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Medical Practitioners Tribunal Service
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Re: Dr Nicholas-Pillai v GMC [2015] EWHC 305 Admin

Background

Dr Nicholas-Pillai appeared before a Fitness to Practise Panel of the Medical Practitioners' Tribunal Service ('Panel') between 14-25 January 2013. It was alleged that the doctor's fitness to practise was impaired by deficient professional performance on the basis of a performance assessment which he had undertaken.

The Panel found that Dr Nicholas-Pillai's fitness to practise was impaired and directed that his name be erased from the medical register.

Dr Nicholas-Pillai appealed the Panel's determination under section 40 Medical Act 1983.

Appeal

The appeal was considered by Mrs Justice Elizabeth Laing on 22 January 2015. Details of why the case was not considered until January 2015 when notice of appeal was lodged on 22 February 2013 are set out in paragraphs 2-6 of the judgment.

Mrs Justice Laing then sets out the facts of the case (paragraphs 7-13) and of the performance assessment which was undertaken by Dr Nicholas-Pillai between 14 and 16 March 2010 (paragraphs 18-33).

She then sets out a short summary of the fitness to practise hearing (paragraphs 34-36) and then sets out in more detail the conduct of Mr Joseph, Counsel for Dr Nicholas-Pillai which was raised by the doctor as part of his appeal (paragraphs 37-54).

The Judge sets out, in some detail, the decision of the Panel (paragraphs 55-68) including the evidence which the Panel heard, their findings in relation to impairment, in particular the question of insight and its impact on fitness to practise and noted the reluctance of the Panel to conclude that erasure was the only appropriate sanction.

Mrs Justice Laing noted that the relevant law was not in dispute and set it out in summary (paragraphs 69-75) including the test to be applied where a ground of appeal relies on the incompetence of counsel (set out in paragraph 74) as follows:

'...was the incompetence of such degree that no reasonable advocate would have acted in that way and did any such incompetence cause the hearing to be unjust?'

The remainder of Mrs Justice Laing's judgment is her discussion of the arguments put forward by the doctor's representative.

The '*principal criticism*' (paragraph 80) was the absence of Mr Joseph from three days of the hearing. Whilst the Judge agreed that this was Wednesbury unreasonable conduct she did not agree that it made the hearing or the decision unjust as the Panel gave the doctor the opportunity to have an adjournment to instruct fresh representatives (but he did not take that opportunity), also it is clear from the transcripts that the Panel took great pains to ensure that the hearing was fair. Further, Dr Nicholas-Pillai was in a good position to cross-examine the two GP assessors and to make submissions on the medical aspects of the case.

Mrs Justice Laing acknowledged that Dr Nicholas-Pillai had very little time to prepare for cross examination of the GP assessors but confirmed (paragraph 81) that he was covering ground that must have been very familiar to him, as it concerned the assessment in which he had taken part.

The second criticism raised by Dr Nicholas-Pillai's representative was in relation to Mr Joseph's lack of preparation for the hearing (paragraph 82).

In relation to this matter Mrs Justice Laing thought although there may be some justification in this complaint, it did not affect the overall fairness of the hearing or make the Panel's decision unjust or wrong, since, regardless of Mr Joseph's lack of preparation, Dr Nicholas-Pillai was able fully to put his case.

Another issue raised by the doctor's representative (paragraph 83) was Mr Joseph's failure to have a fully-thought-out fallback position in the event that the Panel found that the doctor's performance was impaired, and his misjudged submissions on sanction.

Mrs Justice Laing confirmed that, in her view, it did not cause any injustice or a wrong decision by the Panel she stated as follows (paragraph 83):

'First, I note that there is no current evidence that anyone is willing to supervise the appellant. Second, there is no suggestion in either of the appellant's current witness statements that the approach which Mr Joseph took to penalty was not taken on instructions. Third, and more importantly, on the facts as found by the FPP about this, I do not see how the FPP could have concluded that conditional registration was an appropriate sanction.'

Another issue raised by Dr Nicholas-Pillai's representative was the way in which Mr Joseph dealt with the Chair's announcement that he knew the lead assessor. Mrs Justice Laing acknowledged that Mr Joseph did not deal with the point well as he should not

audibly have taken instructions on this from Dr Nicholas-Pillai in the presence of the Panel (paragraph 84). Nonetheless, she goes on to say there was no proper basis on which Mr Joseph could have applied to the Chair for him to recuse himself on two bases:

- 1) The evidence of the lead assessor was not critical in this case; and
- 2) The connection between the Chair and the lead assessor was tenuous.

Allied to this issue was a point made concerning Mr Joseph's cross examination of the lead assessor. Mrs Justice Laing (paragraph 85) confirms the lead assessor's evidence was not crucial, as he was not a GP but a specialist in genito-urinary medicine. She confirmed that what mattered was the cross-examination of the GP assessors, and that was done not by Mr Joseph but by Dr Nicholas-Pillai himself.

A further point taken by Dr Nicholas-Pillai's representative was that the evidence of a Mrs Walker was taken by telephone. The doctor wanted her to be present as he wanted her to realise that they had a connection/there had previously been a dispute between the two about out of hours cover (paragraph 86).

Mrs Justice Laing confirmed she did not understand the objection as the doctor and Mrs Walker had already met face to face during the assessment, and she had interviewed him during the assessment, so she would have been well aware of the connection and would not have needed to see the doctor at the hearing in order to realise this.

Other points were made but Mrs Justice Laing concluded (paragraph 89):

'It seems to me that, overall, the appellant was poorly served by Mr Joseph and that in several respects his conduct of the hearing was Wednesbury unreasonable. Nonetheless, I do not consider that the appellant suffered an injustice as a result, or that the decision of the panel was either wrong, or unjust in consequence. The appellant is an intelligent, well-educated professional. He was given the chance to get a different advocate on the second day of the hearing. The FPP was conspicuously fair to him throughout the hearing. He was, as I have already said, well placed both to cross-examine the GP assessors and to make submissions on the clinical aspects of the case. The bald facts were that there were serious deficiencies in his fitness to practise, he had precious little insight into them, and had done very little to make them good during his suspension. The decisions of the FPP which he challenges have not resulted in any injustice to him. Nor, if this is different, are they wrong or unjust'.

In the circumstances the Judge concluded that the decisions of the Panel were not arguably wrong and dismissed the appeal.

Salient Points

- where a doctor is unrepresented for all or part of a hearing and there may be an issue of competence of the representation the Panel must be alive to the issue and take any necessary steps to ensure that the hearing is fair;

- Reminder where there is an allegation of bias on the part of a Panel member the test is whether a fair minded and informed observer, having considered the facts, would have concluded that there was a real possibility of bias.

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