



CII

PRACTICE NOTE

The Duty to Give Reasons

This Practice Note has been issued by the Institute for the guidance of Disciplinary and Appeal Panels and to assist those appearing before them.

Introduction

1. The giving of reasons is one of the cornerstones of the judicial function and a central aspect of the rule of law¹. The entitlement to reasons is not only an 'indispensable part of a sound system of judicial review', as Professor Wade described it, but also 'a healthy discipline for all who exercise power over others'².
2. There are several, widely accepted arguments in favour of a general duty on decision makers to give reasons for their decisions. They include the following:
 - 2.1 The requirements of legal certainty and the transparency of public institutions mean that ordinary members of the public should not need the benefit of counsel in order to deliberate on the wisdom of the decisions of a court, tribunal and panel.
 - 2.2 Reasons are a check on arbitrary decision-making and a fundamental of good administration.
 - 2.3 Reasons satisfy a basic need for fair play. Even if the decision is adverse, the person affected may be convinced by the reasons to accept it as a rational and unbiased exercise of discretionary power.
 - 2.4 Proper reasons should expose excess of jurisdiction, error of law, unsubstantiated findings, and extraneous considerations.
 - 2.5 Public confidence in the decision-making process is enhanced by the knowledge that supportable reasons have to be given by those who exercise administrative power.

¹ See e.g. Lord Denning, '[t]he giving of reasons is one of the fundamentals of good administration', *Breen v Amalgamated Engineering Union* [1971] 2 QB 175 at 191.

² Wade, *Administrative Law* (6th ed), p 548.

The Position at Common Law

3. At common law there is no general duty to give reasons in public law³ and in the field of regulation there is usually no express requirement on a disciplinary committee to give reasons for its decisions. However, it is almost certain that a court will find that the common law implies an obligation to give reasons, at least where the decision is subject to a statutory appeal process (and with similar logic, judicial review). It is also likely that if the jurisdiction and powers of the panel could extend to the determination of the professional's civil rights and obligations, so as to engage Article 6, then an express obligation to give reasons will exist⁴, although the extent of the reasons that must be given will vary according to the nature of the decision in question.
4. So, for example, in *Threlfall v General Optical Council*⁵ Stanley Burnton J held that the General Optical Council had a duty to give reasons for its decisions both at common law and under Article 6 of the European Convention on Human Rights. The statutory provisions (and in particular, those conferring a right of appeal on the professional) were to be taken into account in determining whether there is an obligation at common law to give adequate reasons; and considering (1) the right of appeal may be rendered illusory if the optician does not know the basis for the decision against him or her, and (2) the importance to an optician of a finding of serious professional misconduct, the judge held that a disciplinary committee was under a duty at common law to give adequate reasons for a finding of serious professional misconduct, and to do so in time for the optician to exercise the right of appeal⁶.
5. That duty does not generally require a panel to identify 'why in reaching its findings of fact it ought to accept some evidence and to reject other evidence': *R (Luthra) v General Medical Council*⁷.
6. However, in *Robert Phipps v General Medical Council*⁸, the Court of Appeal (in an obiter judgment) developed the notion⁹ of an 'exceptional' duty on a disciplinary tribunal to give reasons. Wall LJ said that 'there is no reason why doctors sitting in judgment on their peers should be exempt from the general rules which apply to all other tribunals'; he then quoted (at para 80) from the leading case of *English v Emery Reimbold & Strick*¹⁰:

'16. We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.

³ See e.g. *R v Home Secretary, ex parte Doody* [1994] 1 AC 531, 564E per Lord Mustill.

⁴ This has been recognized frequently in the context of disciplinary proceedings: *Stefan v General Medical Council* [1999] 1 WLR 1293; *Wickramasinghe* [1970] AC 951; *Brabazon-Drenning v UK Central Council for Nursing Midwifery and Health Visiting* [2001] HRLR 6; *Selvanathan v GMC* [2001] Lloyd's Rep. Med. 1.

⁵ [2004] EWHC 2683 (Admin)

⁶ As to article 6, the judge held that its applicability must be determined on the basis of the jurisdiction and powers of the tribunal rather than its ultimate decision; so that the applicability of Article 6 must be determined before the hearing. Since the disciplinary proceedings might have resulted in a decision to suspend or to disqualify the professional, the judge considered that Article 6 applied to the proceedings.

⁷ [2006] EWHC Admin 458, per Elias J (as he then was) at [22].

⁸ [2006] EWCA Civ 397

⁹ As adumbrated by the Privy Council in *Gupta v General Medical Council* [2002] 1 WLR 1691.

¹⁰ [2002] 1 WLR 2409

17. As to the adequacy of reasons... this depends on the nature of the case... [reasons] need not be elaborate...

...

19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.'

7. In *R (on the Application of Dr Safa Kaftan) v General Medical Council*¹¹, Mr Justice Hickinbottom explained the apparent discordance between those decisions in this way:

'whilst professional bodies are under a duty to give reasons, that duty does not require them to give a judgment that might be expected of a court of law. The parties must simply be able to understand why one has won and the other lost on a particular issue [*English* and *Phipps*]. That does not generally require the panel to identify "why in reaching its findings of fact it ought to accept some evidence and to reject other evidence" [*Luthra*]. *Luthra* predated *Phipps*, but it remains good as a general proposition: subject to the caveat that it may be necessary in a particular case to elaborate to ensure a party understands why he has lost the case and hence to ensure procedural fairness to that party.'

Summary

8. The position was summarised, most recently, by Mr Justice Ouseley in *R (on the Application of Susan Angels Duncan) v The General Teaching Council for England*¹². He said (at paragraph 6):

'What is required by way of reasons is an outline of the story which has given rise to the complaint, a summary of the basic factual conclusions and a statement of the reasons which have led the committee to reach their conclusion on those basic facts I add that there are at least two purposes behind the requirement to give reasons which may affect the standard of reasoning required. The first is fairness. The parties should know why they have lost or won. The second is that a deficiency in the conclusions or in the reasoning on the principal issues in controversy may conceal a legal error: material considerations ignored, irrational reasoning or a lack of evidence, provided of course that the doubt over the reasoning is genuine and not

¹¹ [2009] EWHC 3585 (Admin), at para 28

¹² [2010] EWHC 429 (Admin), at para 6

merely forensic. It is not necessary for every factor to be dealt with explicitly in order for the reasoning to be legally adequate.’

9. Beyond that legal duty, Disciplinary and Appeal Panels have an obligation to explain the decisions they reach and the reasons for them, as part of the open and transparent processes which the Institute seeks to operate.

Content of Decisions

10. Any decision of a Panel should be recorded in a manner which explains what was decided and, just as importantly, why it decided as it did. In the interests of transparency, the decision should be drafted so as to allow the reasonably intelligent reader to understand the issues that were before the Panel, its findings and the reasons for them without the need to refer to any other materials.
11. The decision should¹³:
 - 11.1 Summarise the complaint or the grounds for the appeal.
 - 11.2 Identify any procedural issues such as requests for adjournments, the non-attendance of a party¹⁴ or Human Rights Act challenges, how they were dealt with and why.
 - 11.3 Identify the facts, if any, which were undisputed.
 - 11.4 Identify the facts in dispute and in relation to those:
 - 11.4.1 what evidence is relevant to those issues;
 - 11.4.2 what evidence is preferred and what evidence is rejected, and why;
 - 11.4.3 in cases where witnesses have given conflicting evidence, why the evidence of one witness was preferred over that of another.
 - 11.5 The conclusions reached by the Panel on any submissions made by the parties.
 - 11.6 Identify the standard of proof applied¹⁵.
 - 11.7 Identify the findings of fact made by the Panel and:
 - 11.7.1 in the case of a Disciplinary Panel, whether those facts amount to a breach of the Laws of the Institute (including any professional standard that a member is required to observe)¹⁶; and
 - 11.7.2 in the case of an Appeal Panel, whether the decision of the Disciplinary Panel was based on an error of law or fact or an unreasonable exercise of its discretion; unjust because of a serious procedural error or irregularity or that new evidence has become

¹³ This list is neither exhaustive nor proscriptive but it is intended to assist Panels in drafting determinations that set out why it reached the decision that it did on the facts before it.

¹⁴ For which see CII Practice Note ‘Proceeding in the Absence of the Respondent/Appellant’.

¹⁵ For which see CII Practice Note ‘Applying the Civil Standard of Proof’.

¹⁶ Per Disciplinary Regulations 12.4 and 12.6.

available; and/or whether the sanction imposed was too severe or too lenient.¹⁷

- 11.8 In the case of a Disciplinary Panel:
 - 11.8.1 identify any evidence presented by way of mitigation or aggravation and the findings that the Panel made in relation to that evidence;
 - 11.8.2 any sanction that was imposed and why it was appropriate¹⁸; and
 - 11.8.3 whether the Respondent is required to pay all or part of the cost of the proceedings and/or any subscription arrears¹⁹, and why.
- 11.9 In the case of the Appeal Panel,²⁰ set out its reasons:
 - 11.9.1 for affirming or varying the decision made by the Disciplinary Panel;
 - 11.9.2 in appropriate cases, for varying the sanction or sanctions imposed by the Disciplinary Panel; and
 - 11.9.3 any order made as to costs.

Drafting Style

- 12. The length and detail of a decision will vary according to nature and complexity of the case before the Panel and the decision it has reached. However, so far as is possible, it should be comprehensive and written in plain English.
- 13. A Decision should:
 - 13.1 be written so that the Respondent/Appellant concerned, any complainant and other interested parties can understand the decision reached and the reasons for it;
 - 13.2 be written in clear and unambiguous terms; avoiding jargon, technical or esoteric language or explaining any which must be used;
 - 13.3 be written using short sentences and short paragraphs; and
 - 13.4 avoid complicated or unfamiliar words and use precise but everyday language (e.g. "start" instead of "commence").

¹⁷ Per Disciplinary Regulation 12.6 and Rule 37.

¹⁸ A Panel should have regard to the objective of sanctions (set out in Disciplinary Regulation 12.6(m)) and the principle of proportionality flowing there from. It should consider the sanctions available starting with the least restrictive and set out why a lesser sanction is inappropriate (within the context of securing the confidence of the public, employers and Members) before moving on to consider the next most severe.

¹⁹ Per Disciplinary Regulation 12.6.

²⁰ Per Disciplinary Rule 46.