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Re: R (on the application of Banerjee) v GMC [2017] EWCA Civ 78

Summary

This was an appeal to the Court of Appeal against the decision of the High Court to dismiss Dr Banerjee's application for judicial review of a decision in 2014 by the fitness to practise panel of the MPTS to refuse her application for restoration to the medical register.

For a transcript and summary of the decision of the court below see [Appeal Circular A20/15](#) dated 21 August 2015.

Sir Terence Etherton, MR, Rafferty LJ, and Sharp LJ, dismissed the appeal.

Background

The doctor was dismissed for gross misconduct for falsifying records in her electronic profile and attempting to cover up her dishonesty by sending emails suggesting a system malfunction. In 2011, during the course of a GMC investigation, the doctor applied for voluntary erasure (VE). Her application was accepted, partly on the basis of her assurances that she no longer wished to pursue a career in medicine. Four weeks after being granted VE Dr Banerjee applied for and was granted registration in the Maldives and commenced medical practise there. In 2013 she applied for restoration to the GMC register. The panel refused restoration on the basis of her original admitted dishonesty but said there was insufficient evidence of any probity issue regarding the assurances about her intention to not practise medicine. In 2014 the doctor made a second

restoration application which was also refused. Before the 2014 restoration hearing the solicitors for the parties had agreed that the topic of probity in relation to the circumstances in which she made her VE application would not be revisited. The panel were not informed of this agreement and in the course of their questioning asked Dr Banerjee about the matter.

Application for Judicial Review

Dr Banerjee sought to quash the second restoration decision on the grounds of unfairness, on the basis that her probity in the course of her voluntary erasure application had been settled at her first restoration hearing and was a closed matter before the second restoration hearing. The High Court dismissed her application for Judicial Review. Dr Banerjee appealed that decision to the Court of Appeal.

Appeal

Dr Banerjee submitted that (1) the hearing before the second restoration panel had been unfair in view of the number, nature, tone, and content of questions asked by the panel members; (2) the High Court Judge had wrongly failed to step back from his detailed analysis of particular interventions by the panel and had failed to consider the overall fairness of the hearing in the light of the witness statements of the doctor and her solicitor as to the conduct of the panel hearing. The heart of the doctor's complaint was that the panel members had wrongly persisted in questioning her in a hostile and forceful way about the circumstances in which she had made her first application for voluntary erasure. Dr Banerjee's case is that her probity in making the application had been decided in her favour at the first restoration application. The panel had been unaware that the GMC's solicitor had agreed those topics were not to be revisited.

Held: Appeal dismissed.

(1) The questioning by the panel about the application for, and granting of, voluntary erasure was entirely understandable and appropriate. The fact that the questions were asked in a direct, even robust way, does not undermine the fairness of the proceedings. It was not precluded from investigating matters which had been considered on the first application, despite any agreement made between the parties, especially as the effect of the voluntary erasure had been to end the GMC's fitness to practise investigation, which might have led to a sanction. Contrary to the doctor's argument, the first panel had not found in her favour regarding her assurances that she did not wish to practise in the future. It had merely said that there was insufficient evidence to suggest a lack of probity and had drawn no inferences, positive or negative [paras 10-14].

(2) The legal principles for determining whether a decision should be quashed because the trial or hearing was not fair are those contained in [Demarco Almeida v Opportunity Equity Partners Ltd \[2006\] UKPC](#). The Judge in the High Court had been both entitled and right to examine the specific questions and interventions he listed in Annex 1 to his judgment, not least because the doctor's skeleton argument stated that she relied specifically on those passages [paras 5-7].

(3) Even if the questioning by the panel regarding the circumstances of her VE application had been unfair, the panel would inevitably have refused the application for restoration on the grounds of her original misconduct [para 19].

Salient points

- The panel was required to reach decisions which fulfilled their purpose under the [Medical Act 1983 s.1](#) to protect, promote and maintain the health and safety of the public. The panel was not precluded from investigating matters which had been considered at the first restoration application, whatever the parties and their representatives had agreed between themselves [para 11].

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