Appeals Circular A11/12

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Re: Dr Matthew Cornish – v – General Medical Council [2012] EWHC 1196 Admin

Background

Dr Matthew Cornish, a Consultant Anaesthetist, appeared before the Fitness to Practise Panel ("Panel") in May 2011 in respect of a conviction for theft of drugs from his employer, misconduct and adverse physical and mental health, namely opioid dependence syndrome, currently abstinent. The Panel found the facts proved, determined that the doctor's fitness to practise was impaired on the basis of his conviction, misconduct and adverse physical and mental health and determined to erase his name from the Medical Register.

Dr Cornish appealed the Panel's finding of fact that he had self administered drugs within the hospital buildings of Yeovil District Hospital and against the determination to erase his name from the Medical Register.

Appeal

The matter came before Mrs Justice Lang DBE for hearing on 24 April 2012 with judgment being given on 9 May 2012.

The judge sets out the facts in relation to the case in paragraphs 8 to 30 with details of the GMC's proceedings in paragraphs 31to 48 with the specific charges, in relation to Dr Cornish, at paragraph 45.

Mrs Justice Lang thereafter sets out details of the appeals process and the relevant considerations for her in determining the appeal in paragraphs 49 to 55. She also notes that Mr Morris, Counsel for the doctor, relied upon the judgment of Newman J in *Abrahaem v GMC* [2004] EWHC 279 Admin where the judge stated that the degree of deference would be higher in cases where medical procedures were an issue, which are within the sphere of expertise of the professional body, than in cases such as Dr Abrahaem's, which involved dishonesty and possession of drugs.

Mrs Justice Lang confirmed that she should follow the guidance given by the Court of Appeal in preference to the judgment in Abrahaem, which pre-dates *Meadow v GMC* [2007] QB 462 and *Raschid v GMC* [2007] 1 WLR 1460 and, in any event, it was only a first instance (i.e. a high court not a Court of Appeal) decision. She also notes it was only of academic interest since on the particular facts of the case, the conclusions which she reached, were entirely in accordance with those of the Panel.

Mrs Justice Lang sets out the relevant sections of the Medical Act 1983 and Fitness to Practise Rules in paragraphs 56 to 58.

Mrs Justice Lang then goes on to consider the finding of fact challenged by Dr Cornish that he self administered intravenous drugs in hospital buildings at paragraphs 59 to 78. The judge sets out the Panel's conclusions in paragraph 60 and notes in paragraph 61:

> *"Prior to setting out its conclusions, the Panel set out an impressive summary of the evidence and submissions relating to this issue, lending support to the Respondent's submission that the Panel properly took into account the Appellant's evidence and submissions in reaching its conclusions."*

The judge confirms (paragraph 62) that the reasons were *"fully and clearly stated"* and, in her judgment, of the standard required of a lay panel of a professional disciplinary body.

She then considers each of Dr Cornish's submissions:

1. *The Panel's reasoning in reaching the conclusion that the doctor was not a credible witness was flawed (paragraphs 63 to 66).*

   The judge did not accept the doctor's submission. There was evidence before the Panel which demonstrated that he had specifically lied about his drug abuse. The judge did not consider it improbable that the doctor would have chosen to lie about self administering in the hospital buildings when he had admitted to extensive use elsewhere and his submission that after commencing in patient treatment he disclosed the complete history and since 2010, consistently told the truth about his drug history was not supported by the evidence;

2. *The Panel's reasoning in reaching the conclusion that he would not have been able to delay injecting until he had the opportunity to return to his car was flawed (paragraphs 68 to 70).*

   Mrs Justice Lang considered the Panel was entitled, on the evidence, to conclude that the doctor's drug abuse had become so extensive, *"out of control"* and *"chaotic"* that he would not have had the self control not to have self administered within the hospital. She agreed with the submission made by Counsel for the GMC to the Panel, namely, if he was genuinely able to exercise restraint and choose where and when he injected, why did he choose the hospital car park, which was part of the hospital premises in a very public place where he would be recognised?. The judge accepted that Dr Cornish would have faced practical difficulties in absenting himself but she found it *"inconceivable"* the Panel failed to take this evidence into account and rejected the doctor's submission.

3. *The Panel was wrong to conclude that Mr Barry's evidence to the effect that the doctor was uncoordinated, unsteady and trembling in the anaesthetics room, but these symptoms disappeared after a few minutes absence was an indication that he had self administered in the hospital (paragraphs 71 to 72).*

   Dr Cornish did not seek to challenge the reliability of Mr Barry's evidence nor did he have any recollection of the occasion. In Mrs Justice Lang's judgment the Panel

was entitled to rely on this incident as part of the circumstantial evidence supporting the GMC's allegation he was self administering drugs in the hospital buildings.

4. *The Panel was wrong to reject the doctor's evidence that the hospital locker was used as a holding place for used drug detritus brought from his car or home and instead to treat it as circumstantial evidence supporting the GMC's submission he was injecting in the hospital buildings (paragraphs 73 to76).*

In Mrs Justice Lang's judgment the Panel was entitled to reject the doctor's explanation for the drugs paraphernalia in his hospital locker. She considered it was highly implausible for several reasons. First, the photographs showed vast quantities of used drug detritus in his car and at his home, whereas the quantity in his locker was relatively small. Second, it was unlikely that he would take the risk of transporting large quantities of used drug detritus into the hospital. Thirdly, the material was loose in the pockets, not bagged up. In her view it was far more likely that the doctor was using the locker to store drugs paraphernalia for use whilst at work.

Dr Cornish relied on the fact that no cannulae were found in the locker, however, the judge considered this *"hardly conclusive"*. In her judgment, the Panel was entitled to conclude that this fact, taken alone, was not sufficient to displace the inference which it drew from the rest of the contents of the locker.

The judge notes with the benefit of advice from the Legal Assessor, the Panel correctly directed itself on the use of circumstantial evidence and on the burden and standard of proof and, in her judgment, the doctor had failed to establish any grounds for overturning the Panel's determination of fact (paragraph 78).

The judge then goes on to deal with the appeal against the sanction of erasure (paragraphs 78 to 131).

The judge sets out the Panel's determination in paragraph 80 and then goes on to consider each of the submissions made by the doctor that erasure from the medical

register was an excessive and disproportionate sanction. The reasons are summarised in paragraphs 82 to 94:

- The Panel failed to attach any, or any adequate, weight to evidence from the doctor and his colleagues in the Trust, that he was a well regarded, competent practitioner and there had been no formal or informal complaints about his work with patients during his fifteen years of opioid dependence.

- The Panel failed to view his misconduct in its proper context and so failed to give the appropriate weight to the evidence that his misconduct was linked to his ill health, namely his opioid dependence; the opportunistic nature of his drug taking in 1994 and 1996; and the insight into his misconduct, demonstrated by his admissions and full disclosure to the Panel, and the testimonial evidence.

- The Panel was wrong to conclude that there was evidence demonstrating deep-seated personality or attitudinal problems in the light of the expert psychiatric and testimonial evidence and the submissions of GMC's Counsel.

- The Panel's finding that the doctor's honesty and integrity could not be relied upon was wrong in the light of the evidence.

- The Panel failed adequately to take into account the steps the doctor had taken to remedy his opioid dependence.

- The Panel, in concluding they were not convinced the doctor would not repeat his behaviour given the opportunity, failed to consider the evidence as to his remediation and rehabilitation and the risk of relapse.

- The Panel failed to consider the public interest in allowing the return of a clinically competent doctor.

- The Panel failed to bear properly in mind relevant parts of the Indicative Sanctions Guidance.

- No reasonable Panel would conclude that erasure was the appropriate sanction, bearing in mind the advice from the Indicative Sanctions Guidance.

In Mrs Justice Lang's judgment the doctor's grounds for appeal failed to acknowledge or appreciate the seriousness of his misconduct (paragraph 96).

She notes that the Panel had found, in its determination on impairment that all four features of impairment identified in the Shipman Report existed in Dr Cornish's case (paragraphs 97 to 101). Further, the Panel had found that the doctor's conduct breached the fundamental tenets of the profession as set out in Good Medical Practice and constituted a serious departure from the standard expected of a registered medical practitioner (paragraph 102). She notes the Panel had also found the doctor to be *"devious"* (paragraph 103).

The judge notes (paragraph 104) the Panel expressly acknowledged that the doctor's misconduct and conviction were linked to his opioid addiction, and that the doctor had made genuine efforts to abstain from drugs since August 2009. However, it did not consider that this fully explained or mitigated his behaviours. The Panel considered he was guilty of a persistent and serious breach of trust, that he was dishonest, calculating and deceitful.

Mrs Justice Lang (paragraph 105) confirmed her agreement with the Panel's conclusions. Furthermore, she had previously indicated the doctor's sustained lying about the extent of the history of his drug abuse to the Trust, the police and to the GMC, even after he was no longer using drugs, demonstrated a propensity to dishonesty and a lack of integrity which could not be explained or excused on the basis of his addiction. Although the doctor sought credit for making full disclosure to the Panel, he was found by them to have lied when he denied using intravenous drugs in the hospital buildings, the Panel members having had the opportunity to hear his evidence and assess his honesty.

The judge goes on (paragraph 106) to say that the Panel was justified in taking into account the doctor's *"cavalier experimentation"* when he irresponsibility stole from his employers as a young doctor in order to experiment with opioids, thus sowing the seeds of his own addiction.

In her judgment, the Panel's findings that the doctor did not have sufficient insight into his misconduct, and that he had some deep-seated personality or attitudinal problems was justified on the evidence before it (paragraph 107). The judge goes on and considers that

the doctor's record of deceit and lies was exceptional by any standards. As well as his persistent dishonesty, the Panel was troubled by his decision to *"reward"* himself by stealing and using drugs on the very first day of his return from the period of suspension from work and a formal warning in 2000, after he had been found in possession of an ampoule of morphine, and when his wife had given him an ultimatum about his conduct.

Mrs Justice Lang acknowledges the doctor's submissions that the GMC's medical examiners and his psychiatrist did not find evidence of *"a personality disorder"* but, in her view, the Panel was not using the term *"personality or attitudinal problems"* in the way that a psychiatrist might do to denote a psychiatric condition such as a personality disorder.

She concludes (paragraph 109) that on the evidence before it the Panel was entitled to find that the doctor's misconduct demonstrated a *"blatant disregard for patient safety"* and that it was more by good luck than good management that no patients were harmed. She notes that the Panel were particularly concerned by the doctor's own evidence. In her view, the doctor properly accepted in evidence to the Panel that there was a potential risk to patients caused by his addiction and the Panel was entitled so to find (paragraph 110).

The judge also notes that the Panel took into account the testimonials in support of the doctor, praising both his character and his clinical work, but rightly concluded that those testimonials had to be weighed against the evidence in the case (paragraph 111). Whilst the doctor conceded the Panel was correct to decide the conditional registration was not appropriate, he considered that a period of suspension was appropriate.

Mrs Justice Lang notes (paragraph 113) that the Panel appreciated that it had a *"wider brief"* and it had to take into account consideration of the public interest, which includes both the protection of patients and the maintenance of confidence in the profession. In so doing, it expressly took into account the principle of proportionality. The Panel had regard to the Indicative Sanctions Guidance and the cases of *Gupta v GMC* [2002] 1 WLR 1691 and *Bolton v The Law Society* [1994] 1 WLR 512, and correctly applied the guidance on sanctions.

In her judgment (paragraph 114):

> *"…the Panel was right to conclude that the Appellant's misconduct constituted "a particularly serious departure" from, and "a reckless disregard" of, the principles set out in Good Medical Practice. The misconduct and the conviction was likely to undermine public confidence in the profession and bring the standing of the profession into disrepute. This was a case which came well within the scope of paragraphs 77, 78, 79, 81 and 82 of the Indicative Sanctions Guidance, which gives guidance on the circumstances in which erasure is an appropriate sanction. It follows that I do not accept the Appellant's submission that the sanction of erasure was excessive or punitive or disproportionate. Nor do I accept that the Appellant's submission that the sanction of erasure was inconsistent with the Panel's earlier determination on impairment where it expressed the view that the "an insufficient period of time has passed for your misconduct to have been fully remediated". In my view, the Panel was there addressing the Appellant's addiction……"*

In her judgment the Panel correctly concluded suspension would not *"be sufficient to mark the seriousness of your misconduct, to protect the public interest or to ensure the maintenance of public confidence in the profession"* (paragraph 120).

She therefore concludes (paragraph 121):

> *"…the Panel correctly directed itself on the relevant law and guidance, fairly assessed the evidence, and reached conclusions which were justified on the evidence before it. In my only evaluation of the evidence and submissions, I have reached the same conclusions as the Panel, and therefore the degree of deference due to the Panel is not an issue".*

In the circumstances she dismisses the doctor's appeal.

Salient Points

- The credibility of the practitioner, in conjunction with the severity of their misconduct, are factors that play an important role in supporting a Panel's findings and decision on sanction
- In reaching a decision on sanction, the Panel must take into account the public interest, which includes the protection of the public and the maintenance of confidence in the profession.