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**McDermott v Health and Care Professions Council [2017] EWHC 2899
(Admin)**

Learning Points

- When considering what sanction to impose, in light of a registrant's insight and remediation, whilst balancing the public interest and the interests of a registrant, Tribunals should:
 - take into account the actual work undertaken, willingness to improve and progress made by a registrant in the interim period before a hearing, even where it is considered that s/he demonstrates a lack of insight;
 - consider whether insight can be developed whilst under conditions, rather than whilst suspended, having regard to the particular circumstances of the case;
 - consider whether conditions are appropriate and proportionate in light of the registrant's compliance with an interim order of conditions for a lengthy period, having regard to the particular circumstances of the case and the reasons why a sanction should be imposed.
- Whilst an interim order is in no way binding upon a Tribunal considering the substantive case, a registrant's compliance with the interim order (and whether or not any significant concerns were identified during that period) is a relevant part of the context.

Background

This was an appeal by a physiotherapist ('M') against a decision of the Conduct and Competence Committee of the Health and Care Professions Tribunal ('HCPT') decision dated 16 June 2017 that allegations of a lack of competence were proved, that his

fitness to practise was impaired and that he should be suspended for a period of 12 months.

M began working for University Hospitals Birmingham NHS Foundation Trust ('the Trust') in 2009. He commenced a musculoskeletal rotation at the Royal Orthopaedic Hospital ('the Hospital') in May 2012 and, by June 2012, concerns had been raised about him including in relation to the accuracy of patient assessments. After discussions with the Hospital, M was told that his performance would be managed using the poor performance procedure.

M continued to work for the Trust and further concerns were raised. M was escalated up the poor performance procedure and in December 2014 commenced long term sick leave. He then resigned from his position in March 2015. It should be noted that M had dyslexia and he maintained that the Trust had not adequately supported him to manage this – the Trust argued that it had given support.

An HCPC investigation commenced in summer 2015 and in October 2015 an interim order imposing conditions upon M's registration was made. In December 2015 M secured an honorary contract with Birmingham Community Healthcare NHS Trust which enabled him to undertake unpaid voluntary work (subject to the conditions of his interim order). This honorary contract was extended so that at the time of the HCPT's decision, he had been in that voluntary post for about 17 months. He received mainly positive feedback (although concerns were raised in supervision records about assessments, treatment plans, clinical reasoning and time management).

The HCPT hearing commenced in December 2016, was adjourned and concluded in May 2017, with a total of 46 charges found proved. The Tribunal concluded that the facts proved disclosed a lack of competence, M's fitness to practise remained impaired and determined to suspend his registration for a period of 12 months.

Grounds

M appealed the HCPT's decision on the following main grounds:

1. there was a lack of specificity in the charges coupled with a lack of sufficient evidence to support the more general charges;
2. the decision as to a lack of competence was incorrect as the HCPT failed to address M's dyslexia properly and failed to properly consider the question of 'seriousness';
3. the decision as to impairment was wrong, as it failed to properly reflect the evidence of remediation; and
4. the order of suspension was not proportionate as it did not properly reflect what M had done after resigning from the Trust and was based on flawed reasoning.

Judgment

Mrs Justice Yip allowed the appeal. She considered each of the grounds of appeal in turn:

1. Ground 1 – the Judge noted that some of the charges did not refer to specific events or dates and that the phrase '*did not consistently*' was frequently used [para 21]. However, she held that, looking at the evidence presented to the HCPT and their findings, "it is quite clear that any lack of specificity did not produce an unfair hearing" [para 22]. Mrs Justice Yip noted that M was able to respond to the allegations in his witness statement, making it clear where he felt vagueness prevented a less than full response and the Tribunal had carefully explained the basis upon which it had found an allegation proved. It therefore followed that M clearly knew the extent to which he had been found to have fallen below the required standard [para 23]. The HCPT had made findings of fact which it was entitled to make [para 24]. Accordingly, Ground 1 of the appeal failed [para 25].
2. Ground 2 - the Judge held that the HCPT had given detailed reasons at each stage of the hearing process [para 29], had given sufficient prominence to M's dyslexia and the evidence dealing with that [para 31] and M had not identified any material error in the HCPT's treatment of his dyslexia [para 32]. The Judge also rejected M's criticism of the HCPT's reasoning in relation to the issue of seriousness and said that the reasons given by the HCPT were sufficient for M to understand the decision and the basis for it. Ground 2 of the appeal failed as the decision in relation to competence was one which the HCPT was entitled to reach [para 34].
3. Ground 3 - the Judge said that "I do not believe there is any flaw in the [HCPT's] reasoning such as would justify interfering on appeal" [para 37]. She held that the matter of impairment was "firmly" a matter for the judgment of the HCPT and that it had correctly identified the basis upon which they were to approach that question [para 38]. Although the positive testimonials from M's voluntary work made "quite a striking picture of improvement" and M had received overwhelmingly favourable feedback, the Judge found that the HCPT had given concise reasons as to why his fitness to practise remained impaired and were "not required to set out in detail their consideration of each piece of evidence". She said that even taking the positive evidence at its highest, it could not be said that the HCPT were "not entitled to regard the supervision records as evidencing some ongoing concerns" [para 40]. The Judge said that the HCPT were required to have regard to public protection and upholding of proper professional standards, were correct to identify that their findings demonstrated significant competence issues [para 41] and it could not be said that they were wrong to conclude there remained "*a current risk of harm to the public*" [para 43]. Ground 3 of the appeal also failed [para 44].
4. Ground 4 - the Judge referred to the interim conditions which had been imposed, that M had complied with those conditions and no significant

concerns were identified. She referred to the fact that it had been found appropriate to relax the interim conditions (from direct to indirect supervision) and said “[w]hile this was in no way binding upon the final Panel who had the advantage of hearing all the evidence, I consider that it was a highly relevant part of the context” [para 50].

She went on to say:

‘In my judgment the Panel overlooked the reality of what had happened since 2015. It had been considered appropriate to make the Appellant subject to a Conditions of Practice Order in the interim period. He had shown extraordinary commitment to his voluntary placement, keeping up a significant number of hours per week in addition to having a paid job to meet his living expenses. He had complied with the conditions imposed, and in that context, had received genuinely positive references. There was no suggestion that public protection had not been maintained... [para 59]’

Whilst she agreed with the HCPT’s finding that M needed to develop his insight, the Judge said that it was not clear why that insight could not be developed under an order of conditions, in the particular circumstances of the case [para 60]. She said that M had complied with the conditions over a lengthy period of time and, “on any view of the evidence, had made real improvement”. It was, therefore, inappropriate to suspend him:

“In my judgment, taking the Appellant out of practice for a period of 12 months after he has displayed a real commitment to maintain his skills through the long interim period and produced evidence of improvement is not an appropriate sanction. Further, that course of action is likely to worsen rather than improve the Appellant’s performance and I do not consider that it can be said to maintain the balance between public and private interest” [para 62].

It was therefore held that the HCPT’s decision on sanction should be quashed and that the matter was remitted to a new Tribunal with a direction to impose conditions upon M’s registration, on such terms as the new Tribunal felt appropriate in the circumstances whilst reflecting that the Judge had supported the HCPT’s other findings [para 64-65].

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