

21 January 2014

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Dr Kirsten Guest v GMC [2013] EWHC 3121 Admin

Background

Dr Guest's case was considered by a Fitness to Practise Panel ('Panel') between 15 to 18 April 2013. She did not attend and the Panel determined to proceed with the hearing in her absence.

The Panel found proved all but one allegation made against her. In summary, its conclusion was that over a period January 2010 to March 2011 she had made claims for expenses totalling around £12,000, which she knew that she was not entitled to make and had, in the circumstances, been guilty of misconduct which amounted to dishonesty.

The Panel determined that as a consequence her fitness to practise was impaired, and erased her name from the Medical Register.

Dr Guest appealed the Panel's determination under Section 40 of the Medical Act 1983. Her appeal raised three grounds, in summary, as follows:

1. The Panel erred in deciding to proceed to consider and determine the allegations in her absence.
2. The Panel was not able to consider credible evidence from a Dr Julian Parkes, which was not available at the time of the hearing, and which would have had an important influence on the result of the hearing.
3. The decision of the Panel to erase Dr Guest's name from the Medical Register was excessive and disproportionate in all the circumstances.

Appeal

The appeal was considered by His Honour Judge Davies on 31 July 2013.

In the course of the hearing, Counsel for Dr Guest accepted that the second ground of appeal did not, on proper analysis, operate as a free standing ground of appeal. Further, this is not a case where the doctor was seeking to challenge the actual findings of misconduct made against her, nor was she seeking to contend that there was a procedural irregularity in failing to have regard to the evidence of which the Panel was unaware.

Counsel for the doctor confirmed that the importance of ground two to the appeal was merely to buttress the primary ground of appeal but because the Panel decided to proceed with the hearing in her absence, they did not, when it came to decide the case, have the benefit of any evidence or representations from Dr Guest when it arrived at the conclusions which it did. It was accepted for the purposes of the appeal, they were conclusions the Panel was entitled to reach on the basis of the material before it.

In relation to the third ground of appeal, Counsel for the doctor also accepted that this was very much a secondary ground because, he accepted that, realistically once the Panel had gone on to find the allegations of dishonest misconduct to be substantially made out, then the conclusion that erasure from the register was the only proportionate and appropriate sanction was one which it was very difficult for him to challenge on appeal to the court.

In the circumstances, the focus of the appeal was in relation to ground one (paragraphs 3 to 4).

HHJ Davies confirmed it was common ground that the Panel was entitled to proceed in the absence of Dr Guest, and the decision to proceed was taken in two stages. Initially the decision to proceed was taken on the first day of the hearing, and subsequently reconsidered on day two of the hearing (paragraphs 5 to 6).

The Judge also considered it was important to refer to the communications which were before the Panel in relation to the first decision, an email sent by Dr Guest on 11 April 2013 to the GMC's Solicitor (paragraph 7). The email was placed before the Panel. It was also referred to legal authority on the question as to the circumstances in which it was appropriate to proceed in the absence of the doctor (paragraph 9).

The Panel's decision is set out in paragraph 10. Following the decision to proceed, the Panel heard evidence from four witnesses called by the GMC (paragraph 11).

At the beginning of day two, at a time when the Panel was still hearing evidence, there was a communication between the Panel secretary and Dr Guest (paragraph 12). The gist was that Dr Guest had suffered a relapse of a medical condition from which she was

suffering, multiple sclerosis, was unwell, and that she would not be attending the hearing. However, she did not indicate that she wanted the proceedings adjourned because of her ill health.

The Panel raised with Counsel for the GMC whether or not they should reconsider the questions of proceeding in the absence of the doctor, and at that point received further advice from the Legal Assessor (paragraph 13). The Panel adjourned without making a decision and Dr Guest was contacted by the GMC's Solicitor by telephone. A written note was prepared and sent to Dr Guest who confirmed it was accurate. Details of the note are set out at paragraph 14.

The Panel, having considered the additional information, was of the view it was still in the public interest, and in Dr Guest's own interests, to continue with the proceedings, which it did (paragraph 16).

Counsel for the doctor acknowledged that Dr Guest had stated in clear terms that she was not seeking an adjournment of the hearing, nor was she seeking to rely upon her medical condition as a reason as to why the hearing should not proceed. Counsel for the doctor criticised the determination on three grounds (paragraph 17).

In summary, the case he advanced was that in all the circumstances, the Panel was not entitled to accept at face value Dr Guest's communicated wish that the Panel should effectively get on with it and get it over with, and that they should have declined to proceed in those circumstances. At the very least, Counsel for the doctor submitted they should have taken up the opportunity of allowing her to produce medical evidence to confirm and to provide further detail as to her medical condition and as to the current position and prognosis (paragraph 18).

Finally, Counsel for the doctor submitted that when considering countervailing factors, this was not a case where there was a need for urgency, either in terms of any risk to patient safety or in terms of any adverse impact on witness recollection, had there been a deferment of the hearing to allow these matters to be addressed (paragraph 19).

Counsel for the GMC's submissions are set out in paragraphs 20 to 22. The Judge felt it right to record that on a number of occasions, Dr Guest was given advice about the importance of her obtaining legal representation, about the desirability of her putting in written evidence and representations, and about making an application to adjourn, if that is what she wanted to do, or seeking other ways of dealing with the case if she could not afford legal representation (paragraph 21).

Counsel for the GMC also submitted that Dr Guest was fully aware of the potential outcomes of the hearing, and so the Panel clearly understood the nature of the decision

which it had to make and it was so understood that it would need, even if it did proceed in absence, to undertake a careful examination of the case and the evidence.

He submitted that this is what it did, and was demonstrated by the fact that it was critical of the evidence of one of the witnesses, and also by the fact that it did not find every allegation of dishonesty and misconduct proved (paragraph 22).

HHJ Davies said it was necessary for the Panel to consider the question of whether or not to proceed in the absence of the doctor with care. It had to look at all of the relevant considerations, including the reasons as expressed or explained, as to why the doctor was not present, and it had to consider all of the relevant options, which would include proceeding in her absence, and adjourning for a specified period, or even, possibly, determining that it was simply inappropriate to proceed at all (paragraph 23).

The Judge felt that it was important to note that there was no evidence in this case that Dr Guest was, at the relevant time, operating under any medical or other conditions such as would, or even might have, adversely affected her capacity or the ability to make an informed decision as to how to respond to the hearing (paragraph 25).

Further, it could not be said that Dr Guest was not, on the information which was before the Panel, competent to make her own decision that she did not want to be present, and that she did not want a legal representative to be present, and was content that the Panel should make the decision based on all the information before it, including the information she had provided in the course of the proceedings.

Whilst the Judge accepted that it was obvious that Dr Guest regretted that decision, given the outcome of the Panel's determination, that was an entirely different point (paragraph 26). He concluded:

'This was a case where, on the face of it, Dr Guest was making her own decision as to what was in her own best interests and where there is no proper basis upon which it could be said that the Panel could or should have been obliged to second guess that decision.'

The Judge confirmed the Panel was provided with proper legal advice, they took care to consider it and they reached decisions which were properly reasoned and demonstrated that they were aware of, and had taken into account, all relevant factors. He confirmed their findings could not be criticised on the basis of the evidence before them. He did not think either that it could be seriously said that they should have, of their own volition, adjourned to allow the doctor to obtain further medical evidence (paragraph 27).

HHJ Davies also confirmed that it was a case where the Panel was entitled to have regard to the need to move forward (paragraph 28).

The final point which he wished to make in relation to the appeal on ground one, was a suggestion that the Panel should have considered adjourning after having made their decision on misconduct and impairment before proceeding to deal with sanction to allow the doctor to make further representation.

In the Judge's view, such an argument could not avail the doctor in this case; firstly because she had never asked for that opportunity, and secondly, perhaps more importantly, because she had had every opportunity to put forward matters relevant to sanction, and finally, given the findings of dishonesty were made against her, in reality, there was very little scope for her to say very much more than she had already said.

In the circumstances, he dismissed the appeal on ground one.

The Judge then dealt briefly with the issue relating to the evidence of Dr Julian Clarke (paragraph 31). He did not consider that there was anything of particular critical importance in the witness statement and further, it was clear from the doctor's own witness statement that it was material which could, with reasonable diligence, have been obtained and put before the Panel had she wanted to.

The Judge then goes on finally to deal with the issue of sanction (paragraphs 32 to 36).

HHJ Davies confirmed (paragraph 34):

'This was, on any view, a serious case which the appellant, over a prolonged period, made expenses claims in substantial sums on top of the salary she was receiving from her employers on a basis which was false and which she knew to be false, namely that her GP practice had incurred the cost of providing locum cover for her while undertaking PEC business... What is worse is that even if there was a genuine entitlement to make a claim, it was obviously an entitlement which the GP practice had, not which she had personally, which is why it was that the payment was made to the GP's practice. However, as is clear, what she did was to arrange for the payment to be transferred from the GP's practice bank account to her own private account, and she disguised all of this by submitting claims on GP headed notepaper to make it appear as if it was the practice, and not her personally, who was making and receiving these claims.'

Notwithstanding any mitigation which Dr Guest may have been put forward, the Judge concludes (paragraph 35):

'...the essential point which is that she made claims which she knew, on the Panel's findings, she was not entitled to make, and that she did so over a prolonged period and in circumstances where she disguised the true position

from her partners in the GP's practice. On any view, that was serious conduct undermining public confidence in the profession.

Whilst he accepted that she suffered from personal problems, ill health, and family problems, none of that could provide sufficient mitigation such as to demonstrate the decision to erase was wrong and one which the Panel was not entitled to reach.

In the circumstances he dismissed the appeal.

Salient Points

- A relevant factor for the Panel, when considering whether to proceed in the doctor's absence, is the doctor's clearly stated position that he/she is not seeking an adjournment.
- Where the Panel has determined to proceed in the doctor's absence there is no requirement, after making a decision on facts and impairment, to adjourn before proceeding to deal with sanction.

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