

Appeals Circular A12/19

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Re: Beard v General Osteopathic Council [2019] EWHC 1561 (Admin)

Learning Points

- Tribunals should ensure that, when asking questions during hearings, they do so within the bounds of fairness and impartiality.
- When considering questions of fact based purely on witness evidence, Tribunals should ensure that an even and balanced manner is used when questioning witnesses.

Background

This was an appeal made by an osteopath ('B') against a decision of the General Osteopathic Council's Professional Conduct Committee ('PCC') in August 2018 to impose conditions upon B's registration for a period of 12 months.

The allegations against B were that:

- on 18 July 2016, she had failed to conduct an adequate assessment of a patient ('A'), did not provide a diagnosis, did not explain the treatment to A, did not obtain consent from A and used excessive force during treatment;
- on 21 July 2016, she had done all of the above in addition to failing to explain why ultrasound treatment was appropriate and communicated in an inappropriate manner with A.

The hearing commenced in January 2018. A was called to give evidence during the hearing on the first day and was asked a handful of questions by the PCC about his evidence and the circumstances of the case.

On the second day, B gave evidence to the PCC. After counsel for B and the GOC had asked questions, the PCC indicated that there were nine questions to be asked. The lay member was the final member of the PCC to question B and went on to ask over 200 questions on a range of topics [para 119], lasting a significant amount of time. An application was also made by B's representatives for the lay member, or the PCC as a whole, to be recused. This application was rejected by the PCC.

Grounds of Appeal

B appealed against the PCC's decision on various grounds, including some relating to the PCC's assessment of the evidence and provision of reasons. However, the main grounds addressed in the judgment were:

1. The fairness of the hearing was compromised by the PCC's questioning of B and led to bias and procedural unfairness;
2. The application to recuse the lay member of the PCC, or the whole PCC, should have been granted.

Judgment

The appeal was heard by Mr Justice Kerr in April 2019, with judgment given in June 2019.

He initially considered the first two grounds of appeal and confirmed the six principles on the fairness of judicial intervention in legal proceedings [para 109], which had been applied to regulatory proceedings in *Banerjee v General Medical Council [2017] EWCA Civ 78*:

1. Had excessive interventions or critical comments created a real danger of the proceedings being unfair?
2. There is greater scope for judicial intervention when a Judge sits alone than when sitting with a jury.
3. Did any interventions prevent a fair trial because the Judge had closed their mind to further persuasion, or had 'moved into counsel's shoes and into the perils of self-persuasion'?
4. Consideration ought to be given to the context of the proceedings as a whole and in light of the number, length, terms and circumstances of the interventions.

5. The point at which interventions occurred is of relevance: vigorous early interventions are less excusable than those at a later stage aimed at gaining a better understanding of the issues and the weighing of evidence.
6. A more active judicial role is now more accepted practice in proceedings.

Mr Justice Kerr noted the circumstances in *Banerjee* and contrasted them with B's case [paras 115, 142-143]:

- In *Banerjee*, GMC counsel had not cross-examined the doctor on a key point which the Tribunal asked questions on. In B's case, counsel for the GOC had put its case to B fully.
- The PCC in B's case did not have a legally qualified chair and lay members of disciplinary tribunals are generally regarded as less likely than Judges or lawyers to succeed in casting prejudicial material from their mind when making decisions.

It was noted by Mr Justice Kerr that the PCC did not appear to have considered A's correspondence with B and formed an objective view of it [para 146]. It was found that the lay member's questions to B about A's correspondence (and the tone in which those questions had been asked) contributed substantially to B's distress and failed to shed any light on the issues which the PCC had to consider [para 150]. While the mere number of questions asked by the PCC was not, of itself, conclusive as to whether there was unfairness [para 152], the content and tone of the lay member's questions was more troubling [para 153]. Mr Justice Kerr found that there had been a procedural irregularity and that it was serious enough to render the PCC's decision unjust [para 160]. B's credibility, when measured against that of A, was the crucial issue in the case and, to ensure fairness in the proceedings, this issue had to be treated in an even-handed and balanced manner, without inappropriate, protracted and hostile questioning [para 160]. There was a risk that the lay member's 'descent into the arena' may have hampered their ability to properly evaluate and weigh the evidence, so as to impair their judgment. It was also unclear what impact this may have had upon the decision making of the two other members of the PCC [para 161]. Therefore, these grounds 1 and 2 were upheld.

With regards to the remaining grounds of the appeal, Mr Justice Kerr held that, taken alone, they would not have led to interfering with the findings and decision of the PCC [para 162].

Therefore, the PCC's decisions were set aside along with the order of conditions imposed upon B [para 173].

Kind regards

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