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**General Medical Council v Dr Joseph Nyamasve [2018] EWHC 1689
(Admin)**

Learning Points

- The requirement to hold a licence to practise plays an important role in protection of the public. If a doctor is dishonest during revalidation and/or in obtaining a licence to practise or alternatively, a doctor fails to get the necessary licence to practise, then he or she is not being properly subject to the regime, the purpose of which is the protection of the public and the maintenance of proper standards.
- Tribunals should carefully consider whether dishonesty is an isolated incident or persistent and/or deliberate.
- Tribunals should ensure that they treat factors consistently, as either aggravating or mitigating, throughout their decisions at both impairment and sanction stages.
- When considering impairment and sanction, it is important for a tribunal to assess a doctor's insight, remediation and the risk of repetition of the wrongdoing:
 - the greater the insight a doctor has in relation to his/her wrongdoing, the more confident a tribunal can be that the wrongdoing can be remediated;
 - a tribunal can have confidence that there is unlikely to be repetition only if it is satisfied that there is a candid and full acceptance of:

- first the wrongdoing; and
- secondly why it is wrong.

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 24 November 2017 to suspend Dr Nyamasve's ('N') registration for a period of four months, with an immediate order, and to order a review hearing.

The allegations against N were that, having relinquished his licence to practise, he knowingly worked as a locum at a hospital without a licence to practise, he failed to inform the locum agency which placed him and the hospital where he worked, that he did not have a licence to practise and that all of this conduct was dishonest.

N did not attend the hearing and the Tribunal found all the facts proved and that N's fitness to practise was impaired. In its determination on impairment, the Tribunal found that N's failure to inform the locum agency "*took place over a number of months*" and that he had a number of opportunities to disclose his position, his motivation was financial and that his conduct risked patient safety and "*undermined the system put in place to protect patients, which requires every doctor to have a licence to practise....[and]..breached a fundamental tenet of the profession in failing to have a licence to practise in order to undertake clinical work...*". Overall the Tribunal indicated that it was concerned that should N's financial situation be such again, that his behaviour would be repeated and it further noted that N did not acknowledge his financial predicament as an underlying factor in his misconduct.

The Tribunal then went on to consider whether and what sanction ought to be imposed. The Tribunal determined to suspend N's registration for four months and in its decision, the Tribunal:

- said it was "*mindful of the impact that [N's] health may have had on his ability to work, the corresponding effect on his financial situation and whether that contributed to the misconduct*";
- said it was concerned about the mechanisms in place at the time at both the locum agency and the hospital, which allowed N "*to secure a clinical position for a significant period without a licence to practise*";
- found N's misconduct "*took place over a period of months, but that it was a single ongoing occurrence*";
- noted N's failure to engage with the GMC for over two years and that there was no evidence of any steps taken to remediate;
- noted N had a financial advantage in not having a licence to practise "*which*

may have been exacerbated by the background issues regarding his financial position and health problems”;

- said: *“The Tribunal has already determined that Dr Nyamasve's misconduct constitutes a serious departure from Good Medical Practice. The Tribunal bore in mind the mitigating factors in this case including the antiquity of the misconduct, the fact Dr Nyamasve has had an otherwise unblemished medical career and has shown insight into the gravity of his misconduct. The Tribunal is of the view that there is little risk of Dr Nyamasve's misconduct being repeated, as it was an isolated period of behaviour. The Tribunal also took into account paragraphs 120-128 of the SG and noted that Dr Nyamasve made no attempt to cover up his wrong doing and made admissions at the first opportunity he could formally do so.”*

Grounds of Appeal

The GMC appealed against the Tribunal's decision on sanction on the basis that the facts of the case are so serious that in deciding to impose a suspension of four months, the Tribunal clearly failed to grasp the seriousness of the case and N's conduct. The GMC submitted the following:

1. there was an inconsistency between the Tribunal's findings at the impairment stage and those in relation to sanction including:
 - a. that the Tribunal initially found N's insight was limited because *“he did not acknowledge his financial predicament as an underlying factor in his misconduct”* but later in its sanction determination concluded that there was little risk of the misconduct being repeated, despite N's failure to give evidence at the hearing or meaningfully engage with the GMC in relation to it; and
 - b. that N's financial situation and that his ill-health may have prevented him from working were considered mitigating factors at sanction stage, but that this was inconsistent with the MPT's view of his motivation in its impairment decision, where his failure to address the same factor was treated as an aggravating circumstance.
2. the Tribunal did not have a proper evidential basis for some of the matters that they relied upon by way of mitigation, e.g. it may be relevant to take into account that erasure would deprive the public of a doctor's services, but there was in fact a real paucity of evidence about N's current competence.
3. the Tribunal took into account considerations irrelevant to N's culpability such as

its concern about mechanisms in place at the locum agency, and indeed the hospital, which failed to detect that N did not have the necessary licence to practise.

4. the Tribunal attached insufficient weight to the fact that N's conduct was dishonest over a sustained period of time and, because it bypassed the licensing regime, posed a risk to patients and undermined the entire system of requiring a licence to practise.

Judgment

The appeal was heard by Mr Justice Nicklin. The Judge had been referred to a number of authorities by the GMC which it said demonstrated a consistent approach to the assessment of dishonesty and the appropriate sanction [paras 9-18]. Mr Justice Nicklin first considered those authorities and made a number of observations including:

- in relation to the case of *GMC v Theodoropolous [2017] EWHC 1984 (Admin)* (which also involved allegations of dishonesty in connection with a doctor's licence to practise) that:

“What I derive from that authority particularly is the importance of the requirement to hold a licence to practise and the role it plays in protection of the public. A doctor is only allowed to practise if he or she has the relevant licence to practise. The licence can only be obtained on the GMC being satisfied that the relevant doctor has complied with all the requirements as to ongoing training, which are consistent with ensuring that the public is adequately protected from doctors whose competence falls below an acceptable level” [para 14];

- “Those authorities demonstrate the importance and impact of dishonesty. It is not simply that public confidence in doctors is likely to be diminished if doctors are dishonest. It also has a practical importance in the regime of licence to practise. If dishonesty is practised at the stage of revalidation and obtaining a licence to practise or alternatively a doctor fails to get the necessary licence to practise, then he or she is not being properly subject to the regime, the purpose of which is the protection of the public and the maintenance of proper standards” [para 17];

In relation to the grounds of appeal, Mr Justice Nicklin said:

1. “[T]he reasons why a doctor has been dishonest may have a bearing on whether there is likely to be repetition, but for the reasons explained in the

seventh principle in *Jagjivan*¹, such mitigation is likely to have much less significance in the context of regulatory proceedings" [para 38];

2. there was force in the GMC's submissions that the Tribunal's decision on impairment (in treating N's failure to acknowledge "his financial predicament as an underlying factor in his misconduct" as an aggravating factor) was inconsistent with its decision on sanction (in treating the impact N's health may have had on his ability to work, the effect of that on his financial situation and whether that contributed to the misconduct, as a mitigating factor). However, he went on to say that "in my judgment, the most serious issue is the failure of the MPT to attach sufficient weight to the gravity of the doctor's conduct that it had found proved" [para 39];
3. "This was a sustained period of dishonesty. The doctor deliberately relinquished his licence to practise in January 2012 and then made two efforts, which were not successful, to restore his licence. That indicates quite clearly that the doctor knew that he should not be practising without a licence. Indeed, he admitted the fact of that in his police interview. The dishonest conduct was, therefore, deliberate and persisted in over a long period of time" [para 40];
4. although this was a case where N had an unblemished professional record and a sanction of suspension or erasure would lead to the inability to provide services to patients of what is clearly ostensibly a good doctor [para 41], "this was a case where the seriousness of the dishonesty is such that the public interest in maintaining public confidence in the profession and also the importance of protecting patient safety meant it required a severe sanction. If not regarded as punishment, I cannot see what a suspension of four months was likely to achieve by way of protection of the public and maintenance of public confidence, given the Tribunal's findings" [para 42];
5. "The facts were that, albeit under difficult circumstances, the doctor was prepared to deceive people as to his ability to practise. The fundamental question to which the MPT should have addressed its mind was: is a sanction short of erasure sufficient to protect the public and maintain public confidence in the medical profession?" [para 43];

¹ *General Medical Council v Jagjivan and Anor* [2017] EWHC 1247 (Admin):

"(vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public."

6. "there was a deliberate decision by the doctor, borne of his own particular circumstances, not to obtain a licence" and that he (i.e. the Judge) "cannot be satisfied, as the Tribunal appeared to find in relation to sanction, that were the doctor to face similar circumstances in the future that he would not make the same decision again" [para 45];
7. "It is an important consideration for any tribunal to assess whether the doctor has insight into the wrongdoing. Put shortly, the greater the insight that a doctor has in relation to his wrongdoing, the better the basis on which the Tribunal can be confident that the wrongdoing can be remediated" [para 48];
8. the Tribunal attached importance and weight to the fact of N's insight; he accepted immediately that what he had done was wrong and made full admissions in his police interview [para 46]. However, N's apology for the conduct, contained in a letter to the GMC, was "as thin as one could possibly expect to find" [paras 47 and 49];
9. "it is only if the Tribunal is satisfied that there is a candid and full acceptance of firstly the wrongdoing and secondly why it is wrong that the Tribunal can have any confidence that there is unlikely to be repetition. That was not present in this case. It is an important factor, in my judgment, that the Tribunal should have had proper regard to. My view is that their confidence that the incident was unlikely to be repeated was, on the evidence, misplaced" [para 50];
10. that he was satisfied that the Court is as well-placed as the Tribunal to assess what is needed to protect the public and to maintain the reputation and confidence in the medical profession and that "[I]n my judgment, very clearly, a four-month suspension was inadequate when measured against those requirements. I am satisfied that the imposition of this sanction was wrong and I will quash it" [para 51].

The Judge therefore, allowed the GMC's appeal and the direction for suspension was quashed. In light of N's absence from the appeal hearing, and having heard further submissions, the matter of sanction was remitted to a new tribunal for reconsideration in light of the judgment and any further submissions and/or evidence as it admits or allows.

Kind regards

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