Appeals Circular A08 /14

mpts
medical practitioners tribunal service

Medical Practitioners Tribunal Service
Seventh floor, St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Tel: 0161 923 6263
Fax: 0161 240 7199
Email: enquiries@mpts-uk.org

20 January 2014

To: Interim Orders Panel Panellists

Copy: Investigation Committee Panellists
Fitness to Practise Panel Panellists
Legal Assessors
Panel Secretaries
Medical Defence Organisations
Employer Liaison Advisers

R (on the application of Sharaf) v GMC [2013] EWHC 3332 Admin

Background

Dr Sharaf was the subject of charges brought against him by the General Medical Council ('GMC') relating to events on the night of the 30 September 2010 in respect of his treatment of patient A, who had a dislocated shoulder, by undertaking a resetting procedure (shoulder reduction) using conscious sedation.

The hearing commenced before a Fitness to Practise Panel ('Panel') on 15 April 2013. At the conclusion of the GMC's case Dr Sharaf submitted that insufficient evidence had been adduced in relation to find allegation in charge 1(b) proved and submitted that charge 1(b) and related part of charge 4 should be dismissed (charge 1(b) is set out in paragraph 7).

The Panel's determination (paragraph 28) was that there was sufficient evidence in support of paragraph 1(b) and as such the doctor's application was refused. Dr Sharaf made an application for permission to apply for judicial review which was refused on the papers by Mr Justice Stewart on 23 July 2013. The application was renewed and was considered by Mrs Justice Carr on 27 September 2013. The hearing before Mrs Justice Carr proceeded as a 'rolled up' hearing so that permission and full substantive merit were heard and tried together (paragraph 2).

Application

Mrs Justice Carr sets out the facts and background to the application together with details of the proceedings to the point of the hearing in paragraphs 4-29.

She then goes on to deal with the 'short issue' before the court which is whether on an application of the law relating to submissions under rule 17(2)(g) of the GMC (Fitness to

Practise) Rules 2004 (it is arguable) that the Panel erred in law by failing to recognise that insufficient evidence had be adduced to prove charge 1(b).

Details of the claim are set out in paragraphs 30 and 31 including rule 17(2)(g). Dr Sharaf submitted that the Panel's refusal was irrational and one which no reasonable tribunal could have reached.

Mrs Justice Carr acknowledges that rule 17(2)(g) provides an important safeguard. She considers (paragraph 33):

> *'It is oppressive and unjust for an accused person in regulatory proceedings to be required meet a case which has not been established on sufficient evidence.'*

She acknowledges (paragraph 34):

> *'This is a court of review only. My function is not to substitute my own decision but to ask myself whether (it is arguable that) the panel took a course that no reasonable tribunal could properly have taken. The panel did not make any findings of fact. It simply concluded that sufficient evidence had been adduced on charge 1(b) to find the facts proved. It had to proceed of course for that purpose on the basis that, for a fact to be proved, there must be evidence which is reasonably capable of supporting such a finding on a rational basis…'*

It was common ground between the parties that the test laid down in **R v Galbraith** [1981] 1 WLR 1039 applied and that the Panel was correct to address the issues on that basis (paragraph 35). Counsel for the doctor also raised the cross application of the principles laid down in R v Galbraith in a regulatory setting in that the Panel act as both judge and jury and, significant for the present purposes, the standard of proof is the civil not the criminal standard (paragraph 36).

The Judge also identified that the Galbraith test had been applied directly and relatively recently in the fitness to practise case of **Tutin v GMC** [2009] EWHC 553 Admin. Mrs Justice Carr identified the instructive comments made by McCombe J in that case and the approach to be taken in similar circumstances although there were material differences on the facts (paragraph 37).

However, Mrs Justice Carr also accepted counsel for the doctor's submissions that it was important to bear in mind that 'sufficiency' of evidence was the wording in the rule (paragraph 38). She also considered that after the exercise and review by the court 'context' was also important (paragraphs 39-43).

After careful consideration the Judge reached the conclusion that it could not be said that Panel's decision was so outside the range of reasonable response as to be 'Wednesbury'

unreasonable or irrational. She thereafter sets out her reasons (paragraphs 46-52) in summary as follows:

1. The Panel was advised correctly on the law and the Panel expressly accepted the advice;
2. It could not reasonably be said that the Panel did not carry out a proper evaluation of the submissions and did not weigh up the evidence in the round that it had heard from Dr Sheppard in particular.

As to the intensity of the review, the Judge acknowledged that it was right that these were matters of importance to the doctor but it was also right to remember that it was a 'half time' submission, the findings of fact had not been made and, in the event of any adverse findings being made, there was a right of appeal (paragraph 48).

In terms of assessing the intensity of the review Mrs Justice Carr confirmed that the threshold was affected by the fact that the Panel included relevant specialist expertise. Its competence was also heightened by the fact that it also had the advantage of seeing and hearing the witness (paragraph 49). She noted that Dr Sheppard was ably cross examined. How she responded in demeanour, not just in word,s was in the Judge's view a key to an assessment of her credibility (paragraph 50). She confirmed (paragraph 51):

> *'At its core, by whatever route, Dr Sheppard was consistent that on 1 October 2010 she had seen some sort of medical record completed by the applicant which falsely recorded her present at, and directly involved in, the procedure on Patient A.'*

The Judge then sets out (paragraph 52) the material to support that version of events.

In Mrs Justice Carr's judgment Dr Sharaf's case is one where the strength or weakness of the evidence depends on the Panel's view of the witness's reliability. She adds that although a close analysis is undoubtedly a legitimate exercise, one needs to balance against that the fact that Dr Sheppard does not appear to have been well served by the process. She had apparently not been involved in this type of situation or involved in this type of procedure before (paragraph 54) and, additionally, the doctor's close analysis turns, at least, in part on a close reading of a number of emails.

Mrs Justice Carr also confirmed that she was influenced by the fact that charge 1(b) and the allegation within it may be weakened or strengthened by evidence on other charges or other areas of evidence. Further there had been no strike out challenge or half time submission in relation to the other charges (paragraph 56).

The Judge was not persuaded that as a result of the Panel's decision there was some shifting of the evidential burden. Dr Sharaf can make the submission that the prosecution

did not prove the existence of the alternative records to the necessary standard. He has now had time to explore that evidentially by means of the adjournment and he can, of course, give evidence, if he so chooses, as to what records he made (paragraph 57).

Finally, she confirms that judicial review is a remedy of last resort – **R (on the application of Mahfouz) v GMC** [2004] EWCA Civ 233. In the event of any adverse findings against the doctor, he has a right of appeal to the court upon sanction by way by of a re-hearing under section 40 of the Medical Act 1983 (paragraph 58).

Mrs Justice Carr confirms (paragraph 59):

> *'On the basis of the chronology of proceedings which I have previously outlined, no delay or disruption to the ongoing proceedings has been caused by the making of this application. But I accept the GMC's submission that the general rule is that the right moment for challenge is at the conclusion of the disciplinary process if necessary. Where the disciplinary process has been entrusted to a specialist tribunal, there is a public interest in allowing that tribunal to conduct and to complete its procedures. That is to respect the integrity of the process.'*

In the circumstances she concludes there is not a proper case for intervention by the courts. For the reasons she gave she could identify no arguable error of law. Permission was therefore refused and the claim dismissed.

Salient Points

- Reminder that the general rule is that judicial review is a remedy of 'last resort' and that there should be no challenges during the course of disciplinary proceedings – R (on the application of Mahfouz) v GMC.
- Further that there can be no inflexible rule but, in general, it was preferable for the hearing to take its course and a challenge with regard to its validity to take place on appeal. There is a public interest in respecting the integrity of the disciplinary process.

Panel Development Team
0161 240 7292
pandevteam@mpts-uk.org