

# Unacceptable professional conduct or conviction impairment? Professional discipline tribunals must pin their colours to their mast (*Wray v General Osteopathic Council*)

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**Corporate Crime analysis: Professional discipline tribunals must take care take when dealing with fitness to practise proceedings involving admitted criminal conduct to ensure they follow the correct procedure and apply the correct evidential test. Alexander dos Santos, barrister at Serjeant's Inn Chambers, considers the approach taken by the Professional Conduct Committee (PCC) of the General Osteopathic Council, in *Wray v General Osteopathic Council*.**

*Wray v General Osteopathic Council* [\[2020\] EWHC 3409 \(QB\)](#)

## What are the practical implications of this case?

The case is a stark reminder of the need for allegations to be clearly drafted and for procedural rigour as to which kind of case is being pursued.

Both the [Osteopaths Act 1993](#) and the procedure rules (General Osteopathic Council (Professional Conduct Committee) (Procedure) Rules Order of Council 2000) distinguish between proceedings against an osteopath on allegations of unacceptable professional conduct (UPC) or in relation to a criminal conviction. In UPC cases, the PCC is first required to establish the facts. It then moves to the evaluation stage. In conviction matters, the facts of the case are not separately proved or admitted. The conviction, based upon the prosecution files and trial evidence—is sufficient to move to the evaluative stage. The distinction is important as in a conviction case, facts may be necessarily implied in the conviction and the practitioner cannot relitigate those facts. This was not a conviction case.

The PCC adopted a hybrid procedure by which they treated the factual stage as a conviction case and then applied the UPC test to the facts. In this, they fell into error.

The allegations before the PCC cited the criminal charge brought against the appellant and the historic facts of his plea and (spent) conviction. In reality, the allegation was in substance a conviction allegation. The consequence was a degree of ambiguity as to what exactly the appellant had accepted before the PCC. The court held that '[f]airness requires everyone to be clear what facts the UPC test is to be applied to' (para [39]); otherwise, there may be a real lack of clarity regarding the facts being evaluated.

The judgment is also a reminder to be alert to a PCC adding in facts for which there is no evidence. The PCC wrongly applied a bystander test, finding (without evidence) that locals would have been frightened by an unfolding scene of public violence. They should have applied an objective test considering a detached evaluation of the whole story by a disinterested lay person.

## What was the background?

On 10 March 2018, the appellant's teenage daughter arrived home in a poor state, apparently intoxicated by drugs. She went to sleep. Her phone rang persistently. Her father answered the call. The caller claimed that he had attacked and hurt his daughter and would do so again. He suggested the appellant meet him to discuss it 'man to man'. Fearful for his daughter, and despite his son's efforts to dissuade him, the appellant drove to meet the man. His son went with him. When they arrived, a group of men attacked the car. In his car, the appellant had some sports equipment (as he was also a sports coach). He left the car with a rounders bat. His intention was to dissuade the men and to defend himself if necessary. He did not brandish or use it. He and his son were set upon, the bat was taken from him and he was hit over the head with it. He received a wound and required treatment. He was the only person injured. After the events, the police charged him with possession of an offensive weapon.

The offence of possession of an offensive weapon comprises of possession, without lawful excuse, of an article made or adapted for use for causing injury or intended by the person having it for such use by him. While a guilty plea to the offence constitutes an admission that the person charged had such an intent and also lacked reasonable excuse, the appellant's consistent account was that he had no such intent and had a reasonable excuse. At the last minute before his trial on this charge, his solicitor changed his advice and advised him to plead guilty. He had moments to decide, and changed his plea. The magistrates imposed a six-month conditional discharge. The appellant later discovered that he had been ill-advised by his solicitor. An appeal against conviction on the ground that his plea had been equivocal was dismissed as being too far out of time.

The appellant self-reported to the General Osteopathic Council. By reason of [section 14\(1\)](#) of the Powers of Criminal Courts (Sentencing) Act 2000, he did not have a conviction for the purposes of disciplinary proceedings. Accordingly, he was charged with UPC. The PCC followed a hybrid conviction/UPC process and found that his conduct 'had the clear effect of escalating and antagonising a potentially dangerous situation' and 'would attract a degree of moral opprobrium from an objective bystander, knowing all the facts', and 'would be considered deplorable by other practitioners knowing all the facts'. The PCC found his conduct to have been unprofessional and admonished him.

He appealed to the Administrative Court on the grounds that the PCC's decision was wrong and unjust because of serious procedural irregularity. The Administrative Court allowed the appeal and declined to remit the matter, instead substituting the decision with a finding acquitting the appellant of UPC.

## What did the court decide?

The court set aside the finding of UPC. The court declined to remit the matter, finding that the circumstances had little bearing on his fitness to practise, and that although a fair-minded observer with knowledge of the facts may have considered his conduct to have been foolish and ill-judged,

they would be unlikely to think worse of him, would likely have sympathy for him, and would be 'baffled by an invitation to discern grounds for moral opprobrium'.

The court found that the PCC's conduct of the appellant's hearing was seriously irregular, and the hybrid process was unfair. The drafting of the allegation as, in substance, a conviction allegation, was unfair. Both the imprecise drafting of the allegation and the approach taken had created real ambiguity as to the facts.

The PCC had fixed the appellant with having agreed to diametrically opposite 'facts', both accepting his evidence and then by inductive reasoning from the recitation of statute in the allegation, proceeding as though he had accepted an intent to injure and a lack of reasonable excuse. The court found these latter facts were 'unaccepted, unevidenced and unproven.'

By taking facts from the criminal charge and not considering the facts properly, the PCC adopted a hybrid approach to the procedure which in this case 'gave [the appellant] the worst of both worlds' (para [53]).

Additionally, a number of 'new' facts were introduced and found at the second stage, which were adverse to the appellant. There had been 'no evidence' before the PCC to these facts, and they 'did not plausibly fall within any factual admission [the appellant] may have made'.

**Case details:**

- Court: Administrative Court (Queen's Bench Division), High Court of Justice
- Judge: Mrs Justice Collins Rice
- Date of judgment: 15 December 2020

Alexander dos Santos is a barrister at Serjeants' Inn Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact [caseanalysiscommissioning@lexisnexis.co.uk](mailto:caseanalysiscommissioning@lexisnexis.co.uk).

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