a hearing, on the basis that they are not fit enough to attend, then it is their responsibility to ensure sufficient evidence is presented to the Tribunal to establish that this is the case. The Tribunal is satisfied that Dr Hayat is aware of that responsibility, as a result of various communications with him.
>
> 17. The Tribunal considered the email sent on Dr Hayat's behalf this morning at 08.55am and subsequent Statement of Fitness for Work for Social Security of Statutory Sick Pay sent during the course of the afternoon. This document indicates that Dr Hayat is not fit for work because of the following conditions:
>
> This document indicates that Dr Hayat is not fit for work and does not suggest that he is not fit to attend and fully participate in these proceedings. It essentially reiterates the medical information from during the hospital admission.
>
> 18. The Tribunal considered that it can conclude on the basis of present information that Dr Hayat has voluntarily absented himself from this hearing. The Tribunal has therefore determined to accede to your application today to proceed in Dr Hayat's absence.
>
> 19. The Tribunal is aware of its duty to ensure that proceedings conducted in the absence of the doctor are fair and to take reasonable steps to expose any weaknesses in the GMC case."

25. As a consequence of the Tribunal's determination, the hearing proceeded on 7 November in Dr Hayat's absence. The Tribunal asked questions of the GMC's witnesses. The hearing lasted until 18 November. There seems to have been no further attempt by Dr Hayat either to attend the hearing or to communicate with the Tribunal during this period. On that date, the Tribunal handed down their determination on the facts. They did not find all of the allegations proved but they found that the central allegation – that Dr Hayat had fraudulently claimed to have had a heart attack in Pakistan and made a false claim on his Friends Life insurance – had been established.

26. After this, the disciplinary hearing was adjourned part heard and reconvened on 14 February 2017. Dr Hayat attended that hearing and made submissions about the impairment on his fitness to practice. During his submissions he said:

> "I think that nobody is perfect and, similarly, my problem is not perfect as well."

The Tribunal found impairment and, having received submissions from both sides as to sanction, decided to erase the respondent from the register. Dr Hayat appealed to the Administrative Court.

4. The Judgment of Lang J

27. Although neither the decision to proceed in absence on 7 November 2016, nor the Tribunal's treatment of the sick note, were matters which were raised in counsel's skeleton argument provided for the purposes of that appeal, at the hearing before Lang J on 27 June 2017, these matters suddenly assumed centre stage. This was as a result of a further set of written submissions handed in by Mr Mustakim on the morning of the hearing. These new matters led directly to the judge's decision to allow Dr Hayat's appeal.

28. The judgment is at [2017] EWHC 1899 (Admin). The relevant paragraphs begin at [48] as follows:

> "48. The Tribunal relied upon the evidence from Drs Bright and Cunnington that the Appellant was fit to be discharged and fit to attend the hearing. Although they noted "pain" and "discomfort" in the right arm, following the angiogram, there was no mention of infection, and having ruled out vascular damage, they did not address it further in their letters. Unsurprisingly, the focus of their assessment of his fitness to attend the hearing was on his heart complaints. However, that was a medical assessment as at Friday 4 November 2016, not 7 November 2016.
>
> 49. The Appellant's case was that, following his discharge, over the weekend of 5/6 November, the after-effects of the angiogram became sufficiently severe for him to visit his GP on the morning of 7 November. His GP examined him and stated on the form that he had "developed post angiography right arm bruising +/- infection" for which he needed antibiotics. He also declared him unfit for work. I am not clear whether or not the visit to Whipps Cross Hospital over the weekend was also prompted by the after-effects of the angiogram.
>
> 50. It would have assisted the Appellant's case if he (or his friend, if he was not well enough) had provided the Tribunal with more details of his symptoms and also a copy of his "Angiography Discharge Information" sheet which he was given at MRI. This was only produced at the appeal hearing. It listed possible after-effects, advising patients to attend their GP or local hospital. It recommended one week off work following an angiogram. However, in my view, the information in the GP's form was sufficient to require the Tribunal to conduct further investigations into the Appellant's condition, if it was not prepared to adjourn the hearing on the basis of the GP's report alone.
>
> 51. The GMC's scepticism about the genuineness of the Appellant's ill-health could not, in my view, justify the Tribunal in disregarding the evidence of a medical professional, and in fairness, the Tribunal did not suggest that it could.

52. The Tribunal had before it unchallenged evidence of a medical condition, as at 7 November 2016, of sufficient severity for a doctor to certify that he was unfit to work, based on a medical examination that very morning. The GP's evidence raised a new issue which had not been fully addressed in the evidence of Drs Bright and Cunnington because it post-dated their evidence.

53. Applying the authorities, such evidence ought generally to result in an adjournment, to give effect to the common law duty of fairness, and to avoid a violation of Article 6, by depriving the registrant of the opportunity to present his defence to serious charges which threatened his professional career.

54. The Tribunal was not entitled to disregard the GP's certificate that the Appellant was unfit for work merely because it did not also say that he was unfit to attend the hearing. Whilst there may be occasions where a registrant is fit enough to attend a court hearing, even though he is certified unfit for work, that will depend upon an evaluation of the individual circumstances of the case. In my judgment, the Tribunal ought to have given careful consideration to the question whether and to what extent the Appellant's condition would affect his ability to take part in the proceedings. The fact that his GP had certified him as unfit for work should have prompted them to consider whether that could also mean that he was not well enough to conduct a lengthy disciplinary hearing, which would entail spending a week away from his London home, in Manchester. The Tribunal was aware from the postponement application that there was a real risk that he would not be able to afford to instruct a representative for the full hearing (as opposed to the initial adjournment application), in which case he would have to represent himself, making submissions and cross-examining witnesses. In any event, he would have to give oral evidence and be cross-examined. In a case where there were allegations of dishonesty, cross-examination by the GMC was likely to be vigorous. Conducting the hearing would be demanding and he would need to be well enough to do himself justice. In my view, the Tribunal did not give any or any proper consideration to these matters.

55. The Appellant was deprived of the opportunity to give his evidence, and to challenge the evidence of the regulator's witnesses at the fact-finding stage. In this appeal, the fact-finding stage was of critical importance as the Tribunal had to determine whether or not the Appellant had made false claims on the policy, and whether he had acted dishonestly. If the Tribunal found against him on those issues, he would be at risk of findings of misconduct and impairment, and order of erasure.

> 56. For these reasons, I conclude that the Appellant did not receive a fair hearing. The decision of the Tribunal's decision was unjust because of a serious procedural irregularity, and therefore the appeal ought to be allowed.
>
> 57. As there will have to be a re-hearing before a fresh panel, it would not be right for me to go on to express my views on Grounds 2 to 4, as that might unfairly influence the new panel in its deliberations."

5. The Grounds of Appeal

29. The four grounds of appeal now advanced by the GMC assert that, in reaching these conclusions, Lang J:

> "1. misdirected herself that medical evidence suggesting that the registrant was unfit to work '*ought generally'* to result in the adjournment of their disciplinary hearing even when that evidence was unparticularised, unreasoned and disputed;
>
> 2. failed to afford appropriate respect to the judgment of the MPT [the Tribunal] on an issue which the MPT was better placed to judge – i.e. whether the medical conditions identified in the sick note suggested that Dr Hayat would be unfit to participate in the hearing;
>
> 3. failed to recognise that the question of whether to adjourn for further investigations into Dr Hayat's health was a case management decision which should only have been interfered with by an appellate court if it were 'plainly wrong'; and
>
> 4. failed to ask whether the alleged procedural irregularity (in failing to conduct further investigations) caused any injustice. There was no evidence that if the MPT had conducted further enquiries of the author of the sick note it would have discovered anything which would have prevented the hearing from continuing in Dr Hayat's absence."

30. Arden LJ (as she then was) gave unconditional permission to appeal, noting that:

> "Conditions for second appeal [are] satisfied as it is important to have clarity as to the manner in which this Tribunal should act if an application for adjournment on the grounds of ill health is made and there is conflicting evidence. The standard review of its decision is also a legal issue worthy of consideration of this court."

31. On behalf the GMC, Mr Dunlop submitted that, in granting permission, Arden LJ had identified two important points of principle and practice namely:

    i) The manner in which the Tribunal should act where there is conflicting medical evidence and an application to adjourn on grounds of ill health;

ii) The standard of review in an appeal under CPR 52.21(3)(b) in respect of a decision to refuse an adjournment.

iii) I agree with that summary. As will be seen in my analysis below, I have found it convenient to deal with grounds 1 and 4 together first, and then grounds 2 and 3 together. If Mr Dunlop is right on grounds 1 and 4, it is not strictly necessary to go on and consider grounds 2 and 3.

6. Grounds 1 & 4: The Correct Approach to Medical Evidence Relied On In Support of An Application to Adjourn

6.1 The Law

a) General Principles

32. At [44], Lang J identified what she said was the general approach to be adopted when a court or tribunal is considering whether or not to adjourn a hearing or to continue with a hearing in the absence of the defendant. She referred to:

(a) *R v Jones* [2003] 1 AC 1, a criminal case in which Lord Bingham said that the discretion was "to be exercised with great caution and with close regard to the overall fairness of the proceedings". In the same case, Lord Hutton said that there could be circumstances "where in the interests of justice a judge is entitled to decide to proceed, particularly when the defendant has deliberately absconded to avoid trial".

(b) *Brabazon-Drenning v UKCC* [2001] HRLR 6, where Elias J (as he then was) said:

> "…save in very exceptional cases where the public interest points strongly to the contrary, it must be wrong for a committee which has the livelihood and reputation of a professional individual in the palm of its hands, to go on with a hearing where there is unchallenged medical evidence that the individual is simply not fit to withstand the rigours of disciplinary process."

33. Although they were not referred to in Lang J's judgment, at the appeal before this court, counsel for Dr Hayat relied on two other decisions in similar vein, namely *Tait v Royal College of Veterinary Surgeons* [2003] UKPC 34 and *Norton v Bar Standards Board* [2014] EWHC 2681 (Admin). These cases were cited in support of Lang J's statement of principle that evidence such as the sick note "ought generally to result in an adjournment to give effect to the common law duty of fairness".

34. In my view, all these authorities need to be treated with considerable care following the decision of this court in *General Medical Council v Adeogba* [2016] EWCA Civ 162; [2016] 1WLR 3867. There, Sir Brian Leveson, the President of the Queen's Bench Division, began by noting at [4] that, out of 488 cases which proceeded before this Tribunal in 2014 and 2015, 146 proceeded in the absence of the affected practitioner. Hearings in absence are therefore relatively common, certainly compared to 15 or 20 years ago.

35. The material part of his judgment for present purposes is, firstly, at [17] – [20] as follows:

> "17. In my judgment, the principles set out in *Hayward*, as qualified and explained by Lord Bingham in *Jones*, provide a useful starting point for any direction that a legal assessor provides and any decision that a Panel makes under Rule 31 of the 2004 Rules. Having said that, however, it is important to bear in mind that there is a difference between continuing a criminal trial in the absence of the defendant and the decision under Rule 31 to continue a disciplinary hearing. This latter decision must also be guided by the context provided by the main statutory objective of the GMC, namely, the protection, promotion and maintenance of the health and safety of the public as set out in s. 1(1A) of the 1983 Act. In that regard, the fair, economical, expeditious and efficient disposal of allegations made against medical practitioners is of very real importance.
>
> 18. It goes without saying that fairness fully encompasses fairness to the affected medical practitioner (a feature of prime importance) but it also involves fairness to the GMC (described in this context as the prosecution in *Hayward* at [22(5)]). In that regard, it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far. Steps can be taken to enforce attendance by a defendant; he can be arrested and brought to court. No such remedy is available to a regulator.
>
> 19. There are other differences too. First, the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed.
>
> 20. Second, there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

36. In addition, some of the remaining paragraphs of the judgment dealing with the application of the principles to the facts in that case are also relevant to the present appeal. In particular:

"59. Further, in my judgment, to suggest that the GMC should have started to make enquiries of the German authorities or, indeed, the Nigerian authorities (on the basis that this was where he came from) is to put a burden on the GMC which is far beyond that which is appropriate. Their responsibility is very simple. It is to communicate with the practitioner at the address he has provided; neither more nor less. It is the practitioner's obligation to ensure that the address is up to date. In addition, for my part, I am surprised that Dr Adeogba was not very keen to ensure that he kept in touch with the GMC: he was back in Nigeria, unable to earn a living as a doctor; one would have thought that he would be very keen to find out whether and, if so, when he could return to his work. All this is in addition to the point that there is no evidence that communicating with the German or Nigerian authorities would have had the slightest effect.

…

61. Third, the judge appears to have put emphasis on the fact that this was the first hearing and that an adjournment was unlikely to be highly disruptive or inconvenient to attending witnesses. To suggest that the practitioner must be allowed one (or perhaps more than one) adjournment is to fly in the face of the efficient despatch of the regulatory regime. In addition, an adjournment was highly disruptive: the members of the Panel, the legal assessor, the staff and the accommodation had been set up. There is no suggestion that there was any back up work (which in any event would have been inconvenient to others) and 20 days' time would have been lost. Even if witnesses were not attending, it is inevitable that they will have been alerted to the date and, until they were stood down, will have suffered all the well-known anxiety associated with any forthcoming trial. Organising another hearing would have been both disruptive and inconvenient. No regulatory system can operate on the basis that failure to attend should lead to an adjournment on the basis that the practitioner might not know of the date of the hearing (rather than having disengaged from the process or even adopted an 'ostrich like attitude'): any culture of adjournment is to be deprecated.

…

63. The high-water mark of the criticism that can be made of the decision of the Panel is the reference to voluntary waiver of his right to attend and be represented on the basis that such represents a conscious decision. Bearing in mind the professional obligation to maintain the register (and thus the means of contact) and based on the evidence before the Panel, it was legitimate to conclude that, at the very least, the practitioner had deliberately chosen not to engage with his

> regulator. In my judgment, in the context of this type of case (whatever the position might be in criminal proceedings), that is sufficient. If it was otherwise, the system simply could not operate efficiently or effectively and although attendance by the practitioner is of prime importance, it cannot be determinative."

I note that in *Adeogba* at paragraph 101, this court found no basis to interfere with the discretionary decision to proceed in absence made by the Tribunal. They therefore allowed the appeal.

b) The Required Standard of Medical Evidence

37. There are a number of authorities dealing with the nature and standard of the evidence necessary to found an application for an adjournment on the grounds of ill health. There must be evidence that the individual is unfit to participate in the hearing: see *Governor and Company of the Bank of Ireland v Jaffery* [2012] EWHC 724 (Ch) at [19]. That evidence must identify with proper particularity the individual's condition and explain why that condition prevents their participation in the hearing: see *Levy v Ellis Carr* [2012] EWHC 63 (Ch) at [36]. Moreover, that evidence should be unchallenged: see *Brabazon-Drenning* at [18].

38. Of particular importance in this context is the passage from the judgment of Norris J in *Levy v Carr Ellis*, which deals in detail with what sort of evidence is necessary. He said:

> "36. Can the Appellant demonstrate on this appeal that he had good reason not to attend the hearing (as he would have to do under CPR 39.5)? In my judgment he cannot. The Appellant was evidently able to think about the case on 24 May 2011 (because he went to a doctor and asked for a letter that he could use in the case, plainly to be deployed in the event that an adjournment was not granted): if he could do that then he could come to Court, as his wife did. He has made no application to adduce in evidence that letter (and so has not placed before the court any of the factual material necessary to demonstrate that a medical report could not with reasonable diligence have been obtained before the hearing before the Registrar). But I will consider that additional evidence. In my judgment it falls far short of the medical evidence required to demonstrate that the party is unable to attend a hearing and participate in the trial. Such evidence should identify the medical attendant and give details of his familiarity with the party's medical condition (detailing all recent consultations), should identify with particularity what the patient's medical condition is and the features of that condition which (in the medical attendant's opinion) prevent participation in the trial process, should provide a reasoned prognosis and should give the court some confidence that what is being expressed is an independent opinion after a proper examination. It is being tendered as expert evidence. The court can then consider what weight to attach to that opinion, and what arrangements might be made

> (short of an adjournment) to accommodate a party's difficulties. No judge is bound to accept expert evidence: even a proper medical report falls to be considered simply as part of the material as a whole (including the previous conduct of the case). The letter on which the Appellant relies is wholly inadequate."

39. This passage was expressly approved by this court in *Forrester Ketley v Brent & Another* [2012] EWCA Civ 324 at [26]. In the same judgment, Lewison LJ dealt with the width of the judge's discretion when considering the grant of an adjournment:

> "25. His second objection is that Morgan J should have adjourned the hearing on 10 March because Mr Brent was unwell and unable to attend. Whether to adjourn a hearing is a matter of discretion for the first-instance judge. This court will only interfere with a judge's exercise of discretion if the judge has taken into account irrelevant matters, ignored relevant matters or made a mistake of principle. Judges are often faced with late applications for adjournment by litigants in person on medical grounds. An adjournment is not simply there for the asking. While the court must recognise that litigants in person are not as used to the stresses of appearing in court as professional advocates, nevertheless something more than stress occasioned by the litigation will be needed to support an application for an adjournment. In cases where the applicant complains of stress-related illness, an adjournment is unlikely to serve any useful purpose because the stress will simply recur on an adjourned hearing."

40. In addition, in *Mohun-Smith & Another v TBO Investments Limited* [2016] 1 WLR 2919, Lord Dyson MR pointed out the differences between the less rigorous approach applicable to an application under r.39.3(3) and the more rigorous test required by an application to adjourn and, in relation to the standard of medical evidence required for the latter, he said:

> "Nothing that I say in this judgment should be interpreted as casting doubt on the guidance given in the *Levy* case. Generally, the court should adopt a rigorous approach to scrutinising the evidence adduced in support of an application for an adjournment on the grounds that a party or witness is unfit on medical grounds to attend the trial."

41. This court has said repeatedly that a pro-forma sick note (of the kind provided here) may well be insufficient to justify non-attendance at a hearing, particularly if it refers only to an unfitness to attend work. Thus, in *Andreou v The Lord Chancellor's Department* (22 July 2002), Peter Gibson LJ at [41] said:

> "The fact that a person is certified on medical grounds is not fit to attend work does not automatically entail that that person is not fit to attend a Tribunal hearing, though very often that will also be the advice of the medical practitioner."

In similar vein, at [31] of her judgment in *Emojevbe v Secretary of State for Transport* [2017] EWCA Civ 934, King LJ said:

> "iii) A pro-forma fit [sick] note, without more, may well be insufficient to found either a successful application for an adjournment at first instance or even an application under CPR 39.3(3). In considering whether that is the case, the court would undoubtedly have in mind the pressure under which GPs are working and the difficulties which may be faced by a litigant in person who, without the authority of a solicitor's letter may face considerable difficulties in obtaining a report containing more detailed information that the bald details found on a fit [sick] note. Equally on the other side of the coin, the court will have in mind the frequency with which late, unmeritorious applications for an adjournment are made."

c) Further Enquiries

42. The Tribunal has a discretion to conduct further enquiries if the medical evidence does not meet the requirements noted above. *Teinaz v Wandsworth London Borough Council* [2012] EWCA Civ 1040 makes plain that this is a discretion, not a duty. The courts have generally supported tribunals who have refused to adjourn hearings when presented with medical evidence that was inadequate or insufficient: see *Forrester Ketley*, by way of example. The onus remains on the individual to engage with the Tribunal and the process, and "a culture of adjournment is to be deprecated": see *Adeogba* at [61] where, in addition, at [59], Sir Brian Leveson expressly rejected the suggestion that the Tribunal should have made its own further enquiries. Those passages are set out at paragraph 41 above.

43. Furthermore, it seems clear that, if a Tribunal is being criticised for not undertaking further enquiries into the medical evidence, the complainant must be able to demonstrate that those further enquiries would have been material and would have been likely to have led to a different decision. In other words, the alleged failure must be material: see *Fenwick v Camden and Islington HACA* (unreported) 18 April 2000 at [17] – [18]. This was reiterated by Henderson LJ in *Terry Simou v Michael Salliss & Another* [2017] EWCA Civ 312, where he said:

> "60. Mr Collings also rightly accepted that, even if there were a serious procedural irregularity, this court would only allow the appeal and order a retrial if satisfied that the decision of the judge was "unjust": see CPR rule 52.21(3)(b) (previously rule 52.11(3)(b)) and *Hayes v Transco Plc* [2003] EWCA Civ 1261 at [14] per Clarke LJ. Whether or not the decision is unjust "will depend on all the circumstances of the case": ibid."

6.2 Analysis

44. In my view, Lang J failed to apply the principles which I have endeavoured to set out above. As a result, she came to demonstrably the wrong conclusion. There are seven separate reasons for that.

45. First, at [52] Lang J appeared to conclude that, because the sick note post-dated the evidence of Dr Bright and Dr Cunnington, it somehow trumped all that had gone before it. That was wrong in principle; the relevance of the sick note depended on its contents, not its date. Any decision which justifies an adjournment simply on the grounds of timing or date runs the obvious risk of encouraging a culture of adjournment, without regard to the detail of the medical evidence. Lang J compounded this error by saying at [53] that, applying the authorities, evidence of the kind set out in the sick note "ought generally to result in an adjournment". That is incorrect: as I have explained in paragraphs 34 – 36 above, that is manifestly not the approach set out in *Adeogba*.

46. Secondly, the sick note did not say that Dr Hayat was unfit to participate in the hearing. Lang J wrongly equated the statement in the sick note that he could not work with a statement that he could not participate in the hearing, contrary to the principles noted in *Andreou* and *Emojevbe* (paragraph 41 above). There was no medical basis for that conclusion and no consideration in the sick note of how the Tribunal might have accommodated Dr Hayat and any symptoms he might have had, or how and why such accommodation was impossible.

47. Mr Mustakim suggested that the Tribunal's determination was inadequate because, as he put it, "all they did was to say that the sick note did not refer to the hearing, just to work. That is all they gave him". I do not accept that criticism. It ignores the basic principle that a pro-forma sick note may well be insufficient to excuse attendance at a hearing if it does not say as much, and it ignores the care and scrutiny that the Tribunal gave to Dr Hayat's position in all their determinations, including that of 7 November.

48. More generally, I consider that the sick note was wholly insufficient to warrant an adjournment. It failed to meet the *Levy v Carr Ellis* test (paragraph 38 above) in any respect. It did not identify who prepared it, although there was a signature. It did not explain what Dr Hayat's medical condition was or how and why any particular features of that condition meant that he was unable to take part in the hearing. There was no prognosis. There was nothing about the pro-forma sick note which could have allowed the Tribunal 'to conclude with any confidence that what was being expressed was an independent opinion after a proper examination'. In my view, Mr Dunlop was right to say that it failed every element of the analysis required.

49. Thirdly, Lang J appears to have assumed that, in some way, the sick note was diametrically opposite to the evidence of Dr Bright and Dr Cunnington. It was not. Indeed, the material in the box dealing with Dr Hayat's condition, set out at paragraph 28 above, was consistent with what Dr Bright and Dr Cunnington had reported. At its highest, the only matter in the sick note that was even arguably 'new' was the reference to "right arm bruising +/- infection". The bruising could not possibly have justified an adjournment, and it was not suggested to the contrary. The reference to "+/- infection", although unexplained, would usually mean that there may or may not have been an infection, which takes matters no further forward. Further, no prescription of antibiotics has ever been identified, and the unknown doctor who prepared the sick note does not suggest that he prescribed them. The reference to "continue with antibiotics" is therefore unexplained and may – as Mr Dunlop suggested – have been a simple repetition of what that unidentified doctor had been told by Dr Hayat.

50. Fourthly, I consider that Lang J was wholly wrong to say at [51] that the GMC's scepticism about Dr Hayat "could not…justify the Tribunal in *disregarding* the evidence of a medical professional", and at [54], that "the Tribunal is not entitled to *disregard* the GP's certificate that the appellant was unfit for work" (emphasis supplied).

51. In my judgment, it is plain on the face of the Tribunal's written determination of 7 November (paragraph 24 above) that the Tribunal did not disregard the sick note. On the contrary, they carefully considered it, but they concluded that the sick note "essentially reiterates the medical information from during the hospital admission" (i.e. the material from Dr Bright and Dr Cunnington). That was a view to which the Tribunal was plainly entitled to come; speaking for myself, I consider that it is the correct interpretation of the sick note. Other than the bruising (which may well have equated to the 'complication of pain' previously noted by Dr Bright) and the *possibility* of infection, there was nothing new in the sick note at all.

52. Fifthly, the judge was wrong at [50] and again at [54] to suggest that, in some way, because the sick note had given rise to an arguable case that there should be an adjournment on the grounds of ill-health, it was then up to the Tribunal to carry out further investigations. That was incorrect in principle. The onus was always on Dr Hayat, not the Tribunal: see the authorities at paragraph 42 above. What is more, Dr Hayat was or should have been acutely aware of that: he had been told as much by the Tribunal in their determination of 31 October 2016 (paragraph 11 above) and by the GMC in their letter of 4 November 2016 (paragraph 17 above).

53. In any event, if there was anything in the suggestion that the Tribunal failed to carry out the necessary further investigations, it could only be because such further investigations would have yielded better evidence which would have met the *Levy v Carr Ellis* test. But there was no evidence before Lang J, or before us, that any further investigations by the Tribunal into Dr Hayat's medical condition would have made any difference at all. So even if there was a failure it was not material: see paragraph 48 above.

54. Indeed, it is one of the most striking features of this case that Dr Hayat has identified no medical evidence that post-dates the sick note of 7 November 2016. In seeking to appeal the Tribunal's decision he did not at any stage suggest that, if the Tribunal had undertaken its own enquiries, they would have discovered additional medical information that would have demonstrated to them that it was inappropriate to continue in his absence. He has not done that, choosing instead to stand or fall on the terms of the sick note alone.

55. Sixthly, we were referred to the sick note in *TBO*, which simply said that "because of the following condition; family stress, I advise you that you are not fit for work". I accept Mr Dunlop's submission that this was, for material purposes, indistinguishable from the sick note in the present case. In *TBO*, the Court of Appeal said that the judge in that case could not be criticised for dismissing the sick note; indeed, had the r.39.3 application been based on that alone, it would have failed even the less rigorous test applicable to that rule. In just the same way, I consider that the Tribunal cannot be criticised in this case for considering the sick note but concluding that, in the round, the case for an adjournment had not been made out.

56. Finally, I consider that the Tribunal was entitled to weigh up the (inadequate) sick note against all of the other material available to them. This included not only the existing medical evidence (and the fact that the sick note was broadly consistent with that other evidence, and not contrary to it) but also the fact that Dr Hayat had already made three unsuccessful applications to adjourn this hearing on entirely different grounds, each without success.

57. In addition, as part of these wider considerations, there was also the question of the public interest. The Tribunal had already referred to that in their determination of 31 October 2016 (see paragraph 11 above). Any adjournment causes extensive disruption and inconvenience and wastes huge amounts of costs. That would have been particularly acute here, given the number of witnesses and the length of the hearing. Those again were relevant factors which the Tribunal was entitled to consider when arriving at its conclusion.

58. For the avoidance of doubt, I accept the point made by Mr Mustakim that these wider considerations also included the potential consequences for Dr Hayat if the matter went ahead in his absence. But, since there was no medical evidence to persuade the Tribunal that his absence was involuntary, that was of little weight. Moreover, I consider that the consequences of non-attendance were self-evident: they did not need setting out in the determination of a specialist tribunal.

59. For all these reasons I consider that Lang J erred in principle in addressing the way in which the Tribunal reached its decision. The Tribunal was entitled to take into account all it knew, and put the sick note in the context of the other medical evidence, and the case overall. In my view, that is precisely what they did. Their decision to proceed in Dr Hayat's absence was unimpeachable and in consequence, if my Lords agree, this appeal must be allowed.

7. Grounds 2 & 3: The Status Of The Tribunal's Decision and the Threshold For Any Appeal

7.1 Overview

60. It follows that, in the light of my views on grounds 1 and 4 set out above, it is strictly unnecessary to deal with grounds 2 and 3. However I do so simply because, in my view, even a relatively cursory analysis of those matters supports the conclusion that I have already reached.

7.2 The Law

a) Specialist Tribunal

61. The Tribunal is a specialist tribunal. In this case it included two medically qualified members. On any appeal against the Tribunal's decision, the High Court must give appropriate respect to the specialist nature of the tribunal and, in particular, the medical expertise which the judge did not have: see *Threlfall v General Optical Council* [2004] EWHC 2683 (Admin) at [91].

62. In *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879, the Court of Appeal described the substantive findings of the Tribunal in that case as a "multi-

factorial decision". In the judgment of the court at [61], they observed that "it has been repeatedly stated in cases at the highest level that there is limited scope for an appellate court to overturn such a decision". Although that was a case dealing with the final decision of the Tribunal, it seems to me that Mr Dunlop was right to submit that a decision of the kind with which we are concerned (to proceed in absence), although not a final decision, can also properly be regarded as a 'multi-factorial decision': it addressed questions of medical evidence and the public interest, and it had clear consequences for the practitioner if the hearing went ahead without him.

63. In those circumstances, paragraph 67 of the judgment in *Bawa-Garba* is also pertinent:

> "That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts: see *Smech* at [30]; *Khan v General Pharmaceutical Council* [2016] UKSC 64, [2017] 1 WLR 169 at [36]; *Meadow* at [197]; and *Raschid v General Medical Council* [2007] EWCA Civ 46, [2007] 1 WLR 1460 at [18]-[20]. 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 it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide: *Biogen* at 45; *Todd* at [129]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC)* [2001] FSR 11 (HL) at [29]; *Buchanan v Alba Diagnostics Ltd* [2004] UKHL 5, [2004] RPC 34 at [31]. As the authorities show, the addition of "plainly" or "clearly" to the word "wrong" adds nothing in this context."

b) The Relevant Threshold

64. The appeal against the Tribunal's decision fell under CPR 52.21(3). That provides:

> "(3) The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."

65. Before us, the emphasis was on r.52.21(3)(b) because, at [56], Lang J referred to there having been a "serious procedural irregularity". But whichever is the appropriate gateway, the question arises as to the threshold to be applied by the appellate court when considering whether a decision of this kind should be set aside.

66. In my view, since the Tribunal's decision to adjourn was an exercise of discretion, this court would have to be satisfied that a high hurdle has been surmounted before it

intervenes. In *Canfern Ltd v Cameron McDonald* [2000] 1 WLR 1311 at [32], Brooke LJ said that the appellate court should only interfere with such decisions where the decision of the court below "exceeded the generous ambit within which a reasonable disagreement is possible".

67. It is unnecessary to set out all of the subsequent cases in which this approach has been followed. But the touchstone, that the Tribunal would have to be wrong before the appellate court intervened, can be found in a number of the cases to which I have already referred, including *Andreou* ([35] onwards); *Simou* ([59] – [64]); and *Forrester*, from which I have already set out [25] of the judgment of Lewison LJ (paragraph 39 above).

68. Although there are one or two cases which put the emphasis on unfairness (see for example *Terluk v Berezovsky* [2010] EWCA Civ 1345), that emphasis is explicable on the facts of the cases themselves (*Terluk* was about an alleged breach of natural justice), rather than constituting a more general statement of principle. Moreover, I note that in *Dhillon v Asiedu* [2012] EWCA Civ 1020 at [33], this court explained why the *Tanfern* and *Turluk* approaches were "both consistent and analogous". Baron J, with whose judgment both Arden and Davis LJJ agreed, said:

> "Although the language in these two cases is entirely different, the foundation of the decisions is both consistent and analogous. The conclusions which I derive from the authorities are that:
>
> a. the overriding objective requires cases to be dealt with justly. CPR 1.1(2)(d) demands that the Court deals with cases 'expeditiously and fairly'. Fairness requires the position of both sides to be considered and this is in accordance with Article 6 ECHR.
>
> b. fairness can only be determined by taking all relevant matters into account (and excluding irrelevant matters).
>
> c. it may be, in any one scenario, that a number of fair outcomes are possible. Therefore a balancing exercise has to be conducted in each case. It is only when the decision of the first instance judge is plainly wrong that the Court of Appeal will interfere with that decision.
>
> d. unless the Appeal Court can identify that the judge has taken into account immaterial factors, omitted to take into account material factors, erred in principle or come to a decision that was impermissible (*Aldi Stores Limited v WSP Group Plc* [2007[EWCA Civ 1260. [2008] 1 WLR 748, paragraph 16) the decision at First Instance must prevail."

69. I respectfully agree with that passage. I do not find any significant incompatibility between the two, a point which Mr Sarker appeared expressly to accept when he submitted that "there is no conflict between fairness and discretion".

7.3 Analysis

70. In my view, the judge failed to adopt the correct approach. Again, as a result, she fell into error. There are four reasons for that conclusion.

71. First, I consider that Lang J did not apply r.52.21(3). Her judgment reads as if she was deciding the adjournment application *de novo*. That was impermissible. The only relevant question was whether there had been an unlawful (or unfair) exercise of discretion by the Tribunal. That was not something which she addressed. Had she adopted the approach of this court in *Forrester* and *Adeogba* I consider that she would have reached the conclusion that was reached in those cases: that there was no basis on which she could interfere with the Tribunal's exercise of its discretion.

72. Secondly, she paid no heed to the specialist nature of the Tribunal. She makes no reference to it or the nature of the decision reached. As to the reference to "+/- infection", Lang J seems to have reached her own conclusion as to what that meant, regardless of the views of the medical members of the Tribunal.

73. Thirdly, although Lang J found that there had been a procedural irregularity, the only event which could possibly qualify for that description was her earlier assertion that the Tribunal "disregarded" the sick note. As I have explained above, the Tribunal did no such thing; they took it into account and reached a conclusion upon it that they were entitled to reach. There was no procedural irregularity.

74. Finally, when considering the issue of fairness, the judge failed to have any regard to the background material to which I have previously referred. In particular, she had no regard to the previous unsuccessful attempts to obtain an adjournment of this hearing or the public interest. These were matters which the Tribunal was entitled to take into account when exercising its discretion. In my view, Lang J, having approached the central issue on a narrow and incorrect basis (namely the alleged 'disregard' of the sick note), failed to grapple with the latitude to which the Tribunal was entitled as a consequence of the discretionary nature of the decision.

75. In summary, the decision to refuse to adjourn the hearing was a discretionary matter, properly made by a specialist tribunal on the basis of all the evidence. It was a decision to which the Tribunal was entitled to come. As I have already said, speaking for myself, I consider that it was the correct decision in any event.

8. Disposal

76. For the reasons set out above, I would allow this appeal. If my Lords agree, that would mean that Dr Hayat's appeal will be remitted to the High Court, where the only matters for reconsideration are the matters identified by Lang J at [5], namely original grounds of appeal 2, 3, 4 and 5.

Lord Justice Moylan:

77. I agree.

Lord Justice McCombe:

78. I also agree.