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Re: Dr Jenyo v GMC [2016] EWHC 1708 (Admin)

Abstract

An appeal was lodged under section 40 of the Medical Act 1983 against the decision to erase Dr Jenyo from the medical register.

Background

Dr Jenyo retrospectively altered the electronic surgery records of a patient who had died of cancer. He did so after being made aware that the patient's family considered that symptoms of back pain had not been properly investigated; the patient had died of a tumour. Although accepting that he had made the alterations, Dr Jenyo claimed they were made to clarify his past treatment of the patient, and not to mislead. However, the Panel was of the opinion that the amendments were made dishonestly. There were three sets of alterations, which were not clearly dated and could lead to the assumption that they were written at each consultation, which consisted of additions and deletions to the records. The Panel found that 'the amendments created a significantly different clinical picture of Mr A's health from that originally recorded, and that the picture would have improved the Appellant's position in response to criticism or a claim for medical negligence' [para 20]. In summary, the panel found that Dr Jenyo was not a credible or reliable witness, that his fitness to practise was impaired and erased him from the medical register.

Appeal

The appeal was heard before Mrs Justice Andrews, who upheld the decision of the Panel.

On appeal in respect of dishonesty, the issue related solely to the finding of subjective dishonesty. Andrews J summarised the Appellant's argument as him being 'unlikely to have made the alterations in order to deceive, because his behaviour was bound to come to light if anyone did not take the altered records at face value and carried out an audit' [para 26].

In this appeal, Andrews J observed that as this is a case where there was an acceptance that alterations were made deliberately by the Appellant, 'the only person who was able to give direct evidence as to his intention in making them was the Appellant' [para 31]. Credibility was therefore the main issue before the Panel.

Andrews J said that 'it is incumbent upon a panel to consider an alternative innocent explanation given by a doctor for his behaviour' although the panel is not required to 'recite in its decision every factor [the appellant] relies on in argument as pointing towards his version being the truthful one' [para 32]. It was held that the Panel did consider the arguments put forward by the Appellant and 'it took the view that an honest doctor would have flagged up the amendments in some way, so that they would be immediately apparent on the face of the records' [para 34].

It was further observed that 'stupidity and dishonesty are not mutually exclusive' [para 36].

It was further argued that the panel gave inadequate reasons for its decision. The decision of the Court of Appeal in *Phipps v GMC* [2006] EWCA Civ 397 was cited, where it was said that the duty was on tribunals 'to state their decisions in a form which is sufficient to make clear to the losing party why it is that he has lost' and that 'it is not a necessary ingredient of the requisite clarity that the reasons should be expressly stated when they are otherwise plain or obvious'. Further, Andrews J held 'It is clear from the case law that the duty to give reasons does not oblige a tribunal to make express reference to every matter relied on by the doctor as supporting his version of events and to explain why it

has decided that those factors are outweighed by other factors. In a case hinging on credibility, all the doctor needs to be told is why the Panel did not believe him' [para 44]. In this appeal, it was held that it was clear to anyone reading the determination to know why the Panel did not believe the explanation provided to the Panel.

Salient points

- If the matter of dishonesty relates to the doctor's intention, the doctor will be the only person who can give direct evidence on this issue and credibility will be the main issue to consider.
- There is a difference between stupidity and dishonesty; they are not mutually exclusive.
- When giving reasons, in a case that hinges on credibility, it will suffice if the doctor is told why he is not believed.

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