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Arunachalam v The General Medical Council [2018] EWHC 758 (Admin)

Learning Points

- When considering the issue of sanction a tribunal must first evaluate the aggravating and mitigating factors and balance them against each other. This balancing exercise should be carried out before beginning the process of working through the available sanctions and making the decision as to which sanction is appropriate. A tribunal should provide coherent reasoning and make clear in its written determination what weight has been given to both aggravating and mitigating factors in demonstrating the proportionality of the sanction.

Background

This was an appeal by Dr Arunachalam ('A'), pursuant to section 40 of the Medical Act 1983, against the decision dated 23 May 2017 of a Medical Practitioners Tribunal ('the Tribunal') that A's fitness to practise was impaired by reason of misconduct and that his name be erased from the medical register.

The allegations against A were that he had behaved in a sexually motivated way towards two trainee women doctors: in relation to the first, A sent inappropriate and unwanted messages; in relation to the second, A tickled, hugged and kissed the practitioner on the top of the head and inappropriately sought her company at work, making her feel uncomfortable.

The Tribunal found that A's conduct had been sexually motivated and that his fitness

to practise was impaired by reason of misconduct. The Tribunal considered what sanction to impose, starting with the least restrictive. The GMC itself submitted that the appropriate sanction was one of suspension. In its determination, the Tribunal noted the various aggravating and mitigating features in the case. After rejecting making no order and the sanctions of an order of conditions or suspension, the Tribunal determined to erase A from the register on the basis that, despite the impact the sanction would have upon A both professionally and financially, erasure was the only proportionate sanction sufficient to maintain public confidence in the profession and its standards.

Grounds of Appeal

A appealed against the Tribunal's determination to erase him from the medical register on three main grounds:

1. The sanction of erasure was disproportionate and too severe. A submitted that there was no clinical concern or risk to patients and that erasure was not the only means by which maintaining public confidence and upholding standards could be achieved. A period of suspension would have been sufficient to reflect the seriousness of A's misconduct: a reasonable and well informed member of the public with knowledge of the facts would not regard suspension as insufficient or too lenient and would likely consider erasure excessive and disproportionate. A also submitted that the GMC's position before the Tribunal below was a good indicator of what a reasonable, informed member of the public would think and that that was a relevant factor to consider;
2. The Tribunal's observation that A's sexually motivated conduct had been at the lower end of the spectrum of sexually motivated conduct was inconsistent with the Tribunal's rejection of a sanction of suspension. A submitted that the Tribunal drew the wrong conclusion from the correct observation;
3. The Tribunal had failed to engage with and balance the mitigating features against the aggravating factors in A's case; it was insufficient to simply list them, they had to be evaluated.

Judgment

Mr Justice Kerr heard the appeal and made the following observations and comments:

1. cases relating to sexual misconduct are inherently serious and may lead to erasure, even for "a first time offender" with a good clinical record. He said

that “[O]ften, maintaining public confidence in the profession and upholding high standards of behaviour by stamping out unacceptable behaviour of this kind will require erasure in a sexual misconduct case” [paras 34 and 58];

2. in considering the available sanctions in ascending order of gravity, “it is essential that the tribunal must evaluate the mitigating features as well as the aggravating features and balance them against each other when considering whether the sanction of suspension is appropriate. It is an error of law to leave that exercise to the final stage of considering erasure since, once suspension has been ruled out, the case is effectively over since erasure remains the only available sanction” [para 39]¹;
3. where the victim is a colleague, rather than a patient, “severe sanctions....are generally necessary, in addition, to protect and uphold the dignity of workers in the profession and to protect their freedom to work without being molested” [para 59];
4. although A’s case was always one where erasure was a potential outcome, even though he had a good record and had not previously offended in any way [para 60], the Tribunal “did not properly evaluate the factors weighing in the balance in favour of suspension and against erasure” [para 63];
5. “...there is a lack of coherent reasoning and the tribunal has failed to show the weight it gave to mitigating factors in demonstrating the proportionality of the sanction². Looking at the list of mitigating features set out in the decision, the tribunal sets them out and says that it took them into account. The tribunal must therefore have taken account of them in some way, but it is quite impossible to say from the decision what weight it gave to those features.’ [para 64];
6. there was no passage within the Tribunal’s determination where “the mitigating features were evaluated and weighed in the scales against the aggravating features” [para 65];
7. the section of the Tribunal’s determination concerning whether suspension was appropriate contains no mention of the mitigating features and showed that the Tribunal “did not properly balance the mitigating features against the aggravating ones at the stage of considering suspension” [paras 66-67];

¹ Mr Justice Kerr specifically referred to *Wisniewska v Nursing and Midwifery Council* [2016] EWHC 2672 (Admin)

² Mr Justice Kerr followed the comments made by Mr Justice Hayden, at paragraphs 15-16 of *Wisniewska*

8. "the stance of the GMC itself, when presenting the case below, is quite strong evidence of where on the scale of offending a reasonable and informed member of the public would place the appellant's conduct" [para 76];
9. that it was also of relevance that the second practitioner would have been prepared to accept an apology if A had offered one, and had an apology been offered in both cases, there might well have been no disciplinary proceedings at all. The Judge said that "[T]he fact that such an outcome is within the contemplation of at least one of the victims as acceptable is a factor of some relevance to whether restoration of public confidence in the profession demands nothing less than outright erasure" [para 77];
10. although the law guards the rights of female workers against the type of behaviour demonstrated by A, the justice system was not so inflexible as to require that every transgression of this kind must be met with erasure. In A's case, the conduct was not at the top of the spectrum of sexual misconduct cases; there was mitigation present as no patient's safety was at risk, A was of previous good character, had some insight (although it was given slight weight and came late) and had demonstrated a period of two and a half years after the second incident without further offending [para 79].

In the circumstances, Mr Justice Kerr held that the Tribunal's decision was flawed and that it could not stand [para 80]. He said that "In the unusual circumstances of this case, I am persuaded after reflection to substitute the sanction of suspension which both parties plainly considered appropriate when the case was argued before the tribunal" [para 80]. The Tribunal's order of erasure was set aside and substituted for an order suspending A's registration for a period of 12 months [para 82]. Mr Justice Kerr noted that this would mean that A would have been unable to work as a doctor for a period of 20 months, eight more than the statutory maximum which could be ordered by a Tribunal.

Kind regards

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