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The General Medical Council v Dr Somuah-Boateng [2017] EWHC 3565
(Admin)

Learning Points

- A Tribunal should consider all three limbs of the tripartite public interest test in the over-arching objective¹.
- A finding of low risk in respect of something which, if it occurs or re-occurs, would be extremely serious is something that must be given proper weight by a Tribunal; it is not the same as a finding that there is no risk.
- A Tribunal should consider all relevant parts of the Sanctions Guidance:
 - when considering paragraph 109 of the Sanctions Guidance, any of the factors listed in that paragraph may indicate that erasure is appropriate; it is not necessary for all of those factors to be present;
 - if a Tribunal departs from the Sanctions Guidance, clear reasons must be given for doing so.
- When considering if a patient:
 - is/was vulnerable, the characteristics or circumstances listed in paragraph 145 of the Sanctions Guidance are not an exhaustive list;

¹ Section 1(1A) and (1B) of the Medical Act 1983, as amended:

- (a) to protect, promote and maintain the health, safety and well-being of the public
- (b) to promote and maintain public confidence in the medical profession and
- (c) to promote and maintain proper professional standards and conduct for the medical profession.

- has/had been harmed by the actions of a doctor, this includes looking at whether they had suffered both medical and/or emotional harm;

Background

This was an appeal brought by the General Medical Council ('the GMC'), pursuant to section 40A of the Medical Act 1983, against a Medical Practitioners Tribunal ('the Tribunal') decision dated 10 July 2017 suspending Dr Somuah-Boateng's registration for a period of 12 months.

The allegations against Dr Somuah-Boateng arose after he carried out one or more consultations with Patient A at Croydon University Hospital on 12 July 2012. Patient A received a provisional diagnosis of Multiple Sclerosis (MS). Dr Somuah-Boateng obtained Patient A's home address from the hospital records and between July 2012 and February 2013, he entered into an emotional and sexual relationship with the patient (this was admitted, but with the caveat that she was no longer his patient). He provided medication to her (Tramadol and Trimethoprim) without issuing a prescription or entering the details in her medical records. He also told her that having sex with him would be good for her medical condition (or words to that effect).

The Tribunal found that Dr Somuah-Boateng's actions, as stated above, were sexually motivated and that an emotional and sexual relationship had been proved. In addition, the Tribunal found that Dr Somuah-Boateng's misconduct "offended the following parts of the statutory overarching objective:

- (a) ...
- (b) promote and maintain public confidence in the medical profession;
- (c) promote and maintain proper professional standards and conduct for the members of the profession"

and that his fitness to practise was impaired.

The Tribunal had regard to the positive indicators of when erasure may be appropriate, as set out in paragraph 109 of the Sanctions Guidance (paragraph 43 of the Tribunal's determination). It determined which sub paragraphs were engaged (109(d) and 109(i) in that he abused his position of trust to pursue a relationship with Patient A and put his interests ahead of hers) and those which were not engaged. In relation to the remainder, the Tribunal said:

" 43. ... 109(b): The Tribunal did not regard your misconduct as being reckless in the sense of not caring about any harm that might befall Patient A as a result of your

actions.

109(c): Patient A's evidence was that she was deeply distressed by your relationship with her. This harm arose because she felt that you used her for sex and the relationship clearly ended on bad terms. There was however evidence that the relationship was, at times, very affectionate, with many mutual expressions of love. Furthermore, there is nothing to indicate that your relationship with Patient A prevented her from seeking and receiving proper specialist care for her medical condition.....

109(e): Your relationship with Patient A developed at a time when she was coming to terms with a life-changing diagnosis. To that extent, Patient A was vulnerable in the sense that most newly-diagnosed patients are vulnerable. Such patients are likely to welcome the attention and support of an approachable doctor without critically examining the intentions of that doctor or suspecting ulterior motives. However, the Tribunal had regard to the characterisation of a 'vulnerable patient' as set out in para.145 of the SG and determined that Patient A was not vulnerable as per that description...."

The Tribunal determined to suspend Dr Somuah-Boateng for a period of 12 months, indicating that erasure was disproportionate on the following basis:

"44. Taking into account its assessment of your case in relation to para. 109 of the SG and all the other circumstances, the Tribunal determined that erasure would be disproportionate. There is no prior or subsequent history of inappropriate relationships with patients. There is nothing to indicate that clinically you are anything other than a competent doctor. You have demonstrated a willingness and capacity to learn from your past wrongdoing and you have developed a degree of insight, albeit incomplete and late in coming. For these reasons, the Tribunal determined that your misconduct, although serious, is not fundamentally incompatible with continued registration as a doctor and that the public interest can be addressed by a period of suspension of adequate length."

Grounds of Appeal

The GMC appealed on the basis that the Tribunal fell into error in its conclusions as to fitness to practice and misconduct, with the result that the Tribunal's conclusion regarding the appropriate sanction was wrong. More specifically, the GMC submitted that in its findings relating to impairment, which led into the findings regarding sanction, the Tribunal ignored the first of the overarching objectives set out in section 1B of the Medical Act 1983, namely "to protect, promote and maintain the health, safety and well-being of the public".

Judgment

Mr Justice Lane allowed the appeal indicating that the GMC's criticisms were "entirely made out". As Dr Somuah-Boateng was not present at the appeal hearing, as well as the GMC's submissions, he also considered any features that might support the Tribunal's view. He went on to highlight the following problems with the Tribunal's decision:

1. there were a number of "problematic issues" with the paragraphs in which the Tribunal sought to justify why a period of suspension, for 12 months, rather than erasure was appropriate (paragraphs 43-45 of the Tribunal's determination). In particular, in relation to Patient A:
 - a. "the problems experienced by Patient A were wrongly undervalued by the Tribunal". Despite the evidence she gave that her relationship with Dr Somuah-Boateng had left her "feeling that she had been used by persons who she had been given to understand were responsible professionals" and, as a result, evidence "to the effect that Patient A could no longer have confidence in professionals" [para 36], the Tribunal did not make any "express finding on the issue of whether Patient A's confidence in professionals had been undermined. Although the Tribunal found that she continued to be treated by Dr B and others, that was not a finding which amounted to a rejection of Patient A's evidence about her feelings." The Judge stated that Patient A's evidence on the matter therefore "stands unchallenged" [paras 36 and 37];
 - b. despite the Tribunal expressly finding that Dr Somuah-Boateng's behaviour "amounted to predatory behaviour" [para 39], the Tribunal concentrated on paragraph 109 of the Sanctions Guidance (which lists factors which may indicate erasure is appropriate) and did not "cast its eye further forward" to look at paragraphs 142 – 150 of the Sanctions Guidance (which relate to cases that indicate more serious action is likely to be required) and especially paragraph 147 (which relates to predatory behaviour). The Judge said "[H]ad it done so, I find that the Tribunal's conclusion regarding the disproportionate nature of erasure would have been very different. As well as para.147, one sees at para.149 that sexual misconduct with patients, or others, can amount to a case where serious action involving erasure is required. This is because, as para.150 states, wrongful sexual misconduct in this professional context "seriously undermines public trust in the profession. The misconduct is particularly serious where there is an

abuse of the special provision of trust a doctor occupies". That was precisely the position found by the Tribunal in the part of its decision relating to findings of fact" [para 40];

- c. the Tribunal compounded this error "by the fact it confined its analysis of whether Patient A had been harmed to the question whether she had suffered medical harm. That is clearly too narrow a focus. There was plain evidence in the materials of emotional harm having been caused to Patient A" [para 41];
- d. The Tribunal compounded the above error by the view it took of the issue of whether Patient A was vulnerable. The Judge said that "[T]he Tribunal found that Patient A was not vulnerable "as per" the description given in para.145 of the Guidance. If one looks at para.145, one sees immediately that the items described in paras. (a) to (e) are not exhaustive" [para 41]. In addition, he said "it is quite plain that Patient A should have been regarded for this purpose as a vulnerable person. Indeed, at para.143 of the decision dealing with the facts, the Tribunal came to that very conclusion: "The Tribunal consider that Patient A is a young female who was vulnerable. You saw an opportunity to exploit this". That important matter was overlooked when the Tribunal came to consider the issue of sanctions..." [para 42];

2. in relation to the Tribunal's view that it was "highly relevant" that Dr Somuah-Boateng had attended the "Maintaining Professional Boundaries" course in March 2017, during a time when he was in difficult financial circumstances, the Judge said:

- a. it was difficult to see "how any weight, certainly any real weight" could have been placed upon Dr Somuah-Boateng's attendance at the course, in the light of his written statement, "where he completely denied ever having said that having sex with him would improve Patient A's medical condition.....He also denied saying things like, "Trust me. I am your doctor" and that that aspect of his evidence was rejected by the Tribunal [para 44];
- b. the Tribunal could not "rationally conclude" that Dr Somuah-Boateng's decision to go on the course meant that he was aware of the consequences of what he had done, given that at the hearing, which occurred several months after the course, "he was continuing to deny a central element of the complaint against him; namely, that he had used

his position as a doctor in an egregious way in order to persuade Patient A to enter into a sexual relationship with him" [para 45];

- c. that he had reminded himself "that mitigation issues of the kind with which we are here concerned are likely to be of considerably less significance in regulatory proceedings than in a court imposing retributive justice"² [para 46];
 - d. the Tribunal's approach seemed to "ignore entirely the requirement upon it to ensure that high professional standards are maintained generally in the medical profession. This means that penalties may have an effect not only upon the future behaviour of the person concerned, but also may have a general deterrent effect" [para 47];
3. in relation to the fact that the Tribunal found Dr Somuah-Boateng was of low risk of repeating the offence:
- a. "the Tribunal's reliance on this factor ignores the issue of general deterrence" referred to above;
 - b. a finding of low risk is not the same as a finding that there was no risk. The Judge said "[A] finding of low risk in respect of something which, if it occurs or re-occurs, would be extremely serious is something that must be given proper weight by the relevant Tribunal. Such a risk is still a material issue. This point was unappreciated by the Tribunal" [para 48];
4. looking at the Tribunal's consideration of paragraph 109 of the Sanctions Guidance, and its reasons why erasure was disproportionate, the Tribunal ignored the fact that any of the factors listed in paragraph 109 of the Sanctions Guidance may indicate that erasure is appropriate. The Judge said that the "fact that the Tribunal found that some, but not all, were satisfied did not in any sense mean para.109 was not materially engaged. In failing to recognise this, the Tribunal, in my view, materially misread the overall thrust of para.109" and failed to explain why any of the matters present did not merit erasure [para 49].

For all of the above reasons, the Judge found that the decision of the Tribunal was materially flawed "notwithstanding...the court must give deference to the findings of

² GMC and (1) Dr Jagjivan, (2) PSA for Health and Social Care [2017] EWHC 1247 (Admin) para 40(vii)

the Tribunal.... in the realm of sexual misconduct....the court may at least be as well placed to assess for itself what the public interest requires" [para 50].

The Judge concluded that "the only appropriate decision the Tribunal could make, properly directing itself in relation to its factual findings, is to erase [Dr Somuah-Boateng's] name from the register" [para 53]. Whilst he acknowledged that the Sanctions Guidance "does not mandate erasure in these circumstances", he said that it pointed "firmly towards erasure as being not only a possible sanction, but, on these facts, the only realistic sanction" [para 56] and that "[P]ublic confidence in the profession is, I find, unlikely to be satisfied by a suspension, whether or not followed by a review" [para 57].

The Judge allowed the appeal saying "the only appropriate and reasonable step in the satisfaction of the public interest as set out in s.1 of the Medical Act 1983...is to erase the [Dr Somuah-Boateng's] name from the register" [para 58].

Kind regards,

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