

## Appeals Circular A07/23

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### Sun v General Medical Council [2023] EWHC 1515 (Admin)

#### Learning points

- ▶ In cases involving (dishonest) misconduct, when assessing the nature and impact of a health condition in relation to alleged misconduct, the tribunal should:
  - ▶ consider and assess the medical evidence and whether or not there is any suggestion that the mental health impacted the judgement of the practitioner in respect of the actions and conduct which is being alleged
  - ▶ always keep in mind the nature and character of the conduct
  - ▶ consider and assess whether the practitioner knew what they were doing (actual state of knowledge or belief). If the practitioner knew what they were doing, the mental health condition cannot be said to alter the character of the misconduct, or excuse or exonerate it.
  
- ▶ When undertaking an evaluative assessment of the appropriate sanction:
  - ▶ the tribunal should have close regard to the other aspects of the dishonesty
  - ▶ evidence in relation to adverse mental health may still be a relevant mitigating factor. However, the appropriate weight to be given to such a factor is another matter.
  - ▶ it is for the tribunal to identify the appropriate sanction, even if the GMC's submission is for a lesser sanction.

## Background

This was an appeal made by Dr Sun ('S'), pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 24 March 2022 erasing her name from the medical register.

S also requested an extension of time for lodging the appeal and that, along with the question of whether the Court therefore had jurisdiction to deal with the appeal, were referred to as "a procedural issue".

S admitted all of the allegations of misconduct against her in relation to various incidents between May 2018 and September 2019:

- ▶ The following matters amounted to misconduct, but did not involve dishonesty:
  - ▶ *Research study* – S worked at the University of Cambridge ('the University') as a Clinical Research Associate, on a PhD Research Studentship, partly funded by GlaxoSmithKline ('GSK') ('the study'). S received communications between May 2018 and January 2019 from the Chief Investigator for the study and others involved in supervising her, requesting that she provide her research data in various forms so that they could verify the integrity of the data and the results, but S failed fully to comply with those requests. Later, in September 2019, S submitted a manuscript regarding the study ('the manuscript') to the Journal of the American Society of Nephrology without prior authorisation from those involved in the study or GSK, which she knew was required. She also removed the names of several study team members, and when asked to withdraw the manuscript, S ignored that request.
  - ▶ *Unauthorised access to medical records* - on three dates in August 2019, S accessed her own records without (what she knew was) the necessary authorisation.
  
- ▶ The following matters amounted to misconduct involving dishonesty:
  - ▶ *False statements in relation to the study* – in September 2018, S emailed the designer of the study stating that two other members had been given deadlines to work on the manuscript, which they had ignored, and that GSK had seen the manuscript and had given permission for its submission. Later, in May 2019, S wrote to the University lodging a formal complaint against the designer of the study. In this complaint, she stated that the other team members had agreed for the manuscript to be published. All of these statements were untrue, and she knew them to be untrue.
  - ▶ *Failure to declare misconduct:*
    - ▶ in March 2019, S applied for two jobs with Health Education Yorkshire and Humber ('HEYH') and Health Education England North West ('HENW'), stating that she did not know of any matters in her background which might cause her reliability or suitability for employment to be called into question. S also failed to declare that the University had begun an investigation into her conduct, despite being notified of this by letter in February 2019.
    - ▶ Later in March 2019, S completed a self-declaration for revalidation and stated that she did not have anything new to declare since her last annual

review and appraisal; knowingly failing to declare that the University had begun an investigation.

- ▶ In April 2019, S wrote to her Responsible Officer at HEYH stating that she had no direct contact with the University, which was untrue.
- ▶ S also failed to declare to HENW that the University had in July 2019, informed her that they had found a case to answer, and that she had been referred to the GMC, despite having received notification of both matters.
- ▶ *False statements in relation to police investigation* - In August 2019, S submitted a Work Details Form to the GMC and wrote an email to the GMC Revalidation Team, both of which stated that her Responsible Officer at the University and the acting Postgraduate Dean at HEYH both had ongoing criminal proceedings against them, with a warning by the police for sexual harassment and slander of a female trainee. In fact, the police had in August 2019 told S that no further action would be taken in relation to the allegations that she had in respect of the above. In a later email to the revalidation team, S stated that the people who were the subject of her complaint had been issued with a warning by police and would be arrested if their actions continued. During the same time period, S filed an online report with the police, making allegations against a surgeon at the Leeds Trust. In that report, S stated that she had previously reported the surgeon to the police for slander in the workplace for threatening behaviour and breach of GDPR. S stated that the surgeon had been issued with a formal warning to stop his actions. Finally, in September 2019, S emailed the GMC stating that warnings had been issued by the police against the three persons above, to stop their actions and if their actions continued, they would be arrested. All of these statements were untrue, and S knew that they were untrue.
- ▶ S undertook a health assessment directed by the GMC and in their reports dated February and March 2020, the assessors diagnosed S with mental health conditions, which she was suffering from at the time of the alleged misconduct. In 2022, S underwent an updated health assessment, which concluded that S was no longer suffering from any mental health condition, or any such condition that would impair her fitness to practise.

## Grounds

S appealed the Tribunal's decision to erase her name from the medical register on the ground that the misconduct had been affected by her mental health condition. In essence, S argued that:

- ▶ Whilst S accepted that she knew what she was saying was false and that her actions were dishonest when applying the objective standards of ordinary decent people [18], her mental health condition at the time gave a distorted appreciation of the situation in which she was acting (ie she had misinterpreted events and falsely perceived a conspiracy and malice against her) [20] and of whether her conduct was dishonest by the objective standards of ordinary decent people [21]. S therefore had no subjective appreciation that what she did was dishonest (by the standards of ordinary decent people). Whilst this is not a feature or requirement to find dishonesty under the test in *Ivey v Genting Casinos (UK) Ltd [2017]*, its absence made the dishonesty less serious and served to reduce her culpability.

- ▶ Separate to the question of whether and to what extent the conduct had been affected by S’s mental health condition, the evidence as to mental health and its implications was also a relevant factor in mitigation (ie personal mitigation or “a personal circumstance capable of tending to suggest a lesser sanction”) [23]. S submitted that:
  - ▶ the Tribunal did not grapple with the nature and seriousness of her mental health condition, its effect, the role which it played and the extent to which her actions were affected by it. Had the Tribunal grappled with the issues, S submitted that the only evidentially sound findings fairly open on the evidence would have recognised that there was a material and significant reduction in culpability (or mitigation of the conduct) by reason of the effect of the mental health condition and that in any event, there was a material and significant personal mitigation capable substantially of weighing in favour of a lesser sanction [23-24].
  - ▶ The four experts (consultant psychiatrists) agreed that the mental illness provided some mitigation for her actions and that S’s mental health issue should be taken into consideration in mitigating her actions [17]. In particular, S relied on Dr Baggaley’s opinion that the misconduct was caused by S’s health issues.
  - ▶ The Tribunal pointed out that in his oral evidence, Dr Baggaley said that he believed that S’s judgment was impaired by her health issues and this mitigated her actions rather than caused them. S suggested that this reasoning involved a false dichotomy and there was no material difference between the written evidence describing the misconduct as being ‘caused’ by the mental health condition and his oral evidence describing the actions as being mitigated [26].
  - ▶ In their determination on sanction, the Tribunal:
    - ▶ were internally contradictory in that they stated that ‘S’s mental health was a relevant mitigating factor’, and in the same sentence stated that it ‘did not significantly mitigate her persistent and repeated dishonest behaviour’ [29].
    - ▶ stated that S’s mental health ‘may have had an impact on her judgment in relation to some of her misconduct’. The use of the word ‘may’ shows that the tribunal sat on the fence, and the tribunal’s reasoning was plainly inadequate and unsustainable [28].

## Judgment

The appeal was heard by Mr Justice Fordham who dismissed the appeal on the basis that the Tribunal was not wrong in deciding on the sanction of erasure in the light of the misconduct and impairment, on all the evidence and in all the circumstances of the present case and that the sanction of erasure was appropriate and necessary in the public interest [32]. He gave the following reasons as to how he had reached that conclusion:

- ▶ The Tribunal understood S’s position and the points being emphasised by S in the appeal [33] but when considering the questions related to S’s mental health conditions, “the Tribunal rightly recognised the central importance of the Conduct” and “kept the Conduct and its nature well in mind, throughout”, as did Mr Justice Fordham [34].
- ▶ The Tribunal appreciated that at the heart of the case was the role played by S’s mental health condition in relation to the misconduct. However, a key point in the Tribunal’s assessment was what the role was not. He said that all the evidence and argument did not extend to “any sustainable suggestion that [S’s] mental health had led her to misappreciate what she was doing.” S knew what she was doing and had the actual state of knowledge or belief which made the incidents dishonest and the alleged conduct ‘misconduct’ [35].
- ▶ “There was no mental health distortion capable of defending, excusing or exonerating any of the Conduct”... “Dr [S’s] mental health condition did not alter the character of the “misconduct. It did not excuse or exonerate. This was carefully explored by the Tribunal, whose conclusions were clear and fully justified” [35].
- ▶ The Tribunal considered the character of the misconduct which it found to be “persistent, repeated and multi-faceted” and continued over 16 months [36] which, although it did not result in direct harm to patients, the Tribunal found that S’s dishonesty in relation to providing false statements “*was particularly serious and .....caused serious harm and distress and had serious consequences to her colleagues*” [37]. The Tribunal also correctly considered the professional working context in which the conduct arose and that her dishonest actions had serious implications for S and the profession as a whole [38].
- ▶ In light of the above, when considering the evidence about S’s mental health condition, and the nature and impact of it, the Tribunal recognised and recorded that all of the psychiatrists agreed that the mental illness provided some mitigation for S’s actions and the Tribunal accepted that S’s mental health may have had an impact on her judgement in relation to some of her misconduct. The Tribunal concluded that “*whilst mental health was a relevant mitigating factor, it did not significantly mitigate her persistent and repeated dishonest behaviour*”. Mr Justice Fordham concluded that “this reasoning was justified, sound and sufficient in the context and circumstances of the case” [39].
- ▶ “What the Tribunal was clearly recognising was this. The evidence about [S’s] mental health condition could not bear the weight of making a substantial difference to the key evaluative assessment of the appropriate and necessary sanction in the public interest, by reference to the two applicable limbs (b) and (c) of the statutory overarching objective....in light of the nature of the misconduct and the nature of the impairment” which included dishonesty and writing and sending communications “containing information known and understood by [S] to be untrue..... The “judgement” of S which was directly relevant to the misconduct was not a judgement about understanding various circumstances or situations, or treatment, events or colleagues [which is what the evidence related to]. The judgements that centrally mattered were about actions and the state of mind about those actions and their contents, when they were being done” [40].
- ▶ There was no substance in S’s criticism of the Tribunal for supposedly contradicting itself in identifying S’s mental health as a “relevant mitigating factor”, whilst

concluding that it “did not significantly mitigate her behaviour”. He said “Whether a factor can be identified as a relevant factor is one question. The appropriate weight to be given to such a factor, once identified, is another” [41].

- ▶ There was no ‘false dichotomy’ in the Tribunal recording that Dr Baggaley’s report described S’s misconduct as being “caused by” her mental health conditions, whereas his oral evidence described S’s judgment was impaired by her health issues which “mitigated her actions rather than cause them”. This was an entirely fair and accurate description of what Dr Baggaley said to the Tribunal; he thought there was a difference and thought that saying “her conduct is explained by her illness” was a better way of expressing the point rather than saying “it was caused by the illness” [43].
- ▶ As to the fact that the GMC was inviting suspension, Mr Justice Fordham reiterated that it was for the Tribunal to identify the appropriate sanction [44]. He said the Tribunal “ultimately found of central significance that whatever the evidence of the mental health condition, it did not alter the central character of the dishonesty because [S] knew what she was doing including that she was communicating false information” and that the Tribunal “was astute to have close regard to the other aspects of dishonesty such as the length of time of its perpetration, whether it was repeated, and the harm which it caused.” He concluded that in his judgment “the sanction imposed was appropriate and necessary in the public interest; it was not excessive and disproportionate” [45].

## Outcome

Mr Justice Fordham concluded that S could not succeed on the substantive issue above, and therefore her appeal was dismissed.

In relation to the procedural issue, Mr Justice Fordham concluded that he would have granted the extension of time [59], but as the appeal did not succeed on the substantive merits, the question of time did not arise.

The appeal was therefore dismissed.

Kind regards

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