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To: Medical Practitioner Tribunal members
Legal Assessors

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Brookman v General Medical Council [2017] EWHC 2400 (Admin)

Learning Points

- If a Tribunal has concerns about whether a doctor's health may impact on
 - his/her ability to attend or represent him/herself at the hearing, or
 - on its findings on misconduct and/or impairment,it should consider obtaining further evidence about the doctor's health (which may include adjourning for a health assessment) before deciding whether or not to continue with the hearing or to make its findings.
- If further health evidence is obtained a Tribunal must ensure that it fully addresses any concerns raised.
- If a Tribunal decides to continue despite concerns about a doctor's health, it must give full reasons for that decision and any decision it makes on facts, impairment and sanction insofar as the health issues may be relevant to its consideration of those issues.

Background

This was an appeal by a doctor, Dr Michael Brookman, against the decision dated 21 February 2017 of a Medical Practitioners Tribunal ('the Tribunal') of the Medical Practitioners Tribunal Service ('the MPTS') to erase his name from the register of medical practitioners and that he be subject to immediate suspension.

The allegations against Dr Brookman were:

1. that he was impaired by reason of misconduct in that he:
 - had carried out an inappropriate and sexually motivated examination of a female patient at the hospital where he had been working in October 2013 ('the patient allegation'). The Tribunal rejected all significant allegations made by the patient;
 - was dismissed from his post as a lecturer at Bournemouth University in around January 2016, as a result of complaints made from students and following a subsequent investigation ('the Bournemouth allegation'). The Tribunal found that the matters arising in the Bournemouth allegation did not amount to misconduct;
 - failed to notify a locum agency with whom he was registered and Dartford and Gravesham NHS Trust ('the Trust'), where he worked at the time, and was to commence a new locum post in the Urology Department the following day, about the conditions imposed on 1 July 2014 by the IOT;
 - failed to inform Swansea University (in his applications in February 2016, or otherwise) about both his employment at Bournemouth University and the reasons the IOT conditions were imposed and maintained (which included allegations against him regarding his probity).
2. that he was impaired by reason of adverse physical or mental health.

Dr Brookman attended for stage one of the hearing in October 2016 but was unrepresented, save for the cross-examination of the patient, which was carried out by counsel appointed by the MPTS. The hearing resumed in February 2017 for the Tribunal to deliver its factual findings and to consider impairment and sanction, as appropriate.

In February 2017, Dr Brookman indicated by email to the MPTS that he would not be attending the remainder of the hearing as he was unable to afford to do so. The Tribunal decided that it was appropriate to proceed in his absence, but arrangements were made for Dr Brookman to be sent the Tribunal's determinations of the factual allegations and on impairment and he was provided with some time to send written submissions on impairment and on sanction, in response to each determination. Dr Brookman did not make any further submissions.

The Tribunal considered that Dr Brookman's failure to notify the locum agency and Trust of the conditions imposed by the IOT, and Swansea University of his

employment at Bournemouth and the reasons for the IOT's imposition of conditions, amounted to misleading and dishonest conduct. They found the misconduct was sufficiently serious to warrant a finding that his fitness to practise was impaired by reason of misconduct and ultimately erased Dr Brookman from the register (on the basis of the misconduct alone) and immediately suspended him.

The Tribunal also found that Dr Brookman was impaired by reason of adverse physical or mental health.

Grounds of Appeal

Mr Justice Holgate said that the grounds of appeal in the case, which were submitted by Counsel on behalf of Dr Brookman, were not clear, but in summary were:

1. The Tribunal's factual findings were perverse or tainted by other legal error;
2. The Tribunal should not have made any factual findings or reached conclusions on misconduct, impairment of fitness to practise and sanction without an up to date health assessment;
3. The Tribunal misdirected itself as to the correct approach to dishonesty;
4. The Tribunal acted unfairly, in the second and third stages of proceedings, by refusing to permit Dr Brookman's participation by Skype or a telephone link and/or in giving him insufficient time to make written representations;
5. The Tribunal treated dishonesty too seriously, by assuming that it always amounts to (a) misconduct and (b) impairment and (c) justifies erasure except in exceptional circumstances. The Tribunal also failed to take into account relevant mitigating factors;
6. The Tribunal had insufficient up to date information as to A's health to find him impaired by reason of his health;
7. The Tribunal's erred in its conclusions on sanction;
8. The Tribunal was wrong to impose an immediate suspension order.

Judgment

Mr Justice Holgate found it preferable and logical to deal with ground 2 before the other grounds.

Ground 2

1. In 2013 Dr Brookman had been diagnosed as suffering from depression and had since then been taking anti-depressant drugs.

2. Dr Brookman gave evidence during the hearing which included the following:
 - a. "My pills mean that I do not care about things that I need to care about...";
 - b. by the time of the hearing he was taking a lower dose and that had reduced his recklessness;
 - c. in relation to his awareness of the IOT conditions "he had put to one side and left to a later date almost everything to do with the GMC" and that he associated this behaviour with his anti-depressant medication;
 - d. that the medication had made him "not anxious about things and care less about less important matters" [para 65];
 - e. when his medication was changed to citalopram in 2013 he found that he ceased to worry about things. He had become blasé about correspondence from the GMC. The only thing that he had really been concerned about was to clear his name in relation to the allegation of impropriety by the patient. He had not been concerned about the conditions [para 66].
3. On Day 9 of the hearing, and partly as a result of some of Dr Brookman's evidence as referred to above, the Tribunal itself raised the following concerns:
 - a. potential impact of medication on Dr Brookman's decision-making now, and in the last three years;
 - b. potential dependence on medication;
 - c. potential impact of stopping medication;
 - d. impact of stress on mental health;
 - e. impact of Dr Brookman working one day a week as an F1 doctor, whilst also working as a lecturer; and
 - f. assessment of potential autistic tendencies.
4. The Tribunal was concerned that it was going to have to determine a number of dishonesty allegations and that they were not confident that Dr Brookman had fully grasped the seriousness of those allegations and the possible consequences for him.
5. Evidence about Dr Brookman's health (in relation to the allegation of impairment by reason of adverse health) had been given by two consultant psychiatrists, Dr Briscoe and Dr Bickerton, whose reports were dated 26 May 2016 and 14 June 2016 respectively. However, the Tribunal did not consider that that evidence resolved the concerns it subsequently raised, and as detailed above [para 64], in particular the medication Dr Brookman was on and the impact of it.

6. The Tribunal considered submissions on whether or not to adjourn for a further health assessment under Rule 17(7) of the General Medical Council (Fitness to Practise) Rules 2004 ('the 2004 Rules'). The GMC submitted that a health assessment was not necessary and the Tribunal could instead put further questions to Dr Briscoe. However, the GMC submissions "did not make any attempt to tackle the effect of medication on conduct around July 2014.... or indeed the effect of the medication he was taking during the hearing before the Tribunal....which had not even been considered in the evidence submitted by the GMC" [para 69].
7. The Tribunal decided that Dr Briscoe should be recalled to answer further questions. In his additional evidence Dr Briscoe:
 - a. suggested Dr Brookman required further assessment to consider his mental health over a period of time whether there had been changes indicating illness or alternatively a personality disorder. But either would "affect" his ability to represent himself adequately [para 74];
 - b. accepted that a possible side effect of citalopram could be ignoring things that are important;
 - c. could not give an opinion over the telephone as to whether this side effect would render Dr Brookman incompetent to defend himself, but he would nonetheless be very worried about him conducting his own case, and would very strongly advise him about the wisdom of doing this, because it sounded as if he was not taking anything seriously despite the seriousness of the proceedings;
 - d. said that he had not seen any overt signs of autistic spectrum in Dr Brookman;
 - e. said to determine whether Dr Brookman has autistic spectrum disorder it would be necessary for a skilled clinical psychologist to carry out a "fairly lengthy battery of tests". He then gave evidence on whether autistic tendencies would affect Dr Brookman's judgment, but that was solely in the context of his relationship with patients, and not the allegations concerned with non-disclosure and dishonesty;
 - f. said that in light of additional information he had heard he was now of the opinion that Dr Brookman would benefit from "further psychiatric evaluation";
 - g. in re-examination by the GMC said that Dr Brookman had not been so unwell "as to not realise that he is deceiving people or doing something wrong ... He has not lost his ability to know what is right and what is wrong" [para 77/78].

Judgment Ground 2

8. The Judge did not accept the GMC's argument that an appeal court "could not properly interfere with the Tribunal's decision because this was simply a matter of case management.....or that ground 2 merely involves a challenge to the exercise of a discretion as to whether an application for an adjournment should be granted". The Judge indicated that "the Tribunal itself was concerned about the ability of Dr Brookman to represent himself in the hearing, a point going to the fairness of the proceedings, and also the adequacy of the information before them to be able to make proper findings on a range of issues" [para 86].
9. The Judge held that the Tribunal's decision not to adjourn the hearing for a health assessment to be carried out to address the concerns it had raised was wrong and unjust because of a serious procedural irregularity by relying on:
 - a. Dr Briscoe's evidence which it said had "resolved most of its concerns" and that he did not think that Dr Brookman was suffering from any mental health condition that prevented him from knowing the difference between right and wrong at material times; and
 - b. Dr Brookman's reactions to the possibility of an adjournment for a health assessment which were that he became very concerned and, although he confirmed he would co-operate with a further health assessment, he also said that he might not feel able to participate in the remainder of the hearing. [para 84 and 90-92]
10. The Judge concluded that the Tribunal proceeded to make findings which were adverse to Dr Brookman on the non-patient allegations, misconduct, impairment of fitness to practise and sanction without having sufficient evidence to address the concerns it had correctly identified so that it was able to make proper findings. Therefore he found the Tribunal's decisions in all of those matters were "unjust" because of a procedural irregularity, namely the failure to obtain an additional health assessment, and unfair because of a failure to give adequate reasons addressing the concerns the Tribunal had raised and their implications for the findings it went on to make [para 92 and 93].
11. In upholding Ground 2, the Judge summarised the reasons why he reached his conclusions as follows [para 93]:
 - a. It was unacceptable for Dr Briscoe to be asked to give further evidence on the concerns raised without him having read the

allegations and, the relevant transcripts of the hearing when he was not in attendance. This was particularly important, because Dr Briscoe's earlier instructions had been to consider Dr Brookman's state of health at the time of his examination in May 2016, rather than at the time of the allegations;

- b. Dr Briscoe stated twice that the concerns raised by the Tribunal suggested that it was necessary for Dr Brookman's mental health to be reassessed. He did not retract that opinion;
- c. Dr Briscoe accepted that a possible side effect of the medication taken by Dr Brookman was that he could ignore things that were important. This "was plainly also relevant to the way he reacted to the imposition of the IOT's conditions". There was evidence that Dr Brookman was particularly concerned that the patient allegation would lead to his being suspended and that he was elated by the "good news" that he was not to be suspended (by the IOT). Dr Briscoe's evidence gave strong support for requiring a health assessment. Alternatively, the Tribunal failed to take this significant evidence into account in its decision or to express any reasoning on it;
- d. Dr Briscoe expressed clear concerns about Dr Brookman's ability to represent himself in the hearing and when pressed on this subject, in relation to the effect of the medication, Dr Briscoe hesitated to give an opinion over the telephone, which was another clear indication that a further health assessment was required.

The Judge said that "it would have been artificial to draw a distinction between his ability to conduct his case (eg by making submissions) and his giving evidence about the non-patient allegations" and that the evidence from Dr Briscoe about the possible effects of the medication was therefore also relevant to assessing Dr Brookman's state of mind when dealing with the non-patient misconduct allegations.

The Tribunal failed to deal with these additional strong reasons for requiring a further health assessment to be carried out both in its decision not to order that assessment and in its findings on the allegations, misconduct, impairment and sanction ('decisions and findings');

- e. Although Dr Briscoe ruled out a severe autistic syndrome, he did not rule out a milder form of autism and indicated that a diagnosis would depend upon substantial tests being carried out. He then gave some evidence in the context of the patient allegations, but not the other allegations. He did not suggest that autism would be irrelevant to the latter, instead, he said that Dr Brookman should have a further psychiatric evaluation. The Tribunal failed to deal with these matters both in its decisions and findings;
- f. The Tribunal was obviously wrong, if not irrational, to place any significant weight on, let alone pay "particular attention" to, Dr Brookman's opposition to an adjournment, as the reasons for his opposition did not address; the Tribunal's main concerns about the adequacy of the evidence on his mental health and medication, or the evidence that Dr Briscoe had just given. Dr Brookman's cross-examination of Dr Briscoe strongly suggests that he did not understand at that stage the significance of the issues which the Tribunal had raised and the real motive for his opposition to an adjournment was his strong desire to obtain a decision that week on the patient allegations. This was further evidence that he was not in a position to grasp the potential seriousness of the other allegations;
- g. The only other evidence that the Tribunal relied upon for deciding no further health assessment was required was Dr Briscoe's evidence that he did not think that Dr Brookman had been suffering from any mental condition which prevented him from knowing the difference between "right and wrong" at the relevant times. This was wholly unsatisfactory as this had only come out in re-examination (and in response to some brief cross-examination by Dr Brookman which was in itself troubling) but Dr Briscoe had not read through the allegations and he did not deal with the issue whether the medication had caused or contributed to some relevant impairment at the material time, such as a failure to appreciate the significance of his obligations under the IOT's conditions, or the wording of his emails or his reactions to others.

Dr Briscoe's evidence in re-examination did not materially detract from what he had previously said about the possible side effects of the medication and the need for a further assessment. It was inappropriate for the GMC to "cherry pick" this evidence in re-examination, and for the Tribunal to accept their submission. The

Tribunal failed to deal with these matters and the earlier evidence given by Dr Briscoe both in its decision and findings;

- h. Dr Briscoe's evidence in re-examination did not deal with the Tribunal's concern that there was a lack of information to deal with the possible effects of autism, even if not a severe condition. The Tribunal failed to deal with this point, both in its decision and findings;
- i. Having decided not to adjourn so that a further health assessment could be carried out, the Tribunal failed to take into account all or any of the points set out above when reaching any of its findings on the allegations, for example that Dr Brookman's explanations for his conduct lacked plausibility, or that he had been aware of the conditions or other "obligations" (or reckless in relation to those matters), or that he had acted deliberately and therefore dishonestly. These matters ought to have been considered when the Tribunal evaluated the evidence and gave their reasons on the main points;
- j. In any event, these errors tainted the Tribunal's findings on the extent to which Dr Brookman had shown insight into his conduct and its assessment of the risk of that conduct being repeated. As a result, the Tribunal was not in a position to apply paragraph 43 of Sanctions Guidance¹;
- k. It also follows that the Tribunal's conclusions that Dr Brookman's conduct was serious enough to amount to misconduct, that his fitness to practise was thereby impaired, and that no lesser sanction could be imposed than erasure, cannot stand;
- l. Having received evidence casting doubt on whether Dr Brookman was fit to represent himself because of the medication he was taking, the Tribunal did not revisit that issue when it reconvened in February 2017 to receive evidence and submissions on impairment and sanction.

¹ Paragraph 43 of the Sanctions Guidance states: "The tribunal should be aware that cultural differences and the doctor's circumstances (e.g. their ill health) could affect how they express insight. For example, how they frame and communicate an apology or regret."

Ground 1 and 3 -6

12. Counsel on behalf of Dr Brookman did not rely upon the issues concerning Dr Brookman's health in these grounds and so the Judge approached them as if the Tribunal were free from criticism in that respect and as if it had no impact on Dr Brookman's case before the Tribunal (although he did not consider that was the case). The Judge rejected all of those grounds.

Ground 7

13. The Judge indicated that the decision to direct erasure cannot stand [para 189]. He therefore upheld Ground 7 to the extent that the Tribunal ought explicitly to have taken into account important mitigation relied on by Dr Brookman in addition the mental health issues, evaluated and weighed them in the balance. The Judge indicated the failing to do so tainted the subsequent process of reasoning which led to the decision to direct erasure [para 186-189].

Ground 8

14. The Tribunal relied on the seriousness of Dr Brookman's misconduct and the risk of repetition, as well as the public interest considerations, when deciding to impose an order for immediate suspension. The Judge found that the conclusions he had reached in relation to Grounds 2 and 7 also tainted the Tribunal's decision to impose immediate suspension. In any event as the decision on erasure cannot stand the legal foundation for the immediate suspension is removed [para 190].

The Judge allowed the appeal under grounds 2, 7 (in part) and 8 and therefore quashed the directions for erasure and the immediate order of suspension.

After considering that some allegations were not found proved, the potential consequence of obtaining further medical evidence on the remaining allegations, the delay in bringing the initial hearing and further delay if there were to be a rehearing and the effect of that delay on Dr Brookman and his family, following agreement by the parties, the Judge decided to allow the appeal, quashed all findings of the Tribunal which were adverse to Dr Brookman as well, without remittal of the case.

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