

Appeals Circular A03/20

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Seventh floor
St James's Buildings
79 Oxford Street
Manchester
M1 6FQ

0161 923 6263
enquiries@mpts-uk.org
www.mpts-uk.org

To: MPTS Associates

CC: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

Arowojolu v General Medical Council [2019] EWHC 3155 (Admin)

Learning Points

- ▶ Where the making of previous allegations is raised as relevant to a witness's credibility (i.e. as evidence of bad character), the Tribunal must try to resolve the issue of whether those allegations were truthful.
- ▶ If the Tribunal is satisfied that the previous allegations were more likely than not to be untrue, the Tribunal must consider whether they establish a propensity on the part of the witness to make false allegations and, if so, what impact that has on the witness's credibility.
- ▶ The incompleteness of available evidence regarding historic allegations does not necessarily render the assessment of whether those allegations were truthful an impossible task. However, if the Tribunal is unable to resolve the issue of whether previous allegations are more likely than not to be untrue, it need not consider the point further.

Background

The appellant ('Dr A') appealed against the decision of a Medical Practitioners Tribunal in July 2019 to erase his name from the medical register. The Tribunal had determined Dr A's fitness to practise was impaired by reason of misconduct, following findings of sexually motivated conduct towards a colleague.

Dr A worked as an out of hours GP. At the end of a shift in July 2013, he had a conversation with a health centre receptionist ('B'), who revealed concerns about her weight and stomach area. Dr A offered to examine her and to provide advice. Dr A and B went into a consultation room: B's version of events was that Dr A sexually

assaulted her by inappropriately touching her; Dr A's version of events was that he examined B's stomach and advised her to consult her GP if the symptoms continued.

Following a police investigation, Dr A was charged with sexual assault. The criminal proceedings had a complex history which it is not necessary to relate fully here. However, Dr A was ultimately acquitted at a retrial. An earlier retrial had had to be adjourned after the prosecution disclosed unused material not previously provided to Dr A. The material concerned allegations made by B that she had been sexually abused by a family member as a child (the 'family member allegations'). Those allegations had been investigated by the police, but no charges had been brought.

The Tribunal heard evidence from B and Dr A (amongst others) and had access to material regarding the family member allegations. When questions about them were put to B by Dr A's representative she denied making up the family member allegations or that she was a fantasist. At the end of the facts stage of the hearing, the Tribunal received advice from its Legally Qualified Chair ('LQC'), who had stated:

'[The family member allegations] have not been determined by a court, but the tribunal has been provided with evidence about the investigation of them, which led to no further action being taken...the tribunal should bear in mind that it does not need to determine the truth or otherwise of the [family member] allegations. It should simply consider the evidence it has before it about these, alongside all of the other evidence, in determining the issues of fact that it does need to decide.'

The Tribunal accepted the LQC's legal advice and found that Dr A had subjected B to a sexually motivated intimate examination. The Tribunal determined that B had been a plausible witness and noted that *'the evidence of the [family member allegations] do not assist in establishing a tendency on [B's] part to make allegations.'* The Tribunal went on to find that Dr A's fitness to practise was impaired and that the appropriate sanction was to erase Dr A's name from the medical register.

Grounds of Appeal

Dr A appealed principally on the basis that the Tribunal had been misdirected in law on how to approach the family member allegations, and therefore had not properly dealt with this important evidence. Dr A's counsel submitted that the Tribunal ought to have been directed:

- ▶ To decide whether, on the balance of probabilities, the family member allegations made by B were false;
- ▶ If so, to consider whether B had a propensity to make false allegations; and
- ▶ If so, to take this into account when determining the truth or otherwise of her allegations against Dr A.

Dr A also raised as additional grounds that the Tribunal:

- ▶ Failed to adequately take into account the implausibility of B's version of events;
- ▶ Failed to sufficiently take into account Dr A's positive good character;
- ▶ Was wrong in its assessment of the CCTV evidence.

Judgment

The appeal was heard by Mr Justice Knowles in October 2019, with judgment given in December 2019.

In relation to the principal ground of appeal, the Judge rejected the proposition that the legal direction given in disciplinary proceedings must necessarily mirror that given in an earlier criminal trial [para 74]. Instead, Knowles J first considered the reasons why evidence of the family member allegations was adduced before the Tribunal by Dr A's representative. He concluded that it had been adduced so that they could advance the argument that B was a fantasist and had a propensity for making false allegations against older men in positions of authority [paras 76-77]. Drawing a comparison with the admissibility of bad character evidence in criminal trials, the Judge held that evidence of the family member allegations was admitted as it was relevant to the question of whether B had a propensity to be untruthful [para 80], but the LQC had not given the Tribunal proper assistance on how to approach the issue [para 81]. He went to find that:

'...it was not sufficient for the [LQC] merely to direct the Tribunal that it was "right" for the Tribunal to consider the [family member allegations] as part of "the entirety" of the evidence it had heard. That was, in the circumstances, an essentially meaningless direction, as was the [LQC's] direction that the Tribunal "should simply consider the evidence it has before it about these, alongside all of the other evidence, in determining the issues of fact that it does need to decide". These directions did not assist the Tribunal on the issue to which the evidence was relevant, namely, [B's] credibility. Contrary to the directions which the Chair gave, the Tribunal did need to try and determine the truth or otherwise of the historic allegations, because then – and only then – would it have been in a position properly and fairly to have considered the central contention on behalf of [Dr A] that [B] had a propensity for making false allegations against men in positions of authority.' [para 82 – emphasis added]

The Judge held that the Tribunal ought to have assessed the available evidence regarding the family member allegations and decided whether it could be sure that B was telling the truth, even if the evidence was incomplete¹. While it would have been correct for the LQC to have directed the Tribunal to take the issue no further if it could not resolve whether B was telling the truth, it was not appropriate to have effectively absolved the Tribunal from even trying to do so [para 83].

Having found that the Tribunal was materially misdirected on an issue central to B's credibility and Dr A's defence, the Court held that it was impossible to be certain that the Tribunal had properly considered the family member allegation evidence (i.e. whether or not it established that B had a propensity to make false allegations) [paras 90-91].

¹ As per *R v Mitchell* [2016] UKSC 55.

Knowles J allowed Dr A's appeal and quashed the sanction of erasure [para 95]. As the principal ground of appeal succeeded, the remaining grounds were not considered further.

Kind regards

Tribunal Development Section

0161 240 7292

tribunaldevelopmentsection@mpts-uk.org