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**Re: Dr Fazal Hussain v GMC [2014] EWCA Civ 2246**

***Background***

Dr Hussain appeared before the Fitness to Practise Panel of the Medical Practitioners' Tribunal Service ('Panel') who determined, having heard evidence over 11 days in relation to allegations of dishonesty, on 26 June 2013, that Dr Hussain's fitness to practise was impaired by reason of misconduct and his name should be erased from the medical register.

Dr Hussain appealed against the decision under s40 Medical Act 1983.

The matter was considered by His Honour Judge Bird sitting as Deputy Judge of the Administrative Court in Manchester. He dismissed Dr Hussain's appeal against the Panel's determination.

***Appeal***

Dr Hussain appealed to the Court of Appeal (Civil Division). The appeal was considered by Longmore LJ, Bean LJ and Ouseley J on 24 October 2014. The judgment was given by Bean LJ on 7 November 2014.

Bean LJ sets out the allegations against Dr Hussain which proceeded to a final determination before the Panel (paragraph 3) and confirmed (paragraph 4) that each of the allegations was found proved.

The Lord Justice then sets out details of the background to the case (paragraphs 5-28).

In summary, allegation 2 related to a CV which contained false information; allegation 4 the Multi-Source Feedback (MSF) Form, allegations 5, 6 and 7 plagiarism and allegations of dishonesty.

In relation to the issue of dishonesty Bean LJ noted that the Legal Assessor had advised the Panel on the meaning of dishonesty applying the decision of *R v Ghosh* [1982] QB 1053 (paragraph 27). Counsel for the doctor, before the Court of Appeal, took no issue with the Legal Assessor's advice in respect of dishonesty but relied on criticism made by HHJ Bird of the confusion by the Panel between 'falsity' and 'dishonesty' in respect of the CV allegation (paragraph 28).

Bean LJ summarises HHJ Bird's decision (paragraphs 29-35) setting out the Judge's conclusions in relation to the findings of fact (paragraph 29) as follows:

*'...the findings of fact made by the Panel should not be disturbed. The Panel had the benefit of hearing the evidence at first hand and were in the best position to judge which version of events in respect of each allegation they preferred. While a different Panel might have come to a different conclusion, he was unable to conclude that the findings made in respect of allegations 2, 4, 5, 6 and 7 were wrong or should be upset for some other reason. He said that the real thrust of the appeal before him was against the finding that Dr Hussain was dishonest.'*

In that regard HHJ Bird found that the Panel were entitled to conclude that Dr Hussain must himself have realised that what he was doing was dishonest. The nature of the conduct was so serious that the finding of the Panel was inevitable (paragraph 33).

In relation to the issue of plagiarism, HHJ Bird was satisfied that the Panel was entitled to conclude on the evidence that they had heard that according to the standard of reasonable and honest people, Dr Hussain's conduct in that respect was dishonest. The Judge also found that the Panel was entitled to conclude that Dr Hussain must himself have realised that what he was doing was by those standards dishonest (paragraph 35).

The grounds of appeal are set out (paragraphs 36-41).

Bean LJ noted that Counsel for the doctor stated that the Panel had conflated falsity with dishonesty in dealing with the CV allegation that it was 'inconceivable' that they did not make the same error in respect of the other charges which they found proved.

He did not accept this submission. He accepted that the word 'false' was ambiguous when used as a description of the inaccurate entries on Dr Hussain's CV but confirmed that the Panel were not faced with any such ambiguity in considering the facts of the other allegations (paragraph 37). Bean LJ then goes through each of the allegations to support his view as none turned on any ambiguity in the word 'false'.

The next ground for appeal was that, when assessing whether Dr Hussain had been subjectively dishonest when doing the acts complained of, the Panel had failed to give proper weight to his troubled state of mind arising from the death of his father very shortly after his arrival at the Settle practice (paragraph 40). Bean LJ noted that there was a simple answer in relation to this matter that grief caused by bereavement is not a defence to a charge of dishonesty. It may be mitigation, but that is a different point.

In the circumstances he said (paragraph 41):

*'In short, I conclude that given the Panel's findings of fact on allegations 4 and 7, which they were entitled to reach, their finding of dishonesty in respect of those charges was inevitable. On this basis it is unnecessary to recite the well-known authorities about the degree of deference due to the opinion of a professional disciplinary body as to what conduct is to be considered dishonest by the standards of the profession.'*

Bean LJ then goes on to deal with the challenge to the decision on impairment (paragraphs 42-43).

Counsel for the doctor stated that the Panel gave inadequate weight to the fact that the allegations related to a short, aberrant period in Dr Hussain's life in 2010 (three years before the case reached the Panel).

Bean LJ confirms (paragraph 43):

*'The question which a Fitness to Practise Panel has to answer, in a case in which they have found misconduct to have occurred, is whether (at the time of the hearing) the doctor's fitness to practise is impaired by reason of the misconduct. An aggressively run defence is not "misconduct". But the presence or absence of insight into one's failings is often relevant to whether a doctor's fitness to practise remains impaired. If Dr Hussain had immediately admitted his wrongdoing in 2010 his case might have been presented on the basis that it was a long time ago, that he had learned the error of his ways and that his fitness to practise was therefore no longer impaired. But that was*

*not what happened. On the contrary: his case to the Panel was that he had done no wrong, that Dr Hall and his colleagues were racists and that Mrs Wilson was lying as part of a "joint venture" with Dr Hall which had brought about his removal from the practice. This showed, in the words of Judge Bird, a "complete and total lack of insight" into his conduct. In those circumstances, like the judge, I consider that the Panel were entitled to find that the Appellant's fitness to practise remained impaired by reason of the misconduct which they had found proved against him.'*

Bean LJ then went on to deal with the issue of sanction (paragraphs 44-45). He sets out the well-known passage in the decision of the Judicial Committee of the Privy Council in *Gupta v GMC* [2002] 1 WLR 1699 and confirmed that, in view of the findings of dishonesty in respect of the MSF Form and *The Citadel* together with the doctor's evident lack of insight, the Panel's conclusion that erasure was the proportionate response could not be criticised. In the circumstances, he confirmed that the appeal should be dismissed.

Ouseley J and Longmore LJ agreed that the appeal should be dismissed. Ouseley J stated (paragraph 47) in relation to sanction:

*'Sanction is not a punishment. It deals with the identified problem of impaired fitness to practise by reason of misconduct. This is not a case of impairment for want of professional competence, or improper conduct towards a patient or dishonesty in relation to practice or public money. But the misconduct was founded on dishonesty towards trainers, in order to persuade them that he was making progress in his attempt to qualify as a GP, which he was not making. This demonstrated untrustworthiness was then persisted in through the Code of Conduct Panel and FTP hearings. It was compounded by serious but false allegations about doctors and staff where he has worked. This showed a total lack of insight into his earlier misconduct.'*

He goes on (paragraph 48):

*'These are circumstances which call for a difficult judgment as to sanction, where the professional judgment of the FTP has to be upheld unless clearly wrong. It is certainly a judgment to which the FTP was entitled to come, after giving it careful consideration.'*

Longmore LJ agreed with the dismissal of appeal but commented regarding the giving of the *Ghosh* direction (paragraph 51):

*'I would only add that I am a little troubled about the Ghosh direction given by the legal assessor in this case. It would have been standard in a criminal case. But this was a professional disciplinary hearing and it seems to me that in future it would be right and proper for the first part of the direction to be adapted to read that the panel should decide "whether according to the standard of reasonable and honest doctors [not people] what was done was dishonest". There may be a not unimportant difference between the two as shown by the decision of the judge in this very case.'*

### ***Salient Points***

- Reminder that allegations need to be drafted to avoid ambiguous meaning and that they should be sufficiently particularised. This is particularly important when they relate to dishonesty.
- Reminder that it is not always helpful or necessary for the Panel to ask for or be given the *Ghosh* direction when considering matters of dishonesty – see also Singh J's observation in Uddin v GMC [2012] EWHC 2669 Admin (paragraph 31).

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