

Appeals Circular A06/20

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(1) General Medical Council and (2) Professional Standards Authority v Zafar [2020] EWHC 846 (Admin)

Learning points

- ▶ Tribunals must have proper regard to the *Sanctions Guidance* and, if departing from it, must ensure that there are sound reasons for doing so, which are fully and clearly explained.
- ▶ Tribunals must ensure that they correctly identify whether individual factors are aggravating or mitigating in the circumstances of the case and attach appropriate weight to those factors.
- ▶ In cases involving convictions, Tribunals should ensure that there are no relevant legal proceedings which have concluded or are ongoing which may impact upon their considerations. Decisions made by appellate courts on matters to be deliberated upon by Tribunals will always be of relevance.

Background

Z was a GP who had a large private practice preparing medical reports for the purpose of personal injury litigation. Z was instructed by solicitors acting for a taxi driver ('Mr A') who had been involved in a road traffic accident. He examined Mr A and wrote a medical report dealing with his injuries and future prognosis. In his report, he stated that Mr A had fully recovered from his injuries within about a week of the accident.

Mr A's solicitors contacted Z, told him that Mr A still had ongoing symptoms and asked Z to amend his report. Z immediately prepared an amended medical report

(with the same date as the initial report) without further examination of Mr A, in which he stated that Mr A had persisting pain and stiffness of his neck which would fully resolve six to eight months after the accident.

Mr A then commenced a claim for damages, relying on Z's amended report. However, in error, both versions of Z's report were disclosed to the defendant's insurers. They drew the two inconsistent reports to the attention of a District Judge who directed that enquiries should be made. An enquiry agent was instructed by the insurers to carry out an investigation. During that investigation, Z provided a signed witness statement in which he alleged that the original report was correct and that the amendments to it had been made by someone else without his permission. In a second witness statement, Z changed his account and accepted that he had amended his original report. In a third witness statement, he confirmed that he had created the amended report and that it was the correct version.

The insurers commenced contempt proceedings against Z which were heard in the High Court by Mr Justice Garnham. There was a lengthy hearing during which Garnham J found that Z had been reckless in preparing his amended report and had not cared whether the contents of the report were true or false. He also found that Z had been dishonest in his first witness statement which he knew was likely to be used for court purposes and to interfere with the course of justice. He found Z guilty of contempt and sentenced him to six months' imprisonment (suspended for two years).

In an appeal against sentence brought by the insurers, the Court of Appeal emphasised the seriousness of putting forward a false statement in a document verified by a statement of truth. Their judgment gave guidance on the narrow distinction between recklessness and dishonesty in such cases and observed that the High Court Judge had incorrectly assessed Z's lie in his first witness statement as the most serious aspect of his conduct. They considered that, in fact, the seriousness of the case lay in Z putting forward the revised report as if it represented his honest and independent opinion based on his examination of Mr A. They declared that the sentence was unduly lenient but elected not to increase it.

The matter came before an MPT hearing. In advance of the hearing, the GMC's and Z's representatives agreed that the MPT should not receive the Court of Appeal judgment. After finding Z's fitness to practise was impaired, the MPT determined that a sanction of 12 months suspension was appropriate, having taken into account the *Sanctions Guidance*, the High Court's finding of contempt and the sentence imposed.

Grounds

The GMC and PSA appealed against the MPT's decision on the basis that:

- ▶ A sanction of suspension was untenable as the MPT had wrongly been deprived of knowledge of the Court of Appeal's assessment of the Judge's sentence as unduly lenient. Had the MPT been aware of the Court of Appeal's judgment and its reasoning, it would have assessed the allegation against Z differently and, in

particular, would not have highlighted perceived distinctions between Z's acts of dishonesty and recklessness.

- ▶ The MPT had failed to reflect the gravity of Z's conduct, had given too much weight to personal mitigation and had failed to have sufficient regard to the *Sanctions Guidance*.

Both the GMC and the PSA asserted that they were not precluded from relying on the Court of Appeal judgment, despite the earlier agreement reached by the GMC and Z's representatives. Z asserted that the Court of Appeal judgment was of no relevance and it would be an abuse of process for the GMC to now rely upon that judgment in this appeal.

Judgment

The appeal was heard by Lord Justice Davis and Mr Justice Holgate, sitting in the Divisional Court. They first considered whether the Court of Appeal's judgment could be adduced in this appeal. On this issue it was held that:

- ▶ As the High Court Judge's evaluation of Z's case had been judicially re-evaluated in the Court of Appeal, it was logical and sensible that the Court of Appeal judgment ought to have been available to the MPT. The MPT was left to decide the matter on an incomplete basis and it would be wrong to preserve that position in this appeal [para 63].
- ▶ It was essential for the MPT to have had the most authoritative judicial guidance on the facts in Z's case and the gravity of his conduct in the context of the good administration of justice [para 68]. Had the MPT been aware of the Court of Appeal's guidance and declaration, it was unthinkable that it would have expressed itself in the manner in which it did [para 69].
- ▶ As the agreement between the GMC and Z's representative to exclude the Court of Appeal's judgment was erroneous and distorted the MPT hearing, there was no basis to exclude it from this appeal [para 77]. In any event that agreement could not bind the PSA, which was not a party to it [para 73].

On the issue of sanction, the Divisional Court held:

- ▶ The MPT had reached its decision on a mistaken basis: it was unaware of the Court of Appeal's judgment, including its assessment on the correct approach to recklessness and where the true seriousness of the case lay [para 82].
- ▶ Although the MPT had heard evidence from Z on sanction and accepted he had shown contrition and remorse and undertaken focussed remediation, the *Sanctions Guidance* and case law make clear that, in a case of dishonesty, such matters carry limited weight and evidence of clinical competence cannot mitigate serious or persistent dishonesty [para 83].
- ▶ Z's dishonest and reckless conduct had been persistent, struck at the heart of the administration of justice and involved abuse of the trust accorded to experts by

the courts. Accordingly, the only proper sanction was erasure; any lesser sanction would fail to reflect the gravity of the misconduct and would be inconsistent with the overarching objective [para 84].

- ▶ Erasure would have been appropriate even without knowledge of the Court of Appeal judgment. The MPT had not explained how it felt that it was able to depart from the clear guidance of the *Sanctions Guidance*, which identified factors which could lead to erasure [para 86].
- ▶ The MPT included mitigating factors in their determination which, on proper analysis, were not in fact mitigation and could be regarded as aggravating factors. Aside from Z's personal mitigation (remorse and testimonials) which had limited weight in line with case law and the *Sanctions Guidance*, there was no other real mitigation [para 87].

The Divisional Court determined that remittal to the MPT would serve no function and substituted the MPT's sanction with an order for erasure [para 89].

Kind regards

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