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Re: Professional Standards Authority for Health and Social Care v General Medical Council [2014] EWHC 1903 Admin

Background

The Professional Standards Authority for Health and Social Care (PSA) appealed under Section 29 of the National Health Service Reform and Health Professionals Act 2002 against a decision of the Fitness to Practise Panel of the Medical Practitioners Tribunal Service in relation to Dr Nergui made on 9 September 2013 which determined that the doctor's fitness to practise was not impaired.

The Respondents to the appeal were the General Medical Council (GMC) and the Registrant, Dr Nergui, who was the subject matter of the fitness to practise proceedings.

Appeal

The appeal was considered by Mr Justice Ouseley on 22 May 2014. He confirmed that the case raised issues about the appropriate approach to be adopted by a Fitness to Practise Panel (Panel) to what, as far as the evidence in the case showed, is a new form of psychiatric 'offer' in a website online diary or blog.

The Judge set out the background to the case (paragraphs 3 to 21). In summary, Dr Nergui set up a website www.neurofeedback-scotland.com in which he set out his biography, his career in the practice of psychiatry, (including where he had practised). He developed this website for a variety of reasons, including for his own personal development and a desire to assist.

The website was developed from about 2010, but the period with which the proceedings before the Panel were concerned related to the period 19 February to 14 April 2012 (before a disclaimer was added to the website in May 2012).

The Judge provided details of the website (paragraphs 5 to 8) including the disclaimer which was posted by Dr Nergui in May 2012 following the complaint from a user, Patient A which had led to an investigation by the GMC.

The allegations which Dr Nergui faced included that he responded to Patient A with a philosophical style answer which risked misinterpretation together with five schedules relating to a number of answers which he had provided to those questions raised by writing on the blog.

Schedule A (paragraph 11) concerned cases in which he failed to recommend that the user see a doctor or psychiatrist.

Schedule B (paragraph 12) related to occasions 'in which you did not address the users' particular needs'.

Schedule C (paragraph 13) related to those in which 'you failed to recommend that the user attend the course of counselling/ psychotherapy'.

Schedule D (paragraph 13) related to those occasions in which 'you failed to request further information from the user to a view to determining a diagnosis.'

Schedule E (paragraph 13) concerned 18 cases in which it was said that the advice was 'philosophical rather than psychiatric in nature'.

As the Judge noted (paragraphs 10 to 13), a number of the matters were found not proved.

Dr Nergui did not dispute that he operated the website and there was no issue but that he had given the answers which were found on the blog.

However, the Judge noted that the GMC called an expert who was accepted to be an expert in the field of what the Panel called 'conventional psychiatry', but it said, as he did not dispute, that he had 'no experience of psychiatry delivered via the medium of the Internet'. (paragraph 16). The Panel also noted that Dr B openly disapproved of such a practice which they thought could amount to bias and accordingly accepted his advice in relation to conventional psychiatry, but 'treated his evidence in relation to online matters with a degree of reserve' (paragraph 16).

Details of the Panel's findings are set out together with a summary of the factual findings.

The question with which the Panel had regard: 'was the "online psychiatrist blog" a medical practice?'

Mr Justice Ouseley noted that the second to fourth grounds of the appeal related the fact that the Panel had misdirected itself as to the meaning of 'misconduct' focussing on what was the narrow issue of whether the psychiatric blog was a medical practice rather than

on the wider question of whether what was done by Dr Nergui was in the exercise of professional practice or in the exercise of a doctor's medical calling (paragraph 22). The Panel also wrongly failed to have regard to the expectations of users of the website and misdirected itself in its use of guidance contained in the Good Medical Practice (GMP) (paragraph 23).

The Judge noted that in respect of the three grounds relating to those matters the GMC supported the PSA and accepted that the Panel erred in those respects; indeed it went to the extent of urging the Judge to substitute a finding of misconduct for the finding of the Panel (paragraph 24).

Ground 5 of the appeal related to the inadequacy of the reasons of the Panel but Counsel for the PSA and GMC confirmed that this did not add significantly to the other grounds if they were made out (paragraph 25).

The Judge went on to consider the first ground of appeal which is where there was an issue between the PSA and the GMC. That ground (paragraph 26) was that the Panel had adopted an unduly restricted approach to the meaning of the allegation in charge 3b (referred to in paragraph 18) confining itself simply to the question of whether there was or was not an answer to the question posed, ignoring whether the answer dealt with the question to the required professional standard.

Mt Justice Ouseley noted that Dr Nergui appeared on his own behalf at the appeal to contend that all grounds should be dismissed. He then confirmed that central to the whole debate was what form of regulation, if any, applied to the blog. The debate seemed to revolve around a distinction between 'conventional medical practice' and online medical practice' in relation to psychiatry (paragraph 28).

For the purposes of considering the issue Mr Justice Ouseley determined it necessary to refer briefly to a few passages of evidence (paragraphs 29 to 33).

He then set out the powers of the Court in relation to an appeal (paragraphs 34 to 38).

He also looked at what constitutes 'misconduct' as the issue had 'loomed large' in the debate about the lawfulness of the Panel's approach (paragraphs 39 to 42).

The Judge then turned to the first issue which was the Panel's approach to the question of whether the online psychiatrist blog was a medical practice. He observed, at the outset of this consideration, that:

'that is too limited a question for the Panel to ask in relation to an issue of misconduct. The questions that it had to ask were those expressed by Elias LJ. The Panel had to ask itself whether the conduct was in the exercise of professional practice, going to fitness to practise. Even if it did not arise in

the context of a clinical practice, it had to be asked whether it was in the exercise of the doctor's medical calling. A related way of putting it is whether the registrant had assumed any responsibility for medical care. Those questions were not asked' (paragraph 43).

The Judge goes on to say (paragraph 44):

'Even on the limited approach which the Panel adopted, asking whether the registrant was engaged in medical practice, it is clear that the Panel erred. There was throughout the registrant's evidence and submission and manifest in his answers to me an internal contradiction in his approach which on the face of its reasoning has also affected the Panel. "Online psychiatric practice" is a notion of the Panel's devising as a means of describing what the registrant did. But medical practice is not confined to a "conventional medical practice" - another term brought in for the purpose of this case for medicine practised in a traditional doctor patient face-to-face relationship'.

The Judge noted as Counsel for the PSA submitted that even on the narrow approach, the question was whether there was a medical practice based upon the provision of medical advice by someone acting in the exercise of his calling. The distinction between two types of practice, 'conventional' and 'online', is not required for the assessment what constitutes misconduct (paragraph 45).

The Judge goes on that in any event the distinction is a false one (paragraph 46):

'It cannot be the case that when, as here, a qualified psychiatrist sets out to offer advice as a qualified psychiatrist, although it is described as help and assistance, in response to those who write questions seeking advice and help as to what to do, that person is not engaged in medical practice. It is not conventional, in the sense that because it is done online there are certain limitations as to what can be done. But even on the basis of what the registrant did here, he clearly offered advice and forms of treatment, even if just reading a book, which showed that he was engaged in a form of medical practice'.

Mr Justice Ouseley goes on to say (paragraph 48):

'But in my judgment what he was actually doing on the blog as a psychiatrist, presenting himself as a psychiatrist providing answers to vulnerable people, shows quite clearly that he was engaged in medical practice, and even if not he was clearly engaged in the exercise of a doctor's calling. The findings of the Panel in this respect are, with all respect to them wholly internally contradictory. A practice does not cease to be a practice because it is unable wholly to comply with the requirements of good or "conventional practice.'

The Judge then considered the second ground which concerned the way in which it was said that the Panel wrongly failed to have regard to the expectation of users (paragraph 49).

The Judge considered it was wrong for the Panel to have treated the fact that an unknown number of people would have been unaware of the significance of the limitations imposed in using an online blog as being irrelevant. He also noted that the Panel had no evidence that the numbers that were in that situation beyond a 'speculation'. The Judge confirmed (paragraph 50):

'It was for them to assess the risk that those accessing this service would be unable to appreciate the full extent of the limitations. The disclaimer subsequently added, which Dr Nergui accepts should have been provided earlier, speaks volumes and ought to have spoken volumes to the Panel about the potential problems faced by what it regarded as a small fraction of users. But it does go beyond that.'

The Judge also considered (paragraph 51):

'There is a responsibility owed to those who seek advice in this way by the doctor, for qualifying the views and advice given and on which the doctor can properly expect that they would act. There is an assumption of responsibility in relation to anyone who asks for the advice of a qualified psychiatrist in that way. If the practice is to be done at all, it has to be done not just on the transparent basis that Dr Nergui referred to, where he made his own background clear, but with a very clear statement as to the limitations that applied to anyone accessing advice in that way. The FTP Panel failed to consider those aspects of the operation of the blog. That was a serious failing on their part.'

The Judge confirmed (paragraph 52) the decision of the Panel that GMP could not apply because the blog was not medical practice was wrong. He went on to say that the approach thereafter followed by the Panel emphasised the contradiction in their approach. The Panel had no need to consider the question of guidance in the GMP on the basis of its conclusion that this was not a medical practice. However, they still went on to consider it, albeit very shortly.

In the Judge's view there are a number of principles which ought to have been considered to see whether they had relevance in the situation. The GMC submitted that there might be elements fundamentally incompatible with the GMC and Good Medical Practice in various ways including reference to paragraph 57 which required the registrant to ensure that his conduct at all times justified 'the patient's trust in you and the public trust in the profession' (paragraph 52).

The Judge accepted that it was a very significant problem where a qualified psychiatrist gave assistance online, without setting out very clearly what the limitations of the nature of the process were on the quality of the advice, diagnosis and treatment which could be offered (paragraph 53). In the circumstances, the Judge quashed the decision of the Panel (paragraph 55). However, he then turned to the specifics in relation to ground one and the over technical approach adopted by the Panel in relation to allegation 3b in that they had simply considered a question of fact as to what was done or not done as opposed to also considering any 'culpability attendant' on that (paragraph 56).

Mr Justice Ouseley confirmed it was clear that the Panel had adopted an over technical approach (paragraph 57). However, Counsel for the GMC persuaded the Judge that that would not be a ground of quashing in this case because of a very high overlap between allegations in 3b in relation to failing to answer a question and the specific failings alleged, failing to recommend that the questioner go to a psychiatrist or counselling and therapy.

The Judge then determined that the question which arose in view of the conclusion which he had reached in relation to errors of approach of the Panel was whether or not to accede to the submissions of Counsel for the PSA and GMC and substitute a finding of misconduct (paragraph 61).

Mr Justice Ouseley confirmed that he was satisfied that the decision of the Panel was wrong in not finding misconduct. There were sufficient serious incidents, in the context of the absence of a clear statement of the limitations, to warrant that conclusion (paragraph 66).

In the circumstances, the Judge directed that the matter be remitted to a fresh Panel for it to consider the question of impairment.

Salient Points

- In considering the issue of misconduct a Panel should focus on whether the conduct was in the exercise of professional practice or part of a doctor's calling and not whether it amounted to medical practice.
- Reminder that doctors providing medical advice or discussing medical matters online must be alive to the need to ensure that potential users are aware of the limitations of that advice/comment and that they are subject to the GMC's guidance.

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