

3 April 2018

Medical Practitioners Tribunal Service  
Seventh floor, St James's Buildings  
79 Oxford Street  
Manchester M1 6FQ

To: MPTS Associates

Tel: 0161 923 6263

Fax: 0161 240 7199

Email: [enquiries@mpts-uk.org](mailto:enquiries@mpts-uk.org)

Cc: Tribunal Clerks  
Medical Defence Organisations  
Employer Liaison Advisers

## General Medical Council v Dr Robert Stone [2017] EWHC 2534 (Admin)

### Learning Points

- Tribunals must give sufficient weight to each of the three limbs of the overarching objective.
- Tribunals must ensure that relevant parts of the *Sanctions Guidance* are fully considered and sufficiently referenced in their determinations.
- Tribunals must make clear that the gravity of misconduct has been balanced against any mitigating factors and explain fully in their determinations how the mitigation justifies a lower sanction than the *Sanctions Guidance* suggests is the likely outcome.
- The clearer the Tribunal's reasoning is in demonstrating it has covered all relevant considerations, the less likely the Court will interfere with their decision.
- In a disciplinary context personal mitigation carries far less weight than it might in a criminal law context.
- Mitigating medical evidence must not prevent the wider public interest from being upheld. Tribunals ought to draw a distinction between a doctor's moral and professional responsibilities and duties, and the factors which an expert in mental health would take into account in reaching a diagnosis.

### 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 4 August 2016 to suspend Dr Stone's registration from the medical register for a period of 12 months and to order a review hearing.

The GMC also appealed the decision of the Tribunal at the review hearing on 10 August 2017, that Dr Stone's fitness to practise was no longer impaired because of the remedial steps he had taken. The outcome of this appeal was dependent on the outcome of the earlier appeal.

The allegations against Dr Stone were that he had engaged in a sexual and improper emotional relationship with a patient who he knew to be vulnerable ('Patient A') between November 2011 and July 2014 and, during that time, he had continued to act as Patient A's General Practitioner. This was admitted by Dr Stone at the Tribunal hearing.

It was also alleged that Dr Stone had prepared two letters of support for Patient A (including one in relation to her claim for benefit support) in which he dishonestly failed to disclose his sexual relationship with her. This was disputed by Dr Stone at the Tribunal hearing.

Dr Stone gave oral evidence before the Tribunal and Patient A's witness statement was admitted in evidence as hearsay; she was now deceased. After finding the above allegations proved the Tribunal then considered whether Dr Stone's fitness to practise was impaired. The Tribunal heard and accepted evidence from Dr John Hook, a consultant psychiatrist treating Dr Stone, whose report stated that, whilst it appeared that Dr Stone's relationship with Patient A was sexually motivated, there was an alternative explanation "based in the doctor's character pathology and personal circumstances for these behaviours. In my view the combination of the above factors created a perfect storm in which he was confused by his own feelings and behaviours to a degree which interfered with and overrode his professional judgement..... I do not think that his behaviour was sexually predatory". The Tribunal noted that Dr Hook's report '*...contained a "plausible and psychologically coherent narrative"* [para 12].

The Tribunal found Dr Stone's fitness to practise was impaired indicating that it had "*taken into account all the psychological, social and personal factors that contributed to your behaviour. It is, however, mindful that you made a series of conscious and moral choices to behave in this way with a vulnerable patient over a prolonged period and in doing so disregarded fundamental tenets in GMP*" [para 34 of the Tribunal's determination].

The Tribunal then considered what sanction to impose. After expressly referring to the *Sanctions Guidance*<sup>1</sup> and the overarching objective of protecting the public (as set out in the Medical Act 1983), the Tribunal considered both the aggravating and mitigating factors in the case. As part of the mitigating factors, the Tribunal "*observed that the only factor which mitigated the serious misconduct at the time it occurred was the doctor's [condition with which he had been diagnosed]*"<sup>2</sup> and it

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<sup>1</sup> March 2016 edition

<sup>2</sup> The actual condition is redacted from the judgment

accepted Dr Hook's evidence and indicated that it "*considers that you were not predatory. You in fact wanted to help and care for Patient A and having made the wrong choice you were very confused by your different professional and personal responsibilities*" [para 21]. The Tribunal reached the conclusion that Dr Stone was highly unlikely to find himself in the same circumstances again and that the likelihood of repetition was very low. In relation to the finding of dishonesty, the Tribunal found that this was "*inextricably bound up with [Dr Stone's] personal and sexual relationship with Patient A and the inevitable conflict of that dual relationship*" and that the same mitigating factors applied.

The Tribunal determined that suspending Dr Stone's licence for a period of 12 months was '*...appropriate to send a message to the profession and the public and allow [Dr Stone] the time to undertake the recommend psychotherapy*'. The Tribunal also confirmed that erasure was disproportionate due to the significant mitigating factors in the case, "*in particular the abnormal state of mind you were in during time of misconduct and the special circumstances around it*".

## **GMC Appeal**

The GMC appealed against the Tribunal's decision to suspend Dr Stone's registration for a period of 12 months on the following grounds:

1. The Tribunal either misconstrued or failed to consider *Sanctions Guidance* (in which a number of paragraphs indicated that a number of aspects of Dr Stone's misconduct rendered erasure a likely outcome). The GMC submitted that it was incumbent on the Tribunal to specifically deal with the relevant paragraphs and to make clear that the gravity of Dr Stone's misconduct had been balanced against any mitigating features - not doing so meant that the Tribunal had failed to consider two limbs of the overarching objective, namely maintaining public confidence and proper professional standards and conduct;
2. The Tribunal placed disproportionate weight upon the evidence of Dr Hook, the consultant psychiatrist. Although the GMC did not dispute the diagnosis, it considered that the extent to which this disorder could properly serve to mitigate the gravity of the doctor's misconduct had been considerably overplayed;
3. The Tribunal failed to give appropriate weight to the issue of dishonesty and had instead merely incorporated it within the wider consequences of Dr Stone's sexual misconduct;
4. That the sanction was simply wrong in the light of the seriousness of Dr Stone's misconduct, and that even if grounds 1, 2 and 3 are not well-founded, the only appropriate sanction is that of erasure. Mr Justice Jay agreed with Dr Stone's representative that if the GMC cannot succeed on its first three grounds, it must fail on the fourth and said nothing further about it.

## **Judgment**

Mr Justice Jay allowed the appeal.

In his judgment, he made the following general points:

- “The degree of deference which should be paid to the expert MPT must depend on the context and the nature of the issues under scrutiny. An attempted review of matters of primary fact meets the traditional obstacle that this court cannot determine for itself matters of witness credibility and reliability, save in very clear cases....Plainly, deference is on a spectrum and no precise formulation of its intensity should be attempted. But, at least as a general rule, the clearer it is that the tribunal has covered all relevant considerations, the harder it will be for this court to intervene. This is because the issue will tend to dissolve into one about weight and expert evaluation”;
- “paragraph 40(vii) of Jagjivan<sup>3</sup> – matters of personal mitigation are likely to carry considerably less weight in regulatory than in criminal proceedings. In this particular regard, I prefer to follow this authority rather than the second sentence of paragraph 24 of the Sanctions Guidance, to the extent that the latter suggests that more weight may be given to personal mitigation if the concern is about public confidence in the profession.”

Mr Justice Jay then considered the nature of Dr Stone’s misconduct including that there was a lengthy sexual relationship with an obviously vulnerable patient, who he continued to treat throughout the relationship, and that this was “not a momentary lapse of judgment or a “one off”....the doctor had plenty of opportunity to reflect on the wisdom of his actions before this relationship began, and could have taken steps to prevent it from happening.” The Judge also said that, the dishonesty was “a serious additional feature” and that Dr Stone “took a separate decision to assist Patient A by writing the letters....This amounted to a separate error of judgment which was not coextensive with the original error in beginning this sexual relationship in the first place and then continuing [it]” [paras 49-50].

1. Mr Justice Jay noted that Dr Stone had clearly abused the special position of trust that he held in relation to Patient A and that the present case was a serious one of its type [para 52]. He said that paragraphs 140 and 144 of *Sanctions Guidance*<sup>4</sup> taken together indicated that erasure was likely to be the appropriate sanction in a case with the characteristics he had described earlier in his judgment. He said that:
  - a. he would at the very least have expected the Tribunal expressly to set out the relevant paragraphs of *Sanctions Guidance*<sup>5</sup> in the sanction determination, but the Tribunal did not do so in this case [para 53].
  - b. had the Tribunal referred in “appropriate detail to the considerations set out under paragraphs 103, 137, 139 and 144 of the *Sanctions*

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<sup>3</sup> GMC and (1) Dr Jagjivan, (2) PSA for Health and Social Care [2017] EWHC 1247 (Admin)

<sup>4</sup> which are now paragraphs 146 and 150 of the current Sanctions Guidance (February 2018 edition)

<sup>5</sup> Paragraphs 103, 137, 140 and 144 (which are now paragraphs 109, 143, 145 and 150 of the current Sanctions Guidance)

*Guidance*<sup>6</sup> “without providing these exact rubrics”, he would have had no difficulty with its decision-making, but that the converse also applied.

- c. The Tribunal instead referred to the *Sanctions Guidance* in general terms and stated that it had been taken into account. However, the Judge said that in his judgment “there is no indication that the Tribunal grappled with the seriousness of this case...in the context of sanction” and there was “a failure to properly consider the objective features of the instant case, to demonstrate that their gravity had been fully understood, and then to address and explain how the available mitigation operated to justify the imposition of the sanction of suspension”. He went on to say that although the Tribunal had made clear that Dr Stone’s condition was *the* factor which took his case from erasure into suspension that was “insufficient” in his view to transcend the earlier failings he had identified [para 53].

In those circumstances, the Judge held that the GMC’s first ground of appeal was made out. Consequently, he also held that the third ground of appeal (that the Tribunal also failed adequately to protect the public by giving sufficient weight to the second and third limbs of the overarching objective) was also upheld [para 54].

2. The Judge then considered the GMC’s second ground of appeal, as a point of principle. Whilst he noted that it was open to the Tribunal to give weight to the evidence of the consultant psychiatrist in the context of mitigation, considerable caution was needed in fitness to practise cases [paras 57-58]. The Judge said that:
  - a. in a disciplinary context “personal mitigation carries far less weight than it might in the domain of the criminal law, because all three elements of the tripartite public interest are always in play”; and
  - b. when considering Dr Hook’s evidence “[w]hat was relevant to impairment was equally relevant to sanction” namely that the doctor “*made a series of conscious and moral choices to behave in this way with a vulnerable patient over a prolonged period*” [para 58] and that
  - c. confronted with expert evidence of the nature which it received (from Dr Hook), the Tribunal ought to have “drawn a distinction between [Dr Stone’s] moral and professional responsibilities and duties, and factors which an expert in mental health would take into account in reaching a diagnosis” [para 60].

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<sup>6</sup> which are now paragraphs 109, 143, 145 and 150 of the current Sanctions Guidance

The Judge held that this was an extremely serious case of sexual misconduct, the Tribunal had given excessive weight to Dr Hook's evidence and the wider public interest was not upheld by doing so. Therefore, the GMC's second ground of appeal was also upheld [para 61].

3. The Judge considered the GMC's third ground indicating that had it stood alone, he would have required some persuading that it could be sufficient for the present purposes of the appeal. He said that "[o]verall, I do not read paragraph 40 as saying that the doctor's dishonesty was adding to the seriousness of this case, whereas in objective terms it clearly did. Further, the MPT had already effectively decided to suspend the doctor at the end of paragraph 38 of its Determination on Sanction, which decision was "strengthened" (paragraph 39) by other mitigation. This additional mitigation, although substantial, could not logically impact on the seriousness of the doctor's misconduct at the time it occurred" [para 62]. He therefore also upheld this ground.

In the circumstances, the Judge held that, given the gravity, duration and extent of Dr Stone's misconduct, and giving appropriate weight to the available mitigation, paying sufficient regard to the overarching objective, the order of suspension imposed by the Tribunal must be quashed and replaced with an order of erasure from the medical register [paras 64-66].

He also found that no separate order was necessary in relation to the GMC's second appeal as it had been wholly superseded by his ruling on the first appeal.

### **Tribunal Development Section**

**0161 240 7292**

[Tribunaldevelopmentsection@mpts-uk.org](mailto:Tribunaldevelopmentsection@mpts-uk.org)