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Hussain v General Pharmaceutical Council [2018] EWCA Civ 22

Learning Points

- It is not unusual, even in cases where registrants represent themselves, for tribunals to hear evidence, give a decision and then move on (either at once or after only a short break) to consider important consequential matters. Tribunals should bear in mind the time of day when submissions are made.
- Tribunals should ensure that a registrant is sufficiently aware (both before and during the hearing) that they can/will consider the sanction of erasure from the register. In certain circumstances, this may include making explicit reference or warning to the registrant, that the tribunal is considering imposing that sanction.
- An adjournment "is not simply there for the asking"; whether to adjourn a hearing is a matter of discretion and regard must be had to fairness to the regulatory body as well as the registrant. The fact that a registrant does not ask for an adjournment themselves, does not relieve the tribunal of its own obligation to assess the matter.
- The question as to whether there has been procedural irregularity arising from a tribunal referring to a reported case before giving a decision (but after submissions) is whether the reported case raises a new issue or the registrant was deprived of a reasonable opportunity to comment on the facts and circumstances of the reported case in light of the relevant legal framework.
- It is not appropriate for a disciplinary panel or tribunal to be informed of action taken against other registrants involved in the same set of circumstances.

Background

This was an appeal by the registrant ('H') to the Court of Appeal ('CoA') against the High Court's decision dated 23 March 2016 to dismiss H's appeal against the Fitness to Practise Committee ('the Committee') of the General Pharmaceutical Council's ('GPC') decision dated 18 September 2015 to remove H's name from the Register of Pharmacists ('the register').

Committee Hearing

In 2012, the BBC broadcast a television programme which included footage that appeared to show an undercover BBC reporter who had been able to purchase a prescription-only medication over the counter, without a prescription, at a time when H was the 'responsible pharmacist' for that pharmacy. In September 2015, the Committee found that H had been knowingly involved in the unlawful supply of the medication on that occasion, that her fitness to practise was impaired because of that misconduct and that her name ought to be removed from the register.

Shortly before the hearing before the Committee was to commence, H instructed new legal representation. However, they felt unable to represent H at the hearing and therefore, she represented herself, with the assistance of her husband. The Committee hearing commenced in August 2015 but did not conclude by the end of the hearing period. The Committee informed parties that the matter was adjourned until 18 September 2015, stating '*We will start at 9.30 promptly. We will sit that day for as long as is necessary to conclude this case. That may mean that it will be slightly later than the usual time of 4.30.*' The Chairman of the Committee also went through the stages of the proceedings which would take place when the hearing resumed including in relation to facts, impairment and sanction and referred H to the guidance in relation to sanction and said '*So, read that and be familiar with it, because if we find the facts proved, if we find that fitness to practise is impaired, then we will be considering the issue of sanction.*'

When the hearing reconvened on 18 September 2015, the following occurred:

- 12:00 – The Committee delivered its determination on facts and reiterated that it would sit late if necessary;
- 14:05 – The Committee returned from lunch and received submissions on impairment. It then went *in camera* at 14:25;
- 15:30 – The Committee delivered its determination on impairment and then immediately received submissions on sanction. Before retiring to consider the issue of sanction, the Committee requested sight of the decision in *PSA v GPC & Onwughalu* [2014] EWHC 2521 (Admin). It then went *in camera* at 16:05;
- 18:25 – The Committee delivered its determination on sanction;

- 18:50 – The Committee delivered its determination on an immediate order.

High Court appeal

On 23 March 2016, Elisabeth Laing J dismissed H's appeal from the Committee's decision.

Grounds of Appeal to the Court of Appeal

H appealed against the Committee's decision on sanction on the basis that:

1. the procedure adopted by the Committee in the September 2015 hearing was unfair including, amongst other things, that the Committee:
 - a. failed to consider the sanctions imposed upon other pharmacists who had featured in the television programme;
 - b. retired to consider the issue of sanction with case law which H had not been permitted to comment upon;
 - c. did not adequately warn H that, notwithstanding the GPC's submission that suspension would be an appropriate sanction, it was seriously considering removal from the register;
 - d. failed to invite H to consider seeking legal representation in relation to sanction;
2. the removal of H from the register was disproportionate and wrong.

Judgment

The CoA comprised Lord Justices Peter Jackson, Newey and Singh. Lord Justice Newey gave the lead judgment and said that:

1. In relation to the procedural grounds of appeal raised, none of the points presented by H, either individually or taken together, established that the hearing on 18 September 2015 was unfair or unjust because of a serious procedural or other irregularity [para 44]. In particular, Lord Justice Newey said that:
 - a. H was given plenty of notice at the hearing in August 2015 that "if the Committee found against her on the facts, it would go on to consider impairment and, potentially, sanction on 18 September 2015" [para 45];
 - b. H was on notice that the sanctions which the Committee could impose included removal from the register, as this had been identified in a previous letter from the GPC to H and in the guidance on sanctions which had previously been provided to H [para 47];

- c. H was given time to collect her thoughts after the facts determination had been delivered [para 48];
- d. while the hearing did not ultimately conclude until 18:50, submissions on sanction were completed by 16:05. The CoA said "...There is therefore no question of [H] having been required to address the issue at an unreasonably late hour of the day" [para 49];
- e. although H did not have legal representation at the hearing on 18 September 2015, she had had it up to around the end of July 2015, she had an opportunity to approach lawyers in the interval between the August and September hearings, she had assistance from her husband and it is not unusual, even in cases where individuals represent themselves, for decision makers to "hear evidence, give a judgment and then move on (either at once or after only a short break) to consider important consequential matters" [para 51];
- f. H did not ask for or suggest an adjournment and "[I]n any case...an adjournment "is not simply there for the asking"; in deciding whether to grant one, regard must be had to fairness to the Council as well as the Registrant; and whether to adjourn a hearing is "a matter of discretion" and case management with which an appellate Court can interfere only in limited circumstances" [para 54].

However, Lord Justice Peter Jackson said that "[T]he the Committee might have done better to consider adjourning after announcing its decision on impairment...this was an occasion on which it could have offered an unrepresented registrant in distress the opportunity to ask for time. The fact that she did not ask for an adjournment herself does not relieve the Committee of its own obligation to assess the matter" [para 75]. However, he went on to say that it was not obliged to adjourn [para 77];

- g. "while it might have been preferable if the Committee had pressed [H] to address the specific possibility of removal from the Register....I find it impossible to imagine that, in the particular circumstances, more explicit reference to the risk of removal from the Register would have been of any practical assistance to [H]" [para 55].

Lord Justice Peter Jackson said that "it would have been better if the Committee had explicitly warned [H] that it was considering imposing the ultimate penalty. Its passing reference to erasure in exchanges with counsel for the GPC does not in my view take matters further and the fact that [H] might not have been helped by being confronted with the position does not do so either" [para 76].

