

29 March 2018

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General Medical Council v Dr Ahmed Nooh [2017] EWHC 2948 (Admin)

Learning Points

Tribunals considering restoration applications:

- are not entitled to go behind a previous tribunal's findings and question the appropriateness - including those of fact, misconduct, impairment or sanction. However, such tribunals are carrying out a different exercise to that of the previous tribunal and it is appropriate for them to consider where on the spectrum of seriousness the conduct which led to the erasure now falls;
- should take caution in the language used in their determinations when considering the above matter to ensure that there are no misunderstandings in the interpretation of them and clarity of reasoning generally is important;
- can appropriately consider how long the erasure has been imposed for, when considering the over-arching objective and in particular, what is necessary to maintain public confidence and/or proper professional standards and conduct.

Background

This was an appeal brought by the General Medical Council ('the GMC') pursuant to section 40A of the Medical Act 1983, against a Medical Practitioners Tribunal ('the Tribunal') decision dated 13 January 2017 restoring Dr Nooh to the register of medical practitioners.

Erasure from Medical Register – 2009

In July 2009, Dr Nooh was erased from the medical register by a Fitness to Practise Panel ('the Panel'). He did not attend the hearing and was not represented, but his

representatives had made written submissions. The allegations against Dr Nooh related to clinical concerns from 2006, in relation to the treatment of one patient ('Patient A') during his post as a Locum Consultant in Obstetrics and Gynaecology, and probity concerns from 2007, in that he submitted three job application forms in which he failed to declare that he was subject to a GMC investigation.

After finding that Dr Nooh's fitness to practise was impaired, the Panel considered what sanction to impose. After considering the cumulative effect of the Patient A allegations and the dishonesty allegations, it noted that there had been serious and repeated breaches of principles set out in *Good Medical Practice*, which constituted a serious abuse of the public's and patients' trust in the profession, and that there was no evidence that Dr Nooh had recognised the seriousness of, or had made any attempt to remedy, his failings. The Panel considered that erasure was the only appropriate sanction.

Dr Nooh also unsuccessfully; appealed that decision to the High Court, applied to the Court of Appeal for permission to appeal and brought a claim in the European Court of Human Rights.

Restoration

In 2016, Dr Nooh made an application to restore his name to the medical register, pursuant to section 41 of the Medical Act 1983. A restoration hearing before the Tribunal was held in January 2017.

Dr Nooh presented a number of documents to the Tribunal, including a statement from a clinical colleague who stated their opinion that Dr Nooh's management of Patient A was correct. Dr Nooh also gave evidence and indicated that, in relation to some of the failings identified in the Patient A allegations, he had learnt lessons, but denied the remaining ones. In relation to the dishonesty allegations, Dr Nooh accepted that the application forms had been misleading but not dishonest; he admitted that he had made a mistake and apologised for it. Dr Nooh also gave evidence about the health issues which he had faced at the time of the Panel hearing. Moreover, Dr Nooh said that he believed that the whole process of investigation leading to the decision to erase his name was "faulty, flawed, inappropriate, unfair and unjust."

When reaching its decision on the application for restoration, the Tribunal stated that:

- *"Having considered all the evidence, the Tribunal has concluded that, had the details of your health condition as contained in your doctor's letter dated 11 August 2009 been submitted to the GMC in advance of the hearing on 13 July 2009, it is very likely that the hearing would have been adjourned until such time as you were fit to attend"* [paragraph 32 of the Tribunal's determination];
- in relation to the Patient A allegations:

- “[A]lthough the Tribunal was of the view that you might have explained your actions more fully to your colleagues that night, it did not consider that your conduct at the time was as troubling as the Panel had concluded” [paragraph 39 of the Tribunal's determination];
- “Whilst this Tribunal did not seek to go behind the 2009 Panel's findings, it took a different view about the seriousness of your actions which led to erasure, in light of the new evidence that has been presented at this hearing.” [paragraph 44 of the Tribunal's determination];
- in relation to the dishonesty allegations, “[T]he Tribunal has assessed the question of whether you have now demonstrated sufficient insight into this matter. The Tribunal concluded that, in the light of your continuing denials of dishonesty, the only insight that is available in these circumstances is a clear and unequivocal assurance that – whatever the circumstances surrounding the original finding – there has been and will be no repetition of misconduct and that you have learnt from the experience. The Tribunal is satisfied on the evidence that it is extremely unlikely there will be a repetition of the conduct which led to the earlier finding” [paragraph 47 of the Tribunal's determination].

The Tribunal accepted Dr Nooh's evidence of what he had done, in Egypt and elsewhere, since his erasure and said it “*was clear to the Tribunal that you have kept your knowledge and skills up to date and sought to improve your communication skills.....found the body of evidence you provided to be reassuring and compelling in relation to your clinical skills and competency as a doctor. It recognised that you have a record of some 35 years work in the field of gynaecology and obstetrics and have had an otherwise highly successful career*” [paragraph 49 of the Tribunal's determination].

The Tribunal determined to restore Dr Nooh to the medical register, stating that he did not pose a risk to patients, the public's trust in the profession would not be undermined in doing so and that it would be in the public interest to restore his name to the medical register.

Grounds of Appeal

The GMC appealed against the Tribunal's decision on the following grounds:

1. The Tribunal went behind the facts as found and substituted its own assessment of the seriousness of the misconduct;
2. The Tribunal failed to give adequate weight to Dr Nooh's lack of insight;
3. The Tribunal failed to give any or any adequate consideration to the overarching objective;

4. The Tribunal failed to have any or any adequate regard to the seriousness of the dishonesty when applying the overarching objective;
5. The Tribunal failed to give adequate reasons for its decision.

Judgment

Mr Justice Lavender dismissed the GMC's appeal.

Ground 1

It was common ground that it was "appropriate for the Tribunal to consider the seriousness of Dr Nooh's misconduct. This involved a different exercise from that carried out by the Panel. The Panel had to decide whether the misconduct was sufficiently serious to merit erasure. But there is a spectrum of cases which merit erasure where this case fell on that spectrum....was a proper question for the Tribunal to consider" [para 45].

In considering the first ground of appeal, Mr Justice Lavender held that in relation to the:

1. Tribunal's comments that had details of Dr Nooh's health condition been submitted to the GMC in advance of the Panel hearing, it was very likely that that hearing would have been adjourned, the Tribunal was saying "first, that Dr Nooh cannot complain that the Panel hearing went ahead in his absence; and, secondly, that the Tribunal had the advantage of hearing evidence from Dr Nooh which the Panel did not have." Both were correct and therefore it could not be read that Tribunal had misunderstood its role;
2. Patient A allegations (paragraphs 39 and 44 of the Tribunal's determination), whilst "it was most unfortunate that the Tribunal should have expressed itself in this way" and "the language used by the Tribunal...was regrettable", looking at the paragraphs in the context of the decision as a whole [paras 53 and 54]:
 - a. "The Tribunal was not going behind the Panel's findings of fact." It said it did not seek to and the GMC did not pursue the argument that it did;
 - b. "Nor did the Tribunal express any disagreement with the Panel's finding that those facts constituted misconduct. Indeed, the Tribunal expressly referred to them as significant misconduct." There was no disagreement with the Panel's conclusions that Dr Nooh was impaired and his name should be erased;
 - c. Paragraphs 39 and 44 of the Tribunal's determination were only addressing the Patient A allegations whereas references to the Panel's consideration of the seriousness of the misconduct were in relation to the whole of Dr Nooh's misconduct;

- d. "It seems to me that the relevant passages of the Tribunal's decision are best read as saying that, taken by themselves, the Patient A allegations might not have been serious enough to merit erasure...Potential for confusion was introduced by the Tribunal saying that it was taking a different view from the Panel, when the Panel had not addressed the seriousness of the Patient A allegations in isolation. Had the Panel done so, it might well have said that they alone did not merit erasure." [para 53]

The Tribunal was not in truth disagreeing with the Panel but addressing a different question and the substance of its decision was that it took a view as to the seriousness of the Patient A allegations which was legitimate [para 54];

3. Dishonesty allegations, the Tribunal did not say that it was differing from the Panel's assessment of the seriousness of Dr Nooh's dishonesty and that there was no reason to conclude that the Tribunal had formed the view that it was not serious enough to merit erasure. The Tribunal proceeded on the basis that Dr Nooh had been dishonest and it was appropriate for the Tribunal to consider where on the spectrum of seriousness the dishonesty lay. The Judge said "that is not to undermine the proposition that dishonesty is always serious, but these are the questions of fact and degree for the Tribunal to assess" [para 55].

In summary, Mr Justice Lavender determined that it had not been demonstrated that the Tribunal's decision was either wrong or unjust because of a serious procedural error or irregularity [para 56]. Therefore, this ground of appeal was refused.

Grounds 2-4

These three grounds of appeal were considered together and the Judge said that the real question to be determined for each was whether the Tribunal had given too little weight to these factors and to the extent of Dr Nooh's lack of insight [para 58].

The Judge noted that it cannot have been an easy judgment for the Tribunal to undertake when considering "whether, in the context of all of the other circumstances of this case, his dishonesty was so serious, and his insight into his misconduct was so limited, that the over-arching objective required that his name should not be restored to the register" [para 60]. He said that whilst dishonesty by a professional is always serious, and usually leads to erasure, and Dr Nooh's insight was limited, the Tribunal had found that he did not pose a risk to the public, repetition of the dishonest conduct was unlikely, that Dr Nooh had kept his knowledge and skills up to date and sought to improve his communication skills, and that he had been erased from the medical register for 7½ years.

The Judge held that, when considering what is necessary to maintain public confidence or to maintain proper professional standards and conduct, "it is appropriate to consider how long the sanction of erasure has been imposed for. In many cases, there will come a point when it is no longer necessary to continue the sanction" [para 65].

Mr Justice Lavender concluded that on balance, but “not without hesitation”, the Tribunal’s decision in the hearing was “one which was open to [it] to make in the exercise of its discretion, based on the application of its expert judgment to all of the circumstances of this unusual case”.

Accordingly, these grounds of appeal were refused.

Ground 5

The Judge held that, as evidenced by the quotes used throughout the judgment, the Tribunal had given adequate reasons for its decision, although the GMC did not agree with the reasons and “in some respects unfortunate expressions were used”.

This ground of appeal was also refused.

Therefore, the GMC’s appeal was dismissed and Dr Nooh remains restored to the medical register.

Kind regards

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