

Defendant states in the Acknowledgement of Service that the documents created by Mr Smalley and [REDACTED] after the latter's complaint was made in 2008 is "obviously the 'written evidence' to which the FTP Tribunal was referring in its decision" (para 23).

2. The fact that the only written evidence that exists in this case was created after the event is the reason why there cannot be a fair hearing. Instead the Panel has apparently relied on it as the only reason why a fair trial is possible. That is the stark irrationality of the Panel's decision.
3. In *Gibson* (a judicial review in like procedural circumstances to this application; and where permission was granted and the claim heard in full by Elias J) there was no prejudice because there was real evidence: see para 18(a) of the Grounds. There are no 'slides', medical notes, letters or any other pieces of contemporary real evidence in this case.
4. The allegations centre on what Mr Smalley said to [REDACTED] or did or did not do in [REDACTED] presence between February 2006 and November 2007. Memories of what happened 4 to almost 6 years ago are inherently unreliable. Mr Smalley should not have his professional standing put in the balance on the basis of unreliable memories.
5. By way of example Mr Smalley is accused of pursuing a therapeutic approach which was not indicated for the treatment of [REDACTED]. If this were a clinical case, one would examine the medical records, the medical

correspondence and obtain expert reports. Psychotherapy is an oral therapy. There is no record of the therapy. Mr Smalley is being challenged to recall what he said to ██████████ and why he said it during 36 sessions of therapy over 18 months, up to 6 years ago. If this complaint had been heard within 12 months of the therapy, then a fair hearing might have been possible. The prejudice is obvious and no fair hearing can be held.

Delay

6. This claim is not late. The Panel's reasons were received on 12th July 2011 and this claim was issued within 3 months of that date. No reasons were given by the Panel at end of the oral hearing on 2nd June 2011 and time cannot run from that date. The Panel's reasons were received 5 weeks after the hearing, later than promised. The letter before action was sent within one month of receipt of the Panel's reasons during the summer vacation on 12th August 2011 [46]. There was pre-action correspondence in compliance with the Pre-Action Protocol between the parties until 30th September 2011 [66] including in relation to whether or not a constructive dialogue was a possible alternative means of resolution to this claim. Once that prospect diminished, this claim was promptly issued on 10th October 2011. As Brooke J said in *R v Borough of Milton Keynes ex parte Macklen* (30th April 1996, unreported) if parties comply with pre-action procedures there "*would surely be little danger of the application for judicial review being turned down on the*

grounds of delay, because the Applicant had followed the very desirable procedure of seeking to have the dispute resolved by other means”.

Summary

7. Permission is sought to proceed so that the Court can give anxious scrutiny as to the question of whether it should intervene to prevent the possibility of Mr Smalley's professional standing and livelihood being taken away in circumstances of serious prejudice. It is not usually proper to interrupt disciplinary proceedings in this manner, but sometimes it is justified to prevent a miscarriage of justice, as was recognised by Carnwath LJ in *Mahfouz* (see para 10 of the Grounds). The Claimant should be permitted a fair opportunity to make his case as to why the proceedings against him should not continue. Far better to halt unfair proceedings, than to let them continue merely on grounds of expedition.

8. For all the reasons set out in the Grounds and above, this is a claim with a real prospect of success which it is submitted this Court should permit to have the benefit of a full hearing.

ADAM HEPPINSTALL

Henderson Chambers
2 Harcourt Buildings
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