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General Medical Council v Chaudhary [2017] EWHC 2561 (Admin)

Learning Points

- The Judge restated the importance of the overarching objective, the tripartite public interest¹ and the essential need for Tribunals to conduct a proper balancing exercise of all three elements of the public interest test, rather than to focus on just one aspect of the test (in this case public safety and therefore remediation and the risk of repetition).

Background

This was an appeal by the General Medical Council, pursuant to section 40A of the Medical Act 1983, against a Medical Practitioners Tribunal ('the Tribunal') decision dated 29 July 2016 to impose conditions upon Dr Chaudhary's ('C's') registration and to order a review hearing.

The GMC also appealed the decision of the Tribunal at a review hearing on 14 August 2017 which revoked the conditions. The outcome of this appeal was dependant on the outcome of the earlier appeal.

¹ Section 1(A) of the Medical Act 1983, as amended:

- a. to protect, promote and maintain the health, safety and wellbeing of the public
- b. to maintain public confidence in the profession
- c. to promote and maintain proper professional standards and conduct for members of that profession.

The allegations against C arose following a ritual circumcision he performed upon an infant ('A') in November 2008. Complications arose (not due to any failure by C in performing the circumcision) which meant that further treatment was required. In January 2009, C (a GP, but not A's GP) referred A to a consultant paediatric urologist. C also sent a letter to A's GP in October 2009. Issues arose as to the accuracy and honesty of both of those letters.

The Tribunal found that C had been dishonest in the referral letter as C failed to provide contact details for A's registered GP, gave the impression that C was A's GP, gave his own address as the contact details for A's carer and next of kin and stated that A was his nephew's son.

The Tribunal also found that C's letter to A's GP had been dishonest as C stated that A and his family had moved residence and had initially opted to register with C's practice, but had then changed their minds, when in fact A's family had never considered this. C also admitted that he had failed to communicate with the child's GP at any point prior to the October 2009 letter.

After adjourning for a period of three months, the Tribunal resumed to consider the issue of impairment. In relation to C's failure to communicate with colleagues, the Tribunal determined that, although this misconduct could be remediated, C had not achieved adequate insight into his failings because they had not seen adequate evidence that C understood the nature of his duties to A when he performed the circumcision, including his duties as set out in Good Medical Practice. Accordingly, C's fitness to practise was found to be impaired on this point.

In relation to the "accuracy" of the letters written by C (in terms of them being misleading), the Tribunal concluded that C's fitness to practise was not impaired, as there was no evidence C had repeated this behaviour or misled colleagues in other areas of his practice, there was sufficient evidence to show C had made efforts to remediate his behaviour and that he understood the significance of writing letters containing false or deficient information, and therefore, it was highly unlikely C would repeat the behaviour.

In relation to C's dishonesty in writing the letters, whilst the Tribunal acknowledged that dishonesty is difficult to remediate, it said that matters of context and degree were relevant, that there was no 'malign motive' for C's conduct and he had not sought to cover up any clinical malpractice, "*[R]ather it previously found that this dishonest behaviour was intended to enable you to pursue your misplaced eagerness to maintain control of Patient A's case*". The Tribunal found that there was evidence of "*considerable development of insight and genuine reflection*" and as a result concluded that C had "*demonstrated remediation in relation to [your] dishonesty*" and that C was highly unlikely to repeat the conduct. When considering the tripartite public interest test, as set out in the over-arching objective of the GMC, the Tribunal therefore considered "*that the public interest in respect of public confidence in the*

profession and the promotion and maintenance of standards is not undermined by its finding".

The Tribunal determined to impose conditions upon C's registration for a period of 12 months and, at a review hearing in August 2017, these conditions were revoked.

Grounds of Appeal

The GMC appealed against the Tribunal's initial decision on three main grounds which were that:

1. When looking at the issue of impairment, the Tribunal gave undue weight and priority to the issue of C's remediation and the risk of repetition and no or no sufficient weight to the other elements of the wider tripartite public interest test: maintaining public confidence in the profession and maintaining proper professional standards and conduct;
2. The Tribunal had erred in its assessment of C's motivation for his conduct and/or had given inadequate reasons for its findings that the motive for his action was 'not malign';
3. The Tribunal's overall assessment of the gravity of the case was wrong, particularly given that C contested the issue of dishonesty and his remediation had come far too late to carry the weight it did. The finding of impairment usually flows from a finding of dishonesty, and there was nothing in this case to make it exceptional.

Judgment

Mr Justice Jay considered each of the grounds of appeal in turn and said that:

1. The only fair, reasonable and sensible reading of the determination on impairment taken as a whole, "is that because the respondent's misconduct was remediable and had been remediated, he was not impaired at the material time" [para 49] and that he could not consider the relevant paragraph (or the determination as a whole) as "properly balancing the second and third elements of the tripartite public interest (as I have described it) against the first" or [para 50 and 51]. Previous case law (Council for Healthcare Regulatory Excellence v Nursing and Midwifery Council and Grant [2011] EWHC 927) has established that a proper balance of all three elements of the public interest test must be undertaken and this had not been done in C's case [para 52]. The Judge went on to say "[T]he whole of the public interest in this regulatory context is vital. I am not to be understood as saying that elements two and three are more important than the first element (which is public safety) and the position of the doctor, but everything must properly be placed

in the balance" [para 53]. Therefore, the Tribunal's failure to do this led to the Judge upholding the first ground.

2. When it came to the issues of probity, dishonesty and trustworthiness in the context of impairment, the Tribunal had been entitled to approach the issue in the way it did [para 56]. The Judge agreed with the Tribunal that dishonesty is not necessarily an immovable notion. As a result, questions of degree arise and dishonesty does not have to be an all pervading or immutable trait: it can occur as a 'one off' [para 57]. He also agreed that it was open to the Tribunal to consider the context of C's dishonesty. While the finding of no 'malign motive' was generous to C, there was no conflict with that finding, once placed in context, and the earlier finding of dishonesty; it was open to the Tribunal to reach that outcome on the evidence it heard [para 58]. Therefore the Judge rejected the second ground.
3. Mr Justice Jay accepted that, on its own, the third ground could not survive. He considered that in this ground the GMC was asking him to substitute a finding of impairment, whether or not the first ground of appeal was successful, which he said was 'a step too far' [para 60]. The Judge said that the Tribunal was well placed to assess dishonesty and motive and was entitled to reach the conclusion it did [para 60].

Mr Justice Jay also provided additional guidance on whether it was necessary for the GMC to issue a separate appeal in respect of the review hearing, in circumstances where if the main appeal is successful, there would be considerable force in saying the review determination must be void [para 61]. He said that, if the appeal relating to the initial Tribunal hearing succeeded, then the basis of the review determination had been removed (because it would not necessarily follow that an order of conditions with a review was the appropriate outcome/sanction, as the Tribunal's findings in the context of impairment is no longer valid or must be reconsidered, in light of the appeal outcome). Therefore, there was no need for the GMC to issue a second appeal in this case.

In terms of concluding the appeal, the Judge allowed the appeal and quashed the Tribunal's decision in part; in respect of the Tribunal's determination on impairment in relation to the issue of probity, honesty and trustworthiness. He substituted a finding that C's fitness to practise was impaired, but directed that no further action be taken by the GMC or by any Tribunal [para 68]. In taking this course of action, Mr Justice Jay noted that the events had taken place around eight years earlier, C had been in unrestricted practice since, had abided by the conditions which were imposed (although on a narrower basis than should have been), no longer undertook the relevant procedure, that it had been a 'one off' event and dishonesty perpetrated within a specific context and that public interest was served by this course of action [para 67].

Kind regards

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