MPTS Medical Practitioners Tribunal Service

Appeals Circular A07/20

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R. (on the application of Dutta) v The General Medical Council *[2020] EWHC 1974 (Admin)*

Learning points

- Tribunals can only make factual findings against a doctor which are based on an interpretation of events that has previously been disclosed to them and in respect of which they have been provided with adequate opportunity to investigate, call evidence and make submissions.
- Tribunals should base factual findings on inferences drawn from documentary evidence and known or probable facts and use oral evidence to subject the documentary records to critical scrutiny and to consider the witness's personality and motivation. Tribunals should assess the evidence in the round.
- Tribunals should not assess a witness's credibility exclusively on their demeanour when giving evidence. A witness's veracity should be tested by reference to the objective fact(s) proved independently of their testimony, in particular by reference to the documents in the case.
- Tribunals should make a rounded assessment of a witness's reliability, rather than approaching their reliability in respect of each charge in isolation from the others.

Background

This was a consolidated hearing to consider a claim by Dr Ashish Dutta ('Dr D') for judicial review in respect of a GMC decision dated August 2016 to refer certain

allegations for investigation, which included a decision that the five year rule[1] was not engaged in respect of allegations from 2009 ('the JR') and an appeal by Dr D pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal') decision dated 20 November 2019 to suspend him from practice ('the Appeal').

GMC investigation

Dr D was a cosmetic surgeon and the GMC's case against him arose from allegations of misconduct in his professional dealings with four patients, between 2009 and 2015. The GMC investigated the following matters:

- Patient A: on 11 April 2009, Dr Dutta performed a breast augmentation operation on Patient A ('the Augmentation Operation') with a follow up scan in August 2010 ('the 2010 scan'). Patient A was then referred to another surgeon, Dr B, who carried out two further operations on her. In 2014, Patient A complained to Dr D that Dr B had allegedly indecently assaulted her. The GMC investigated allegations against Dr D that he:
  - failed to provide appropriate advice prior to the Augmentation Operation; offered a financial incentive to A to have that operation swiftly; mishandled the operation and then told A there was nothing wrong ('the 2009 Allegations'); and
  - falsely reported that the 2010 scan showed nothing wrong ('the 2010 Allegation').

- In 2015, Dr D performed a series of seven procedures on Patient C, two gynaecomastia procedures on Patient D and one operation on Patient E. An inspector from the Care Quality Commission ('CQC') referred to the GMC concerns about Dr D's conduct towards and/or record-keeping in respect of Patients C, D and E ('the 2015 Allegations').

The GMC opened its investigation into Dr D in November 2015, upon receipt of the referral from the CQC. On 16 November 2015, Patient A gave a witness statement to the GMC in connection with its investigation into Dr B. In that statement Patient A made allegations about Dr D's qualifications, his medical treatment of her and his response to her complaints about Dr B. However, in September 2014 the police (who were investigating Patient A's allegations against Dr B) had also informed the GMC of some of Patient A's comments in relation to Dr D.

The five year rule and referral decisions

On 18 August 2016 an Assistant Registrar ('the AR') of the GMC decided to refer allegations about Dr D's conduct in respect of all four patients for investigation. Having taken legal advice, the AR considered that the five year rule was not engaged in relation to the 2009 Allegations, essentially on the basis that the 2010 Scan was

[1] GMC (Fitness to Practise) Rules 2004, as amended ('the FTP Rules'): Rule 4: Initial consideration and referral of allegations, subsection (5) No allegation shall proceed further if, at the time it is first made or first comes to the attention of the General Council, more than five years have elapsed since the most recent events giving rise to the allegation, unless the Registrar considers that it is in the public interest for it to proceed.

part of the same course of treatment as the Augmentation Operation, and the conversation with the police in 2014 was within 5 years of the 2010 Scan. Dr D was not notified of the five year rule decision (as it was not required by the FTP Rules).

On 8 February 2019 the Case Examiners referred the 2009 and 2015 Allegations to a Tribunal but did not refer the 2010 Allegation.

Tribunal Hearing

The hearing took place between 28 October 2019 and 20 November 2019. Dr D made some admissions, some allegations were withdrawn, and others dismissed. At the end of the factual stage of the proceedings, the Tribunal considered and found proved that:

- Dr D inappropriately pressurised A into having the 2009 Augmentation Operation by offering her a discount, for financial motives;
- Dr D failed to obtain adequate informed consent from A to that surgery;
- in 2014 Dr D failed to take appropriate action and acted inappropriately having been told of Dr B's reported inappropriate behaviour towards Patient A; and
- in 2015, Dr D failed to obtain adequate informed consent in relation to Patients C, D and E.

The Tribunal went on to find that Dr D's fitness to practise was impaired and suspended his registration for a period of 9 months.

Grounds

The Appeal was brought on the grounds that the findings of fact (except those admitted by Dr D) were wrong and so (consequentially) were the determinations on impairment and sanction. This was on the basis that:

- the Tribunal's conclusion in relation to the offer of a discount for the Augmentation Operation was procedurally flawed and/or wrong, because the Tribunal made errors of principle in its approach, reached findings of fact that were not open to it as a matter of principle, and (in any event) the only conclusion that any reasonable Tribunal could have reached on the evidence was that Patient A's recollection, that she was offered a discount if she agreed to undergo the procedure the following week, was wrong;
- the Tribunal's findings that Dr D did not obtain adequate informed consent from all patients was contrary to the evidence, irrational and/or plainly wrong;
- further and alternatively, the Tribunal's approach to the charge of offering a discount for the Augmentation operation was so fundamentally flawed as to taint all its other findings of fact against Dr D and all those other findings were unsafe and should be quashed.

The JR was issued on the grounds that the decision in respect of the five year rule was wrong and therefore that the referral decision was wrong, insofar as it related to the 2009 Allegations.

Judgment

The JR and Appeal were heard by Mr Justice Warby who concluded that:

- (in the Appeal) the Tribunal erred in finding proved the offer of a discount for the Augmentation Operation: those findings were procedurally flawed and untenable. However, D had not established that the Court should interfere with any of the Tribunal's other findings;
- (in the JR) that none of the 2009 Allegations should have been before the Tribunal as the five-year rule decision was unlawful and so was the referral decision, insofar as it related to the 2009 Allegations.

Appeal

Mr Justice Warby said that the Tribunal's approach in relation to the charge that Dr D offered a discount for the Augmentation Operation was wrong in principle and untenable, for the following reasons [para 33]:

- it was not open to the Tribunal as a matter of procedural fairness to find facts proved against Dr D based on an interpretation of events that had never been put forward by the GMC (and which was in fact at odds with the evidence of Patient A) nor that had ever been put to Dr D [paras 34-35]. The Tribunal's suggested version of events was novel and had "no direct support in any of the oral or documentary evidence" and was not easy to reconcile with them. He said that fairness required that before reaching a conclusion on this suggestion/theory it should have been disclosed to Dr D and his legal team and that they should be given reasonable opportunity to understand it, investigate it evidentially, call evidence and make submissions in relation to it (and that the GMC may also have wanted to make submissions) [para 36];

- the Tribunal's reasoning process contained at least three fundamental errors of approach [para 38]:
  - in seeking to resolve the main factual dispute, the Tribunal "start[ed] with an assessment of the credibility of a witness's uncorroborated evidence about events ten years earlier, only then going on to consider the significance of unchallenged contemporary documents" [para 38]. The Tribunal should have "started with the objective facts as shown by the contemporaneous documents, independent of the witness, and using oral evidence as a means of subjecting these to "critical scrutiny"" [para 42]. This approach is especially important the older the events are [paras 39 and 42];

  - the Tribunal's assessment of the A's credibility was based largely if not exclusively on her demeanour when giving evidence [para 38] which is a "discredited method of judicial decision-making" [para 42]. Mr Justice Warby referred to *Kimathi v Foreign and Commonwealth Office* [2018] EWHC 2066 (QB) which distilled key aspects of lessons of experience and of science in relation to the judicial determination of facts [para 39]. Two specific common errors have been identified which are "to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be

accurate" [para 39]. The Judge said that the latter fallacy was illustrated by A's insistence that authentic documents shown to her in cross examination were fake, when her only basis for saying so was that they were at odds with what she was saying. He went on to say that the Tribunal failed to clearly or sufficiently acknowledge the fluidity of memory, or the fact that an honest witness can construct an entirely false "memory" [para 42] which either did not happen at all or which happened to somebody else;

- the way the Tribunal tested the witness evidence against the documents involved a mistaken approach to the burden of proof and the standard of proof [para 38]. When considering the discrepancies between documents and A's evidence, the Tribunal asked itself if a document was "determinative" and such as to "preclude" the factual theory which it had adopted. In effect this required Dr D to establish his defence to the criminal standard. The Tribunal's task was "to assess the evidence in the round and decide whether the GMC had discharged the burden of showing that it was more likely than not that pressure was applied by means of a discount offer, for financial motives, as alleged" [para 43];

- the Tribunal found some allegations (in particular of dishonesty) against Dr D not proved and in doing so rejected evidence given by Patient A. The Judge said that although a tribunal of fact need not give comprehensive reasons, the fact that the Tribunal made no reference to the adverse conclusions which it reached in respect of other aspects of Patient A's evidence lent support to his conclusion that its decision on the factual issues could not stand [para 44-46]. He said the Tribunal should have made a rounded assessment of the witness's reliability, rather than approaching each charge in isolation from the others [para 47].

The Judge considered the factual findings in relation to the offer of a discount for the Augmentation Operation could not stand and the evidence was not capable of enabling those charges to be found proved [para 49]. He also quashed the Tribunal's decisions on impairment and sanction as the Tribunal's decision making at those stages placed considerable weight on the charges it had found proved in respect of the Augmentation Operation.

However, the Judge said he was not persuaded that the Tribunal was wrong on any of the consent charges [paras 52 – 62] or that the Tribunal's findings in relation to the Augmentation Operation tainted or infected their findings in relation to the other charges [paras 63 – 66].

The JR claim

Mr Justice Warby found that the five year rule decision was wrong as the AR:

- failed to distinguish between related allegations concerning a single "course of treatment" and separate and distinct allegations of impaired fitness to practise and the "most recent events giving rise to the allegation" [paras 82-88]; and
- was wrong about when the 2009 Allegation was "first made or first [came] to the GMC's attention". He said any allegations of unfitness to practise were not made to or did not come to the attention of the GMC in September 2014; it was not

until further information was provided (by the CQC and in A's witness statement) that the GMC identified such allegations [paras 89 – 90]. In addition, the information in 2014 did not include any mention of an offer of discount for swift surgery [para 91].

Therefore, the five year rule decision was quashed, and therefore so was the decision to refer the 2009 Allegations.

The Judge remitted the case for reconsideration of impairment and sanction, based on the other charges that were admitted or found proved [para 92].

Kind regards
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