

## Appeals Circular A03/21

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### The General Medical Council v Donadio [2021] EWHC 562 (Admin)

#### Learning Points

- ▶ The indicative factors in the Sanctions Guidance are just indicators and are non-exhaustive. However, if a tribunal departs from the Sanctions Guidance it must give sufficient and clear reasons for doing so.
- ▶ Where a tribunal is assessing gravity in a case involving a 'knowing regulatory breach' by a registrant, it should consider both the dishonesty and the fact and effect of the regulatory breach, in its own right.
- ▶ A regulatory breach of an order imposed directly and personally on a registrant adds to the gravity of the breach and goes directly to the overarching objective of the protection of the public

#### Background

This was an appeal brought by the General Medical Council ('GMC') pursuant to section 40A of the Medical Act 1983 against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 26 February 2020 to suspend Dr Donadio's ('D's') registration for 12 months and to order a review hearing.

D was referred to the GMC in June 2017 whilst he was working as a locum consultant radiologist. There were concerns that his performance might be deficient as he was 'over calling' abnormalities in radiology results (false positives) and as a result, patients were being worried unnecessarily about the prospect of having cancer and some were having needless appointments or procedures. D acknowledged the problem, explained it by reference to anxiety and personal worries relating to his

family in Ukraine, and indicated he was confident his performance in his next locum posting would be back to normal standards.

A GMC performance assessment was undertaken in April 2018 which found D's professional performance was deficient and that he was fit to practise on a limited basis only, recommending that he could only work at the level of a supervised junior trainee (level 3 of 9 leading to consultant) and should be 'directly supervised' as such.

As a result of the assessment, D was referred by the GMC to an Interim Orders Tribunal (IOT). The IOT sat on 9 July 2018, by which time Dr D was working as a locum consultant radiologist at Kettering General Hospital. He did not attend the IOT and was not represented and the IOT imposed conditions on his registration for 12 months.

D left the UK in August 2018, to attend to family matters in Ukraine. In the meantime, however, he had continued to work as a consultant radiologist at Kettering, unsupervised, as before.

The GMC referred the matter to a tribunal alleging D had breached his interim conditions by: working at Kettering as a consultant and unsupervised, failing to notify the GMC of his current post or provide the required contact details and failing to inform his line manager or employer of the interim conditions, all of which the GMC alleged was dishonest.

D made no admissions, did not attend and was not represented at the hearing in February 2020. The Tribunal found the allegations of breach, as set out above, proved and that from 12 July 2018, they were committed in the knowledge of the conditions imposed on him and therefore dishonestly.

The Tribunal found serious misconduct and impairment, suspended D for 12 months and ordered a review (despite the GMC seeking erasure). The Tribunal referred to paragraphs 97 (factors which may indicate suspension is appropriate) and 109 (factors which may indicate erasure is appropriate) of the Sanctions Guidance ('the Guidance') and indicated that 5 of the factors in para 109 were present. However, it said that whilst D's actions and dishonest conduct had the potential to be fundamentally incompatible with continued registration it was satisfied that, in the circumstances of this case it fell just short of that. The Tribunal said:

*"....the Tribunal noted that not every case of dishonesty must result in erasure. Whilst Dr Donadio's misconduct was deliberate and repeated on more than one occasion, it took place over a short period of time after which he removed himself from the workplace. The Tribunal had regard to the fact that Dr Donadio ceased his dishonest conduct before it had been discovered.....there has been no repetition of the behaviour since August 2018. The Tribunal is of the view that a period of suspension would be both appropriate and proportionate, notwithstanding the punitive effect it will have on Dr Donadio." [33]*

The Tribunal said that the wider public interest could properly be served by imposing a period of suspension and erasure would be disproportionate.

## Grounds of appeal

The GMC appealed the decision to suspend on the basis it was insufficient to protect the public and on the following grounds:

- ▶ the Tribunal's failure to erase D fell outside the range of sanctions open to it, given the gravity of the misconduct; and
- ▶ the Tribunal failed correctly to apply the Sanctions Guidance and hence made an error of principle.

The GMC said that proper application of the Guidance's indicators for suspension and for erasure pointed to erasure, so the Tribunal departed from the Guidance, but no good reasons were given for doing so.

## Judgment

Mrs Justice Collins Rice gave judgment and said that the case law<sup>1</sup> suggested that whilst the indicative factors in the Guidance are just non-exhaustive indicators, a necessary part of the tribunal's decision-making process "involves addressing itself to the indicative factors, building up a picture of the sanction they cumulatively indicate, and then either applying that sanction or explaining with sufficient clarity why not. That is only fair, both to the doctor and to the public" [41]. However, the test was for "[S]ufficiency of reasoning....and not anything more elaborate....The determination needs to be read fairly, and as a whole, to assess the sufficiency of its reasoning" [42].

Whilst Collins Rice, J found that up until the very point of making its decision on sanction, it was hard to fault "the careful and methodical approach of the [Tribunal], including in its referencing of the Guidance" [43], the Tribunal's own findings in its previous determinations on facts, misconduct and impairment, triggered the Guidance's indicators for erasure and not for suspension. The Tribunal was entitled to depart from the Guidance altogether, provided it gave sufficient explanation for what it was doing [44 and 66]. However, the explanation given in the Tribunal's sanction determination:

- ▶ "had a flavour of a generalised assertion of the disproportionality of erasure of the kind found objectionable in Stone and Saeed"
- ▶ disclosed an over-reliance on the mitigation of D's departure from the UK in August 2018, and the curtailment of the period of breach, which did not appear to be capable of amounting to sufficient explanation on its own [45 and 67].

Collins Rice, J, then looked at whether sufficient explanation was given by reading the Tribunal's determinations fairly as a whole. She said when considering gravity, looking at the dishonesty on its own, the only 'dishonesty' involved was simply knowingly acting in breach of IOT conditions. The Tribunal had emphasised that not every case of dishonesty must result in erasure and said that this type of dishonesty was capable of remediation [46-47 and 68].

<sup>1</sup> Including GMC v Stone [2017] EWHC 2534 (Admin), at paragraph 53 and GMC v Saeed [2020] EWHC 830 (Admin) at paragraphs 66-67 and 75-77.

Collins Rice, J, acknowledged that the Tribunal may have had difficulty in applying the Guidance to dishonesty of the 'type' before it and finding it of the utmost gravity, such that nothing short of erasure would properly protect the public [68]. However, she said that the personal dishonesty was not the primary mischief; the Tribunal had to look at a 'knowing regulatory breach'. She referred to the case of GMC v Nyamasve<sup>2</sup> in which the Court treated a knowing regulatory breach as a species of 'serious dishonesty'. She said "[T]he risk to the public is that the doctor will practise contrary to their registration or licence status. The focus on the personal dishonesty of so doing (the 'how' of the matter) can mean that sight is lost of the 'what' – the substance of what is going on where doctors practise medicine when their professional regulator has provided that they must not – and the public perspective on that." [58]

Collins Rice, J said in this case, "any willingness of [D] to deceive people into thinking he was still entitled to practise as a consultant unsupervised was a second-order issue to the fact that he was not. The gravity of that fact, the practical reality for the public as well as [D's] state of mind, had to be considered on its own merits." [60].

Collins, J said that the IOT had made D's registration subject to an order of conditions on the basis that it was *necessary* for the protection of the public and to maintain confidence in the profession. In that respect she said:

- ▶ this was not just any regulatory breach it was a breach of an order imposed directly on D after regulatory and legal process examining the specifics of his case, placing detailed restrictions on his registration [62]
- ▶ it was a breach which was knowing and deliberate and D then went on to deny that he knew about the IOT determination, demonstrated a lack of candour and resisted engagement with the regulatory authorities when challenged. She said that the lack of submission to a regulatory process to which D was already personally subject to in a detailed manner added to the gravity of the breach of the order itself [63]
- ▶ "the failure to demonstrate insight into breach, and to acknowledge the entitlement of the public to see a consultant radiologist entitled to practise as such when they needed to, is a further aggravation." [63]
- ▶ the conditions imposed by the IOT on D included transparency conditions expressly requiring him to declare the conditions imposed on him to those with a proper professional interest in knowing about them. Non-disclosure was not only a species of dishonesty, but a further breach of the explicit requirements of the IOT order [64].

Collins Rice, J said that these facts, as found by the Tribunal, raised a *prima facie* case of considerable gravity, going to the issues of public wellbeing, public confidence and the maintenance of professional standards [64]. However, the Tribunal failed to deal with the seriousness of the breach, which therefore "undercuts the formal processes already engaged for the protection of the public" [65].

She said that she could not "conclude that a gravity determination based on the conduct alone is a satisfactory explanation for the sanction imposed, since it does

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<sup>2</sup> [2018] EWHC 1689 (Admin)

not fully address the prima facie case of gravity raised by the fact of regulatory breach in its own right in this case.”[68]

She said the Tribunal’s decision disclosed an insufficiency of reasoning, but also an error of principle. “It is an error similar to that in Stone , namely a failure properly to assess the gravity of conduct before it, and hence correctly to apply itself to the question of sanction – in this case, by failing fully to address the quality of that conduct as a regulatory breach.” [69]

Collins Rice, J said that Tribunals should have in mind that cases of the deliberate breach of specific restrictions imposed personally on doctors go directly to the overarching objective and must be considered in the context of upholding the efficacy of regulatory regimes and of orders made under statutory powers exercised on the grounds of necessity for the protection of the public. “In particular, where a doctor's registration has been made conditional on compliance with certain requirements, and those requirements are not complied with, it is essential that [a tribunal] deals directly with the conditionality of the doctor's registration in its assessment of the gravity of the conduct before it, and in its approach to sanction, and demonstrates that clearly in the reasons it gives for its conclusions.” [70]

She concluded that the Tribunal made an error of principle in its sanction evaluation resulting in an insufficiency of reasoning for departure from the Guidance, which was a serious irregularity vitiating the justice of its conclusion [71].

The appeal was allowed and the matter of sanction was remitted to a tribunal.

Kind regards

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