Ed Morgan provides a summary of a recent case involving **Duty of Regulatory panel in absence of Registrant**

Thorneycroft v NMC [2014] EWHC 1565 (Admin) [Mr Thomas QC sitting as a Judge of the High Court]

The registrant was a senior specialist nurse performing executive managerial functions. He faced allegations of misconduct before the NMC. The core allegations related to statements alleged to have been made by him concerning service users. The allegations were disputed. There was no suggestion the Registrant had directed any statements toward service users directly. Whilst the registrant did not attend the NMC hearing, he submitted written representations and supporting documents. The NMC were aware of difficulties in securing the attendance of their principal witnesses. These were not shared with the registrant. The Committee resolved to proceed in the absence of the registrant. It immediately received applications from the presenting officer for the NMC for the admission of the witness statements notwithstanding the non-attendance of the witnesses concerned. Thereafter, the presenting officer and the legal assessor purported to filter and control the submissions and material lodged by the registrant; seemingly taking the view that certain aspects were contrary to his interests. The allegations of misconduct were upheld, a finding of impairment followed together with a sanction of 12 months suspension. The registrant appealed. He contended he had been misled as to the evidential position relied upon by the NMC. He further complained the NMC Committee had failed to properly engage with its inquisitorial function and its own procedural duty which required them to control the evidence before them. The registrant submitted that this duty extended to a requirement that the Committee form its own assessment of the reliability and credibility of the witness material before it. Mr Andrew Thomas QC, sitting as a High Court Judge agreed. Setting aside the orders of the Committee, and declining to remit the matter for reconsideration. This is an important case dealing with the frequent problem of registrants being financially unable to attend regulatory proceedings and the responsibility of both the presenting officer and the relevant Committee or Panel in those circumstances. [Ed Morgan appeared as Counsel for the registrant appellant].

Ed Morgan provides a summary of a recent case involving **Conduct or Gross Misconduct for section 98 ERA?**

Ham v Beardwood College [2014[EAT (HHJ Peter Clark)

The claimant was formerly employed as a teacher at the respondent college. She brought claims before the Tribunal alleging her dismissal was in retaliation to Trade Union activities. The Respondent contended the reason for dismissal was conduct. The Tribunal accepted the reason for dismissal was conduct; but determined the dismissal was unfair. In arriving at this judgment, it considered the conduct in question was not gross misconduct and, given the likely closure of the college in the near future and redundancies which would accompany it, the sanction of dismissal was disproportionate and unfair for the purposes of section 98(4). The Tribunal awarded the claimant in excess of £80,000 by way of remedy for unfair dismissal. The respondent appealed. It contended the reason for dismissal need not be gross misconduct but conduct. It was also argued: (i)in assessing the quality of the misconduct, a reasonable employer was entitled to have regard to the totality of the conduct alleged; and (b) the imminent closure of the college was in fact irrelevant since, any conclusion to the contrary

required the artificial preservation of the employment relationship to gain access to rights she did not enjoy at the date of dismissal, The EAT agreed and remitted the matter back to the same tribunal for consideration of the section 98(4) question. Having done so, it made it dismissed the unfair dismissal claim and aside the earlier order. This is a helpful reminder of the entitlement of the employer to look to the consequences of the misconduct identified and not simply the seriousness or others of particular offences and components. [Ed Morgan appeared on the Appeal and remitted hearing].

Ed Morgan provides summary of a recent case involving **Calculation of Weeks Pay for WTR**

Bear Scotland and Ors v Fulton and Baxter and Ors [2014] EAT (Langstaff J)

The Working Time Regulations 1998 (WTR) have given rise to significant disagreement and litigation before the domestic and European Courts. This case arose by way of conjoined appeals from decisions made in England and Scotland. In each instance, the employees were employed under contracts of employment which made provision for both basic or guaranteed hours of working. The same contracts anticipated the employees would be required to work additional hours by way of overtime. In the case of Mr Baxter and Mr Fulton, the contractual regime was operated in such a way as to involve their allocation of overtime hours several weeks in advance. In both cases, they were could be excused overtime commitment provided the employer was satisfied they had a good reason. The EAT was required to consider a number of issues. These comprised: the extent to which the WTR might be interpreted to give effect to the Work Time Directive; the calculation of a weeks pay for the purposes of regulation 16 of WTR; and the meaning of a series of deductions for the purposes of arrears of unpaid holiday pay. In the resolution of those issues, Langstaff J was required to reconcile the tensions said to be present between the European jurisprudence (most recently expressed in *British Airways v Williams* and *Lock*) and the domestic court decisions (e.g. *Bamsey v Albion Engineering and Manufacturing plc*). The Appellants submitted the domestic provisions and analysis in Bamsey should prevail. In the alternative, it was submitted the EAT should provide a prospective ruling applicable to future cases only; thereby insulating employers from the financial burdens which might otherwise follow. The Respondents submitted that the European jurisprudence conferred the right of a worker to annual leave free from any financial penalty or disincentive upon the exercise of the right. On this basis, the calculation of a week's pay ought properly take into account the sums customarily received from the employer as part of the pattern of working. As such, the fact that the employer was not obliged to provide overtime ought not to be determinative. The EAT agreed and elected to follow the European authorities as the proper articulation of the rights conferred by the Directive and the WTR. The EAT judgment also affirmed the 3 month limitation applicable to unlawful deduction claims and provided clarification as to the meaning of a 'series' of deductions for the purposes of section 23 ERA. [Ed Morgan appeared as Counsel for Fulton and Baxter – Respondents in the Bear Scotland Appeal].