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Re: Dr Kimmance v GMC [2016] EWHC 1808 (Admin)

Abstract

This is an appeal under section 40 of the Medical Act 1983 to appeal against the decision to erase Dr Kimmance from the medical register.

Background

The appellant was involved in a family dispute, following which he became the subject of a number of injunctions which he breached by sending 'very intemperately worded' communications from around 2012 to 2014. As a result, the GMC brought ten allegations against him to the effect "that he had sent substantial amounts of correspondence to Durham County Council, Durham Constabulary and local authority schools; and this had led to a warning in the form of a "police information notice" issued in November 2012 under the Protection from Harassment Act 1997" [para 3]. These allegations were referred to the Fitness to Practise Panel, to whom the appellant made a written application for the panel to recuse itself, contending that there was a conflict of interest in relation to two of the panel members on the basis that they were "professionals which run the family justice system – social workers and lawyers".

The appellant did not attend the hearing before the panel, and he was unrepresented. The panel rejected the recusal application and proceeded in his absence, finding all charges proved and his fitness to practise was deemed to be impaired – although there were no clinical concerns, there was no evidence of any insight into misconduct which was 'further demonstrated by the sending of

inappropriate correspondence to GMC and members of its staff in the run-up to the hearing, including bitter complaints about the way the family justice system treats fathers, and an allegation that the [GMC] had “fabricated” the allegations against him” [para 14].

The panel considered that Dr Kimmance’s actions undermined the public’s trust in the medical profession, and that he displayed a ‘profound and persistent lack of insight into the seriousness of his actions and the consequences, particularly in respect of the alarm and distress the correspondence he sends causes the recipients’ [para 15]. Dr Kimmance was erased from the medical register.

Appeal

The matter was heard by Kerr J who dismissed the appeal. In relation to the assertion of bias, it was said that this ‘amounts to no more than a generic grievance against persons involved in professions’ which ‘comes nowhere near even raising an arguable case fulfilling the test for an appearance of bias’ [para 20]. In dismissing this, Kerr J cited the decision in *Locabail (UK) Limited v Bayfield Properties Limited [2000] QB 451*, where it was observed that (although each case is dependent on its own facts) ‘an association with the same walk of life on the part of a panel member and a person coming before that panel will of itself come nowhere near establishing an appearance of bias’ [para 22].

A further aspect of the appeal relates to the argument raised about dishonesty / lack of integrity. The case was opened on the basis of dishonesty, although it did not form part of the allegations, and the panel were invited to take integrity into consideration, which was said to be procedurally unfair. Kerr J was of the opinion that the concept of dishonesty was immaterial to the charges given that the ‘essence of his misconduct was nothing to do with whether he believed in the truth of what he was alleging’ [para 37]. The misconduct was summarised as ‘[breaking] court orders, making seriously offensive remarks to public servants doing their duty and thereby conducting himself in a manner unbecoming to a doctor, undermining public confidence in the profession’ [para 38]. However, this irregularity was not material because the panel made an express reference to the absence of dishonesty in the determination, and was aware of the essence of the wrongdoing.

Whilst it was noted that at the fact finding stage the panel was referred to the question of dishonesty and the sanctions guidance, Kerr J considered that counsel was doing ‘no more than looking ahead to what her submissions would be at subsequent stages of the exercise’, and said that ‘it is always good practice to maintain a clear intellectual separation between the different stages of the

exercise', although considered that it was clear from the determination and reasoning that the panel were aware of the separate nature of each stage of the exercise [para 43].

In agreeing that the sanction of erasure was proportionate, Kerr J observed that 'doctors have to be people who do not write documents of the type that this one did. Even when they are convinced...that they are victims of a grave injustice and have been separated from their child without good cause, it is a misjudgement to suppose that this doctor's private life was under scrutiny, not his public and professional life, and to suppose that that (sic) because there was no clinical concern about his practice, he could expect to continue working as a doctor after writing documents such as those that formed the subject of the charges' [para 64]. Kerr J held that given his behaviour, Dr Kimmance could not remain on the medical register and that 'he needed to conduct his private life...in a manner befitting a doctor' [para 65].

When demonstrating insight and remediation, a doctor 'who has done wrong has to look at his or her conduct with a self-critical eye, acknowledge fault, say sorry and convince a panel that there is a real reason to believe he or she has learned a lesson from the experience' [para 66]. Kerr J is of the opinion that in the majority of cases this cannot be done if the doctor doesn't turn up to the hearing. He goes on to state that in this jurisdiction, 'where issues of insight and remediation are very important, and where the conduct complained of is clearly very serious, non-attendance of the hearing can come close to professional suicide' [para 71].

Salient points

- Although fact specific, the test for apparent bias will not be met by a tribunal member and person coming before the tribunal having an association with the same walk of life eg profession
- When approaching the three stage exercise, it is good practice for the tribunal to keep each stage separate on an intellectual level, and be able to demonstrate this in the determination
- In the majority of cases, it will be difficult to demonstrate insight and remediation if a doctor does not attend the hearing; the panel may have questions to ask which the doctor has not made him/herself available to answer.

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