



Neutral Citation Number: [2014] EWHC 4311 (Admin)

Case No: CO/4825/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/12/2014

Before :

MR JUSTICE CRANSTON

Between :

British Dental Association
- and -
General Dental Council

Claimant

Defendant

Philip Havers QC and Jeremy Hyam (instructed by Hempsons Solicitors) for the Claimant
Karen Steyn QC (instructed by Kingsley Napley) for the Defendant

Hearing dates: 15 December 2014

Approved Judgment

Mr Justice Cranston:

Introduction

1. The British Dental Association, the claimant, seeks to challenge a decision of the council of the defendant, the General Dental Council. The decision was made on 30 October 2014 and set the annual retention fee for 2015 for dentists at £890. This sum is so named because it is the annual fee allowing dentists to retain their practicing certificate; it is, in effect, an annual practicing fee. It is tax deductible. There is no challenge to the annual retention fee for 2015 for dental care professionals, set at £116. The legal basis for the challenge is first, the failure properly to consult on the fee increase and secondly, the failure to re-consult after the consultation period. There is an urgency about the case since, under the General Dental Council (Dentists) (Fees) Regulations 2014, dentists must pay the fee by the end of the year. Irwin J ordered the case in for a “rolled up” hearing.

The parties

2. The British Dental Association dates back to 1880 and was established as a professional association to advance the art, science and ethics of dentistry. It is a company limited by guarantee and a registered trade union in England and Wales. As with similar bodies it gathers information and proposes policy. It is governed by a principal executive committee of elected dentists. It represents some 19000 of the 40000 dentists in the United Kingdom. I accept the submission that, collectively, the secretariat and the elected committee of the association are very knowledgeable about developments within the regulatory environment.
3. The General Dental Council (“the GDC”) was established under the Dentists Act 1984 (“the 1984 Act”) to regulate dentists and dental care professionals. Before 1984 the GDC operated as part of the General Medical Council. Dental care professionals include dental technicians, hygienists and nurses. In effect the Council’s main statutory objective is to protect patients and the public. It sets the standards for dentists and dental care professionals, provides guidance, investigates complaints and takes action against dental professionals who are not considered fit to practise, as well as against those who practise dentistry illegally. The GDC maintains and administers a register of all those entitled to practise as dentists or dental care professionals in the United Kingdom.

Fitness to practise

4. The GDC has a statutory duty to investigate any allegation “made to the Council against a registered dentist that his fitness to practise as a dentist is impaired”: Dentists Act 1984, s.27(1). The registrar of the GDC must refer any such allegation to the Investigating Committee. Not every complaint made to the GDC about a dental professional constitutes an allegation of impaired fitness to practise. Complaints proceed through a “triage process”, an assessment, then through the Investigating Committee, and may finally result in a fitness to practise hearing. As would be expected there is an erosion in the number of complaints at each stage of the process as they are resolved.

5. There has been increasing concern that the fitness to practise processes are outdated and that legislative change is necessary. In January 2012, the GDC published a paper entitled “Modernisation of the General Dental Council’s Fitness to Practise procedures, Consultation Paper”. It noted that the GDC was working within the confines of a “one size fits all” statutory model. That meant a single incident, clinical complaint was managed in the same way as a serious conviction. The one-size fits all approach was not proportionate and did not enable the GDC to fast track those cases which were more serious. In 2014 the GDC expressed disappointment that the work it had undertaken with the Department of Health and the Law Commission had not led to a Bill reforming the procedures being included in the Queen’s speech in 2014. It does, indeed, seem regrettable.

GDC funding

6. The work of the GDC is funded almost entirely by the annual retention fee which dentists and dental care professionals are required to pay in order to be entitled to practise. The GDC’s only other sources of income are first, the funds that the GDC has invested and secondly, the fees the GDC receives from those dentists who sit the Overseas Registration Examination. That provides a small income. However, the overseas registration fees are fixed by legislation at a level that is now lower than the amount the GDC is charged by the institutions providing the examination, so they provide no net income. The GDC is pressing for legislative change on this matter as well.
7. In September 2005 the GDC approved a reserves policy, which was to maintain financial reserves equivalent to one year’s expenditure. There was a change in policy in September 2008, when the GDC approved a reserves policy of maintaining reserves within a range of £10m-£16m. Yet a further change was adopted in December 2011, when the GDC approved a reserves policy that reserves be within a range of four to six months of annual operating expenditure. That was restated in 2013 and is the current reserves policy. The fees set for 2015 mean, based on the 2015 budget, that reserves will reduce to three months annual operating expenditure.

Consultation on fee policy

8. In September 2010 the GDC agreed an “Annual Retention Fees Policy”. It was to set the annual retention fee each year to cover costs and to apportion the fee fairly between the two registrant groups, i.e. dentists and dental care professionals. The annual retention fee was to be set irrespective of age, working hours, type of practise or location. At the same time as adopting the 2010 Policy, the Council increased the annual retention fee for 2011 to £576 for dentists and £120 for dental care professionals (an increase of 31% and 25%, respectively). The fee remained at that level until the increase challenged in this judicial review.
9. Late in 2012 the GDC announced that it was undertaking a review of the 2010 Policy. The approach to the review was set out in a “Position Paper on ARF Policy Review”. In February 2013 the GDC issued a “Call for Evidence” explaining that the review would consider “the extent to which setting the fee levels should be determined by: the affordability of the fee for different groups; the cost of regulating different groups of registrants.” Amendments to the actual fee levels would not come into effect until 2015, although changes to the fee levels could be introduced in 2014 for other

reasons. The “Call for Evidence” was sent to a number of professional associations, including the claimant, and responses were received from all of them.

10. In December 2013 the Council described that consultation on both the annual retention fee policy and the fee level should be in accordance with the approach set out in a paper entitled “Annual Retention Fee policy review and consultation 2014”. The paper was published on the Council’s website. It provided that a consultation would be held in April 2014 proposing that registrant groups be charged according to how much it costs the GDC to regulate them. The income and individual circumstances of registrants would not be taken into account when determining the fee levels for individual registrants. The paper added:

“Views will be sought on whether these principles are understood and supported by registrants and if the language used by the GDC makes it clear to registrants why they are required to pay an annual charge for registration.”
11. The policy consultation began on 16 April 2014 and closed on 4 June 2014. The consultation paper sought views on the proposed approach to setting the annual retention fee. It noted that in 2013 the GDC raised £31 million through the fee, but spent £33.9 million. The vast majority of the £33.9million expenditure - £26.6million - was spent on fulfilling its fitness to practise function. The consultation paper explained that different registrant groups cost different amounts to regulate. 88% of the money spent on the fitness to practise function related to dentists, with only 12% attributable to dental care professionals. It stated that the

“main reason why our costs are likely to increase is because of an increase in Fitness to Practise complaints as this is the most expensive part of what we do. Since 2010 our Fitness to Practise complaints have increased by 113% which has led to an increase in Fitness to Practise direct costs of 28% over the same period.”
12. The policy consultation paper was emailed to all registrants. The Council placed articles in the dental press and the Gazette (which is sent to all registrants), notified the professional associations in advance of the consultation and sent reminder emails throughout the consultation period. 1,255 responses were submitted, including from the claimant and other professional associations. Of those who responded, 65 percent agreed with the proposal that the GDC should set the fee according to how much each registrant group costs the GDC. The claimant objected to that policy.
13. On 18 June 2014 the GDC approved the policy approach and issued the 2014 Policy. It noted that 34 percent of those who responded wanted more financial information than had been provided in the consultation document. In particular, concerns were raised about the cost of fitness to practise in cases. Respondents wanted greater detail on why these were so high and more information on the figures provided in the consultation document. “It was clear from the comments, that the high level figures that we did provide were not sufficient”. The policy document stated:

“Proposed Action: In the consultation document on the Annual Retention Fee Level for 2015 we will provide more detail on the different aspects of the Fitness to Practise process, and will build this into our public reporting on how we spend the fee income.”

The conclusion to the Executive Summary of the policy document added that it was clear that one area the GDC needed to keep under review was transparency in providing financial information.

14. The GDC issued a statement accompanying the consultation on its annual fee retention policy. It stated:

“In the future we will set out how all of this has been calculated when we consult on any changes to the fee levels. We will also set out what we have done to keep the costs of regulating the profession down.”

The statement concluded:

“Fitness to Practise Costs

A third of respondents called for greater transparency in relation to the GDC’s financial information, in particular Fitness to Practise costs. In the forthcoming consultation document on the Annual Retention Fee Level for 2015 we will provide more detail on the different aspects of the Fitness to Practise process, and will build this into our public reporting on how we spend the fee income.”

The PSA Review

15. At the meeting on 18 June 2014 approving the annual fee retention policy the GDC also considered a paper entitled “2013/2014 Professional Standards Authority PSA Performance Review”. The Professional Standards Authority is the regulatory body for the GDC. The review concluded that for the year 2013-2014 the GDC met only 3 out of 10 standards in relation to fitness to practise. That was as compared to 2012-2013, where 9 out of 10 standards had been met. In particular standard 6, which was not met, provides that fitness to practise must be dealt with as quickly as possible taking into account the complexity and type of case and the conduct of both sides.

The fee level consultation and the decision

16. On 20 February 2014 the GDC considered a document entitled “Annual Retention Fee Modelling Review”. That said that it was difficult to project matters with accuracy and continuous monitoring would be required to ensure that increases in the fee were no greater than they needed to be. On the basis of an increase at an average of 4,125 complaints in both 2015 and 2016 (a 37 percent increase), it would be necessary to increase the annual retention fee in 2015 by 25 percent to £720 and £150 respectively. A phased deficit recovery model of more modest increases over 3 years (estimated at 12 percent per annum) might be preferable to a one-off increase. However, greater

- scrutiny of the fitness to practise statistics over the following 6 months would be necessary in order to judge more accurately the level of the initial and subsequent increases. The review also identified the need to make efficiency savings.
17. Also on 20 February 2014, the Council of the GDC considered a paper entitled "Additional Resource to deal with backlog of Fitness to Practise". It stated that the financial cost of establishing the proposed backlog casework team in 2014 would amount to a maximum of £400,000, made up of £264,000 staffing costs.
 18. The GDC Council in May 2014 reported on its financial performance in the 3 months to 31 March 2014. One point made was that the number of fitness to practise cases received had increased with 299, 250 and 286 new cases received in January, February and March 2014 respectively. Projecting forward on a rolling 12 month basis that trend suggested that it might receive some 3,700 such cases in 2014. There was a graph showing a trend line to that effect.
 19. The annual retention fee level consultation began on 30 June 2014 and ended on 4 September 2014. As with the policy consultation, the GDC emailed the consultation paper to all registrants, placed articles in the dental press and the Gazette, notified professional associations in advance of the consultation and sent reminder emails throughout the consultation.
 20. The consultation paper began with the proposal to increase the fee level for dentists to £945 and for dental care professionals to £128. It explained that the GDC's fitness to practise function was by far the most costly element of its work. On average, for complaints that went to a fitness to practise hearing, the average cost of the hearing process itself was £78,000 each. Since 2010, when the annual retention fee had last been increased, there had been a 110 percent increase in the number of complaints from patients and members of the public, employers, other registrants and the police about GDC registrants. As a result, the GDC needed additional funds to investigate these complaints and where necessary to bring fitness to practise cases involving dentists and dental care professionals. If it did not have sufficient funds to bring these cases it would fail in its duty to protect patients and the public. In total it estimated that it would need to collect an extra £18 million in fee income on 2010 figures to allow it to deal with the extra volume of complaints and fitness to practise hearings anticipated in 2014 and 2015.
 21. The consultation document contained a Table 2. The introductory text to the table stated that it set out the number of complaints and the number of hearings since 2010, and the predictions for 2014 and 2015 based on trends. The number of hearings held in 2013 and the number of hearings predicted in the future had increased faster than the number of complaints received.

"The significant increase in hearings predicted in 2014 and 2015 was due to a drive to process cases on a more timely basis, the need to clear a backlog of cases and the time lag from the date of a complaint being received by us and the point at which it is heard by a Fitness to Practise committee."

Table 2 was as follows:

Table 2: The number of complaints and the number of hearings

	2010	2011	2012	2013	2014	2015
Number of complaints received	1401	1578	2278	2990	3500	4000
% increase of complaints on previous year	N/A	13%	44%	31%	17%	13%
Number of FTP hearings	139	134	149	160	296	638
% increase in FTP hearings on previous year	N/A	-4%	11%	7%	85%	116%

22. In addition, the consultation document addressed the question whether the GDC could use financial reserves to reduce the funding gap. The document acknowledged that it had used reserves to reduce the gap between its income and expenditure over the past three years, but observed that the current level of reserves was not large enough to reduce the projected funding gap and, unless the GDC increased the annual retention fee, reserve levels were likely to sink “below prudent levels”.

Aftermath of consultation

23. Three weeks into the consultation, on 24 July 2014, the claimant sent a pre-action protocol letter. It asserted that there was plainly insufficient information from the consultation document and publicly available materials for consultees to understand how the 2015 suggested fee increase related to the annual cost for 2015 of providing professional regulation. The consultation document contained predictions “based on current trends” but there was no reliable current trend information available to support the percentage increase suggested. It was wholly unexplained why a 17 percent increase in complaints over the previous year, 2014, should result in an 85 percent increase in fitness to practise hearings for that year compared with the previous year, or that a 13 percent predicted increase in hearings for 2015 should result in a 116 percent increase in such hearings on the previous year. An exponential increase in hearings in relation to a relatively modest increase in complaints required a full and proper explanation since the cause of the increase may be that cases were wrongly being referred to expensive hearings which should have been resolved at an earlier stage of the complaint process. A freedom of information request was included.
24. The GDC’s response to the claimant’s freedom of information request came on 12 August 2014. To the claimant’s question about the higher than previous rates at which complaints became fitness to practise cases, the GDC said that it was for the claimant to specify what it meant by that question. The response to a question about the reasoning behind projected complaints and fitness to practise cases, and any change in conversion rates, was as follows: “As stated on page three of the Consultation, there was a 110 percent increase in incoming complaints received between 2010 and 2013.”

25. The claimant had engaged FTI Consulting LLP to assist its examination of the GDC case. It reported in early September 2014. FTI concluded that further information was required, including a detailed explanation of the estimates of the number of fitness to practise hearings. Moreover, consultees would also require information sufficient to enable them to understand how the GDC's estimate of the number of complaints it received translated over time into hearings. There was insufficient information, said FTI, as to whether the GDC could set a lower fee for the time being and keep the situation under review.
26. There were 4474 respondents to the consultations, 85 percent being dentists. Of the 4408 who replied to the question: "is there any other information you think would be useful?", 2927 answered "Yes". The claimant responded formally to the consultation on 4 September 2014, the last day of the consultation period. It enclosed a copy of the FTI report and underlined the need for more information. Unless the GDC had considered that additional information, it asserted, the GDC would not be able to consider conscientiously the consultees' responses.
27. In a press release on 11 September 2014 the GDC stated that it had been testing its assumptions and calculations on the most up to date information on trends in the fitness to practise caseload. It also announced that it had commissioned KPMG to review the full range of assumptions underlying the proposal to raise the annual retention fee. KPMG would focus in particular on the projected fitness to practise caseload.
28. As a result the claimant requested that consultees have a further opportunity to respond. On 2 October 2014 the GDC through its lawyers stated that fairness did not require it to re-open the consultation. The GDC sent a specific response to the claimant on 23 October 2014, purporting to meet the points raised.
29. Meanwhile, KPMG reported to the GDC on 17 October 2014. Overall, it concluded that the GDC's assumptions were within a reasonable range. The assumption that the referrals to fitness to practise would increase to 3000 in 2014, and 3500 in 2015, was balanced, in that it was within the standard deviation of the past trend from January 2011. The GDC had been optimistic in estimating that 30 percent of cases would be closed at the triage stage, and 54 percent at the assessment stage, although the latter was not outside the standard deviation of the trend line in the figures. Although there was only data for 2013, the GDC estimate of 49 percent of cases being closed at the Investigation Committee stage was within the trend line. However, KPMG concluded that the GDC had been too prudent in its estimation that at the assessment stage 30 percent of backlog cases would be closed, and 40 percent at the Investigation Committee stage. Its estimate was that the respective figures were 47 percent and 55 percent respectively.
30. On 30 October 2014 the GDC decided that the retention fee for dentists for 2015 should be £890 and for dental care professionals, £116. One reason that the amounts were lower than those proposed in the consultation document was that the GDC had reduced its estimates of the number of complaints received in 2016 and 2017. The GDC restated that the primary driver for the increase in operational expenditure was the increase in complaints about the fitness to practise of dental professionals, mainly dentists.

Failure to consult

31. The claimant's case is that fairness demanded that the GDC give sufficient information to consultees on the annual retention fee to test the validity of the suggested increase. In its submission insufficient information was provided by the GDC despite its clear policy to be transparent about its calculations. Therefore the decision which was purportedly based on the consultation should be quashed. The consultation document misleadingly implied that the fee increase was the inevitable consequence of the asserted rise in complaints and that there were no alternatives to the fee increase. By not disclosing adequate information the GDC avoided consultation on the key assumptions underlying the suggested increase and whether they were valid, or whether there were alternatives to the fee increase proposal. The GDC has accordingly disappointed the claimant's procedural legitimate expectation. R (Moseley) v Haringey [2014] UKSC 56; [2014] 1 WLR 3947 and various other authorities were invoked in support.
32. In reply the GDC contended that the starting point for considering the merits of this challenge was that the level of the annual retention fee fell to be set, and was set, by reference to a lawful policy. That policy rejected income banding and a flat fee for all registrants, including dental care professionals. Thus the GDC had limited options. The GDC undertook a consultation regarding the level of the annual retention fee for 2015 against this background of a thorough and fair consultation regarding the policy for setting it, and applied that policy. The GDC then conscientiously took into account the product of the consultation before reaching its decision. There was the clear fact that in 2010 the GDC received 1,401 complaints but that figure had risen every year since, reaching 2,990 complaints in 2013. The rise had resulted in a backlog of complaints. As a result the Professional Standards Authority had warned the GDC that it was not meeting the requisite regulatory standards.
33. Moreover, the GDC did not have the option to increase its funding by other means, or to reduce expenditure on services provided on a discretionary basis. Nor was it open to the GDC to fund its expenditure by taking money from the pension fund. The only option, other than raising the annual retention fee, was to borrow from reserves. That was specifically flagged in the consultation paper, whilst making clear that borrowing from reserves alone could not plug the gap. In fact following the consultation, the GDC decided to set the annual retention fee for 2015 at a lower level than that consulted upon. In doing so, the GDC conscientiously took into account the consultation responses. It also instructed KPMG to test its assumptions, revised its budget by reference to updated information, applied the policy and made a decision to set the fee at a level which would reduce reserves lower than the reserves policy dictated. When available the KPMG's analysis was that on the whole the GDC's approach could be supported.
34. One thing to me is clear: the impact of this decision is not such that the common law duty of fairness would impose a duty to consult. As Ms Steyn QC for the GDC pointed out, the impact of the GDC's decision on dentists does not bear comparison with cases such as R v Devon Council ex parte Baker [1995] 1 All ER 73, regarding the closure of the residential home in which the claimant lived, or R (London Criminal Solicitors Association and Criminal Law Solicitors Association) v Lord Chancellor [2014] EWHC 3020, where the decision was likely to have the effect that

solicitors firms would have to close, individual solicitors would lose their jobs, and access to justice in the criminal field would be imperiled: [35], [37]. This is more analogous to the situation in R (on the application of British Medical Association) v General Medical Council [2008] EWHC 2602 (Admin), where the General Medical Council was held not to have acted unfairly in abolishing, without consulting those affected, a concession to doctors over 65 that they not pay any fee to remain on the medical register. One aspect of Burnett J's reasoning was that the impact of the change in monetary terms was not, in truth, profound: [89].

35. Mr Havers QC tried to avoid this difficulty by focusing on the global impact, that there would be an additional levy on dental professionals of £18 million for 2014-2015, and overall some £45.1million over three years, approximately an additional £15million per year. In my view the relevant impact is that on the individual consultee. As Ms Steyn QC pointed out, the decision has the effect that, depending on whether they are within the higher rate tax band, dentists will have to pay either £251.20 or £188.40 p.a. (net of tax) more than last year. (The evidence before me is that registrants who are dentists will have earnings that put them in the higher rate tax band.) The impact of this decision on dentists gets nowhere near requiring, as a matter of common law fairness, that they be consulted.
36. However, and to its credit, a constant theme of the GDC's public announcements has been a commitment to a transparent consultation. Thus in its report on the annual retention fee policy consultation, the GDC said that it was clear that there were a number of important areas that needed to be kept under review, including ensuring that it was transparent in providing financial information. To my mind specific public announcements such as this gave rise to a legitimate expectation among registrants that a transparent consultation would be conducted. A transparent consultation meant that consultees had to be put in a position to test the validity of the assumptions purporting to underlie the suggested fee increase, and why alternatives had been rejected, and to enable consultees to make an informed and intelligent response and, if minded to do so, propose alternatives. Importantly, as in Eisai Ltd v National Institute for Health and Clinical Excellence (NICE) [2008] EWCA Civ 438; [2008] LS Law Medical 333; (2008) 101 BMLR 26, there was a need if the consultation was to be fair to provide enough information to the consultees to enable them to test the robustness or reliability of the model behind what was being presented: [36].
37. I accept that what needs to be consulted about is very much a matter for the judgment of the body carrying it out, and that the courts will accord it a very broad discretion: Devon County Council v Secretary of State for Communities and Local Government [2010] EWHC 1456 (Admin), [68]. In my judgment, however, there was a gaping hole in the GDC annual retention fee consultation. That was the lack of any explanation as to the assumption that an increase in complaints would translate into such a substantially increased number of fitness to practise hearings requiring an extra £18million funding. This failure was most graphically illustrated in Table 2 of the consultation document, set out earlier in the judgment, with its projected exponential rise in the number of fitness to practise hearings. The prediction in the consultation document was for the number of hearings to increase from an average of 146 fitness to practise hearings a year over the three years 2010-2013, to more than double that in 2014, and nearly 4.5 times that number in 2015. There is no explanation in the text accompanying that table, except for non-specific references to time lags and the

backlog, which grapples with why this should be the case. The backlog justification did not jell with the 20 February 2014 £400,000 cost estimates of dealing with the backlog, even if that did not cover all aspects of running fitness to practise hearings. The GDC's answer to the freedom of information request which attempted to explore the issue further was distinctly unhelpful.

38. In my judgment this substantially increased projection of the number of fitness to practise hearings clearly required a transparent explanation and adequate information as to how it was calculated. It is common ground that fitness to practise hearings are the main driver of costs. I accept the claimant's submission that it was difficult to see how consultees could express an intelligent view on the proposed increases in the annual retention fee unless they had some idea of what information the very substantial projected increase in fitness to practise hearings was based on. None of the key information as regards closure rates and fitness to practise trend information was disclosed as part of the consultation.
39. Ms Steyn QC points to the previous consultation on policy and to the conscientious manner in which it was conducted. But that cannot affect the fairness of the consultation on the fee level itself. She also highlights the subsequent KPMG report, which found that the GDC was on the whole correct in the assumptions it had used. I note in passing that the KPMG conclusions were based on very limited data. For example, there was no analysis of how complaints made in one year might not be disposed of in that year and of when and at what point in the process they are resolved. For present purposes the crucial fact is that none of the KPMG information was provided in the consultation process itself.
40. It was necessary to a proper assessment of the reliability of the calculations purporting to justify increases in the annual retention fee that that type of information should have been provided in the consultation itself. I fully accept that the court should not pore over consultation documents and find unfairness because of occasional or less important gaps in information. In this case, however, the gap was fundamental to the whole edifice. In the result, the consultation was not transparent and was thus unlawful. It did not explain the position in clear and accessible terms, enabling consultees to provide intelligent and informed responses.

Re-consultation

41. In R (on the application of Elphinstone) v Westminster City Council [2008] EWHC 1287 (Admin), Kenneth Parker J (as he now is) referred to the test for re-consultation Silber J had stated in R (Smith) v East Kent National Health Service Trust [2002] EWHC 2640 (Admin), that the test was whether a later change in the proposal was fundamental. If it was, the consultation was flawed and there would need to be further consultation before a lawful decision could be taken: [45]. Kenneth Parker J said this:

“[62] Given the context, and the underlying principle of fairness that governs the caselaw on consultation, it seems to me that a fundamental change is a change of such a kind that it would be conspicuously unfair for the decision-maker to proceed without having given consultees a further opportunity to make representations about the proposal as so changed.”

42. Mr Havers QC advanced the case for re-consultation majoring on the significant number of consultees who said that they needed more information to respond. In any event, he submitted, there plainly had been a fundamental change of position in that the key premise of the consultation had gone, namely, that past increased complaint levels would continue and inexorably lead to future increased fitness to practise hearings. Moreover, the figures the GDC used had so radically changed over time, and the basis for the increase with it, that a further period of consultation was required. This problem may have been cured had the GDC reopened the consultation period on 18 September 2014 and disclosed the full information the claimant requested which it has provided to KPMG and the key information requested, but it did not do so.
43. In my judgment there was not the fundamental change, as Kenneth Parker J characterised it in Elphinstone, which meant it was conspicuously unfair not to re-consult. I accept Ms Steyn QC's submission that in as much as there was a change in the proposals consulted on in the estimates of future complaints considered on 30 October 2014 it was a change to lessen the increase, to the registrants' benefit. It was not unfair to proceed without re-consulting on the lower levels of increase put before the Council of the GDC for decision on that date. I also take the view that the KPMG report did not reflect any fundamental change. However limited in scope its analysis was, the KPMG report was generally supportive of the GDC's case that the assumptions and forecasts which fed into the consultation were reasonable.

Conclusion

44. I grant permission and declare that the annual retention fee consultation was unlawful. I will hear submissions as to whether any other form of relief should be granted.

