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## **Uwen v General Medical Council [2018] EWHC 2484 (Admin)**

### **Learning Points**

- Professional indemnity insurance is not the same as cover for legal expenses arising from a claim made against a practitioner. The former also includes insurance in respect of any liabilities arising from any claim made by a patient.
- It is a statutory and Good Medical Practice obligation on a practitioner to ensure that they have adequate indemnity cover or insurance – not to do so will lead to a risk to the protection of the public.

### **Background**

This was an application made by Dr Uwen ('U') pursuant to section 41A(10) of the Medical Act 1983, seeking termination of an interim order of suspension imposed by an Interim Orders Tribunal ('IOT') on 13/04/2018 for a period of 13 months. The IOT made the order on the basis that it was necessary to protect both the public and the public interest.

The concerns raised regarding U were that, during two periods in 2017, she had practised as a locum doctor for a private company without having appropriate professional indemnity insurance cover in place, despite claiming at the time that she had indemnity insurance for private practice in place through her legal cover, which was provided through her solicitors. Apart from these two periods, it appears that U had worked almost exclusively for the National Health Service (NHS) which provided the requisite indemnity.

The distinction between legal cover and indemnity insurance, and confusion in

relation to it, pervades the material correspondence considered in this IOT case.

As part of her contract with the locum agency through which she obtained work, U was required to obtain adequate professional indemnity insurance. In documentation reviewed by the IOT in March 2017, U indicated there were no issues with regard to her '*medical indemnity/malpractice insurance cover*' and that her '*legal cover was accepted by the GMC for [my] revalidation*'. A subsequent email from the locum agency, seeking clarification of the position, referred expressly to indemnity insurance in private practice, and U was asked to confirm whether her legal cover, which was provided through her solicitors, also extended to private practice work. U confirmed that it did, although never provided an indemnity certificate to prove this.

In December 2017, U was again asked about her indemnity insurance. At that time, although U appeared to be aware of the difference between legal cover and indemnity insurance, she took the position that she had provided confirmation of her legal cover and that in the absence of any specific requirement of the employer to provide an indemnity insurance certificate, and as her legal cover had previously been accepted, she was under no obligation to make such arrangements (and that any indemnity cover could not be backdated anyway). U also referred to the fact that in all her many years of practice she had never faced an allegation of negligence or malpractice. In light of this correspondence, U appeared not to be aware of any statutory<sup>1</sup> or good practice obligation<sup>2</sup> to make arrangements for appropriate indemnity cover, regardless of any contractual requirement of any particular employer [para 57].

The IOT hearing in April 2018 was held in U's absence. In written submissions provided to the IOT, U's legal representatives stated that '*It is apparent from all the communications referred to in the referral decision that [U] had not stated that she had indemnity insurance. She stated that she had a legal cover which covered her... she did not in any way state that her legal cover was the same as indemnity insurance.*' The IOT determined that, based on the information before it that day, there were concerns relating to U which posed a risk to the public (in relation to the concerns about the protection her patients would have should they bring a claim of negligence against her) and may adversely affect the public interest (in relation to U's probity). An interim order of suspension was said to be necessary as '*[T]here is an allegation before the [IOT] that [U] might have breached one of the tenets of Good*

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<sup>1</sup> Section 44C(1) – “a person who holds a licence to practise as a medical practitioner, and practises as such, must have in force in relation to him an indemnity arrangement which provides appropriate cover for practising as such”

<sup>2</sup> Good Medical Practice, paragraph 63 - “you must make sure that you have adequate insurance or indemnity cover so that your patients will not be disadvantaged if they make a claim about the clinical case you have provided in the UK”.

*Medical Practice and the information presented suggests that she has little insight into the serious nature and risks of such a breach. The [IOT] concluded there were no workable nor adequate conditions which could address such risks. The [IOT] determined that an order of suspension was therefore proportionate.'*

## **Grounds of Application**

U challenged the IOT's determination on three main grounds:

1. In relation to an interim order being necessary for the protection of the public, there had been a failure by the IOT properly to assess the weight of the information as to the likelihood of repetition. The risk to patients who had already been treated by U was not relevant to the question of continuing risk and the IOT did not identify a causal link between the previous lack of indemnity insurance and any ongoing risk to the public;
2. In relation to an interim order being necessary to protect the public interest, the IOT failed properly to assess the weight of the evidence presented in relation to the issue of U's probity. The correspondence regarding U's indemnity insurance was ambiguous and could be interpreted as showing that U had been confused as to the nature of the professional requirements for indemnity insurance in private practice and as to the adequacy of her legal cover to meet what was required. U had made an honest mistake in conflating legal cover with indemnity insurance and had this been considered by the IOT, it would have lessened the strength of their concerns that public confidence in the profession would be **seriously** damaged if U were allowed to continue to work with patients;
3. Although the IOT made reference to the interim order being a proportionate response to the concerns raised, it failed to give adequate consideration to the impact which an order of suspension would have on U's reputation as a locum consultant and her ability financially to provide for her family. There were workable conditions which could have been formulated to meet any concerns of the IOT.

## **Judgment**

Mr Justice King heard the application and determined that based on the information which was before the IOT:

1. Ground 1 - its decision that an interim order was necessary for the protection of the public was not wrong [para 88 and 96]. The Judge noted that:
  - a. U's position, as presented at the High Court hearing was to acknowledge that:

- she had made a mistake which would not be repeated;
  - she had recognised her error in believing that her legal cover was sufficient to meet her professional obligation to have in place appropriate indemnity insurance; and
  - it had been a genuine oversight borne out of confusion as to what was required outside the NHS and no more than an administrative failure, in respect of which she could be relied upon to take steps to rectify [para 89];
- b. however, there was no such acknowledgement of U's mistake or oversight before the IOT in either the correspondence or the submissions made on U's behalf [para 90]. U's position before the IOT was that:
- she could not understand that working without any indemnity insurance or cover during the periods in question was wrong;
  - without any express request from the place(s) she worked to have indemnity insurance, there was no fault on her part in not having the indemnity during the periods she worked; any fault was that of the place where she worked;
  - the legal cover had been accepted as sufficient in the past and she had not been informed of anything to the contrary;
  - she had not required anything more than the legal cover because no negligence claim had been made against her in the past [para 91];
  - absent any express condition of employment that a certificate of indemnity insurance be provided, U would continue to rely on her solicitors' legal cover as sufficient, which she herself acknowledged did not amount to an indemnity certificate [para 92];
- c. the IOT, based on the information before it, was fully entitled to conclude that U had little insight into the seriousness of working without indemnity insurance and the seriousness of the risk to which any patient treated by her would be exposed as a result; "The fact that risk had (as yet) never materialised was and is to nothing" [para 93];
- d. U had "little insight into or awareness of, her statutory and good practice professional obligations, regardless of any contractual arrangements, to ensure she had adequate insurance or indemnity

cover so that her patients would not be disadvantaged if they made a claim about the clinical care she had provided" [paras 93 and 34-41];

- e. "...everything in the information before the IOT pointed, in my judgment, to the very real and serious risk that absent an Interim Order, [U] would make the same mistake again, and would continue to rely on her legal cover even in private practice, absent a contractual requirement for indemnity insurance"[para 95].

- 2. Ground 2 - based on the information before the IOT, because the Judge had found that the interim order was necessary in order to protect the public, the concerns about the interim order being made on public interest grounds meant that he could not terminate the interim order.

However, he said that, had he not found that there was a proper basis for a finding of a real and continuing risk to the public, he would probably have concluded that there were not sufficient grounds for an interim order based only on the allegations of lack of probity and the argument that public confidence may be damaged if U were allowed to continue in practice pending resolution of those allegations [paragraph 99-100]. This was because:

- a. there was still ambiguity as to whether U was being deliberately dishonest and misleading, or simply working under an honest mistake borne of confusion as to what was required;
- b. although the highly arguable fact that U should not have been confused about indemnity insurance and should not have been operating under a mistaken understanding was relevant to the issue of continuing risk in the interim period, in the absence of any acknowledgement of U's mistake on the information before the IOT, it "is to nothing on this issue of probity.....which.....raises issues as to [U's] honesty";
- c. he did not consider that an informed and reasonable member of the public would be offended by U being allowed to continue practising whilst the issues of probity were being investigated and the ambiguities resolved. The Judge also said that a reasonable member of the public would have had regard to U's previous unblemished record in many years of practice [para 99].

- 3. Ground 3 - U had not set out, in the submissions presented to the IOT, any matters she wished to be taken into account in relation to the financial impact an interim order would have upon her and her family. Therefore, the interim order could not be said to be disproportionate to the continuing risk against which the public needed to be protected [para 98]. In addition, the IOT was an expert body entitled to determine that there were no workable conditions available to address

the risk: the High Court was not in a position to impose a contrary view in light also of the impact of the lack of U's insight at the IOT hearing in terms of complying with any conditions [para 97].

#### Review of the interim order

Mr Justice King again stressed that the interim order could not be said to be wrong on the information as it stood before the IOT. However, he went on to say that his decision may well have been different on the issue of whether there was a continuing risk to the public to justify an interim order of suspension had the IOT been aware of the submissions and information provided by U to the High Court in terms of:

- a clear acknowledgement of her mistake;
- an expression of insight into the seriousness of the failure, the risks to which she had exposed her patients;
- an awareness of her professional obligations in regard to indemnity insurance;
- the steps taken to obtain that cover for the future; and
- details of her financial circumstances and the impact of any suspension on her ability to care for her family [para 102].

Mr Justice King noted that U's interim order would be reviewed within the statutory six month period and that it appeared to be in U's interests to provide the reviewing IOT with the information provided to the High Court as outlined above [para 103].

Kind regards

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