

Appeals Circular A02/20

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Professional Standards Authority (PSA) v Nursing and Midwifery Council (NMC) (Lembethe and Mkhize) [2019] EWHC 3326 (Admin)

Learning Points

- ▶ When new and highly relevant evidence comes to light during a hearing, Tribunals must ensure that they assess the impact of admitting the evidence or otherwise upon the public interest, as well as any prejudice caused to the practitioner.
- ▶ Where the evidence is crucial to the issues to be determined, Tribunals must assess whether there are alternative ways to remedy any potential prejudice to practitioner, rather than excluding such evidence. For example, it may be appropriate in the circumstances to adjourn the hearing where it is necessary to give the practitioner time to consider the impact of the new evidence.

Background

This was an appeal by the PSA against the decision of a Fitness to Practise Committee ('the Committee') of the NMC in April 2019 regarding two registered nurses, L and M.

The NMC alleged that:

- ▶ L had dishonestly produced and signed a certificate indicating that M had completed an in-house basic life support training course at a nursing home in January 2017, when M had not commenced work there until February 2017;

- ▶ M had dishonestly submitted the certificate to an employment agency in January 2017.

The Committee received witness evidence from an employee of the employment agency, but their witness statement did not exhibit any email from M attaching the certificate in question. During an adjournment, the NMC was able to obtain a copy of an email dated 27/01/2017 purportedly sent by M to the employment agency with the certificate attached.

The Committee invited submissions on whether to admit the email:

- ▶ The NMC argued that the email ought to be admitted as it was clearly relevant to the allegations and would allow the Committee to make the correct decision on the facts;
- ▶ Counsel for L strongly opposed admission of the email on the basis that L would be prejudiced by the late production of the email due to having no opportunity to properly scrutinise and challenge its authenticity;
- ▶ M expressed concern about not having received the email before from the NMC.

In response to those submissions, the NMC suggested that Committee could adjourn to allow L and M to review the email and gather further evidence if they wished to do so. Counsel for L opposed an adjournment and submitted that it would be appropriate for the email evidence to be excluded.

The Committee received advice from the Legal Assessor, whose advice included the following: *'My advice would be that it is fairness really to the Registrants that needs to take particular weight in your decision because they are the ones who are subject to a dishonesty charge'*. None of the parties commented on the advice provided.

The Committee accepted the advice of the Legal Assessor and determined that it would be unfair to admit the email as it would be very difficult for L or M to challenge it. The Committee noted that the NMC had a duty to disclose material in advance of the hearing and that allowing the admission of the email at such a late stage would be wholly unfair.

In its determination on facts, the Committee found that it could not be satisfied on the balance of probabilities that the employment agency had received the certificate in January 2017, and therefore neither L nor M were found to have acted dishonestly. The Committee subsequently held that the purely factual charges admitted did not amount to misconduct.

PSA Appeal

The PSA appealed against the Committee's decision on the following grounds:

- ▶ The Committee erred in refusing to admit the email as evidence;
- ▶ The Committee's factual findings in respect of the receipt of the certificate and dishonesty were wrong;
- ▶ The manner in which the NMC had charged/prosecuted L and M meant that important aspects of their conduct had not been considered adequately or at all.

In submissions, counsel for the PSA clarified that it was asserted that the failure to obtain and exhibit evidence in good time amounted to a form of under-prosecution.

The NMC conceded the appeals. The appeal regarding M proceeded in her absence.

Judgment

The appeal was heard by Mrs Justice Steyn in November 2019, and allowed in part.

Ground one

Steyn J firstly noted that the question of whether it is fair to admit evidence is an issue of law, to be judged objectively by the Court, rather than by reference to whether the decision made by the Committee was a reasonable use of discretion, as stated in *Squier v GMC*¹ [para 55].

It was observed that the Committee's wish to proceed with the case was understandable. There had been no explanation from the NMC as to why the email had not been disclosed earlier, and the Committee had already separately declined to adjourn for unrelated reasons. Nevertheless, the Judge found that the Committee had been wrong not to have admitted the email, for the following reasons [para 57]:

- ▶ The email was not only relevant, but also crucial and potentially conclusive evidence on the central question of dishonesty;
- ▶ While it would have been unfair to have admitted the email without giving L and M time to consider and address it, that prejudice could have been addressed by an adjournment;
- ▶ Adjourning the hearing would give rise to a different type of prejudice (namely the cost and inconvenience of multiple hearings and prolonged uncertainty for L and M), but this had to be weighed against the public interest in very important evidence being considered by the Committee. In the circumstances of L and M's case, the correct assessment would have been that the public interest substantially outweighed any prejudice caused by an adjournment;
- ▶ The Legal Assessor failed to draw any distinction between, if the email was admitted, the hearing continuing immediately or adjourning to give L and M time to consider it. Similarly, this distinction was not reflected in the Committee's determination, nor did it address the NMC's suggestion of an adjournment. The Legal Assessor failed to refer to the Committee's primary function (i.e. to protect, promote and maintain the health and safety of the public) or to the need to balance fairness to L and M with the public interest in the Committee reaching a correct decision. Similarly, these issues were not adequately addressed or given due weight by the Committee.

Accordingly, the Judge allowed the PSA's appeal on this ground.

¹ [2015] EWHC 299 (Admin), 23.

Ground two

On the second ground of appeal, Steyn J noted that L and M had not yet had the opportunity to take steps to challenge the email, and it would therefore be unfair to take this evidence into account on appeal [para 61]. The Judge also rejected the PSA's assertion that, notwithstanding the exclusion of the email evidence, the Committee's decision on dishonesty was wrong based on the other evidence it received [para 62].

Ground three

With regards to the third ground of appeal, Steyn J noted that it was apparent from the witness statements obtained by the NMC that there would be an issue regarding how and when the certificate was provided to the employment agency. If the NMC had taken the necessary steps to clarify the witness evidence, it would have found and disclosed the email along with its evidence [para 68]. She held that, although the NMC's approach to evidence gathering could fairly be criticised, it had not been established that the way in which it had investigated and prosecuted the case was so seriously flawed that the appeal should be allowed on this ground [para 71].

Accordingly, the appeal was allowed in relation to the first ground of appeal for both L and M and the allegation of dishonesty was to be remitted back to the Committee for reconsideration [para 72].

Kind regards
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