

Appeals Circular A06/17



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**Re: General Medical Council - and - (1) Dr Nilesh
Pravin Jagjivan, (2) Professional Standards Authority
for Health and Social Care
[2017] EWHC 1247 (Admin)**

Summary: The court construed the Medical Act 1983 s.40A on its ordinary wording, which gives the General Medical Council power to appeal against a tribunal finding of no impairment.

Background: The General Medical Council appealed under the Medical Act 1983 s.40A against a determination of the Medical Practitioners Tribunal that conduct by the first respondent hospital doctor was not sexually motivated and did not amount to impaired fitness to practise. The PSA supported the GMC appeal. Section 40B(1)(b) prevents the PSA from appealing where the GMC has appealed but Section 40B(2) permits the PSA to become a party to the appeal, and this is what occurred in this case (para 23).

The doctor, a cardiology registrar, had had a consultation with a 27-year-old female patient about what could be done to raise her heart rate. The patient alleged that the doctor had told her that she could raise her heart rate by exciting herself in one of three places, indicating her breasts and her vagina. She said that he suggested that she could stimulate herself "down there", referring to her vagina. He then told her that there was another way, and put his hand on top of hers at a time when her hand was above her vagina. She was partially undressed, but the vaginal area was clothed. The tribunal found that the doctor's conduct amounted to misconduct. However, it gave three reasons for finding that the conduct had not been sexually motivated: first, the absence of evidence that the doctor had ever engaged in sexual banter or

inappropriate communication; second, his own testimony that he was not attracted to men or women, and had no sexual experience; third, the absence of evidence that he had been seeking to pursue a sexual relationship with the patient.

The tribunal decided that the doctor's fitness to practise was not impaired, and decided not to issue a warning.

The issues were (1) whether, on a proper construction of s.40A of the Act, the GMC had jurisdiction to appeal; (2) the court's approach to the tribunal's findings of fact.

Held: Appeal allowed.

(1) Section 40A empowered the GMC to appeal against a "relevant decision" if it considered that the decision was not sufficient for the protection of the public. Its jurisdiction under s.40A(1)(d), the relevant provision in the instant case, depended on the tribunal having made "a decision not to give a direction under s.35D" of the Act. Section 35D provided a list of sanctions which could be imposed upon a finding that fitness to practise was impaired.

On the ordinary wording of s.40A(1)(d), the tribunal had made "a decision not to give a direction under s.35D" because, at the end of the hearing, a direction under s.35D had not been given. The GMC therefore had jurisdiction to appeal. The wording used in s.40A(3) of the Act supported such a construction, because it demonstrated that a "finding" need not be a finding of impairment, but could also be a finding that there was no impairment. The doctor's argument that s.40A(1)(d) did not provide jurisdiction to appeal because the tribunal could only give a s.35D direction if it identified an impairment of fitness to practise was rejected. That construction would mean adding the words "after determining that the person's fitness to practise is impaired" at the end of s.40A(1)(d), when those words were not present and did not need to be read into the section, *Ruscillo v Council for Regulation of Health Care Professionals and others* [2004] EWCA Civ 1356; [2005] 1 WLR 717, applied.

(2) Appeals under s.40A of the Act should be approached in the same way as appeals under s.40. The court outlined the appropriate approach (para.40) (see paras 20-22, 26-28, 31, 33-34 of judgment). The court outlined the appropriate approach (para.40).

On the facts found by the tribunal, an inference that the doctor's actions had been sexually motivated was irresistible and the tribunal's finding to the contrary was wrong and unsustainable. There could be no motive other than a sexual one for making statements to a partially-dressed patient about intimate body parts and the stimulation of her vagina (paras 44-46).

Salient points:

- s.40A empowers the GMC to appeal against an MPT finding of no impairment.
- Whilst any appeal court must be extremely cautious about upsetting a conclusion of primary fact, when the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence.