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## **Yusuff v General Medical Council [2018] EWHC 13 (Admin)**

### **Learning Points**

- During Medical Practitioners Tribunal review hearings, findings of fact from the original hearing are not to be reopened.
- When considering whether fitness to practise remains impaired, it is relevant for the Tribunal to know whether or not the registrant now admits the findings or whether they accept the findings in the sense that they do not seek to go behind them, while still maintaining a denial of the conduct underpinning the findings. However:
  - admitting the misconduct is not a condition precedent to establishing that the registrant understands the gravity of the offending and is unlikely to repeat it;
  - if it is made apparent that the registrant does not accept the truth of the findings, questioning should not focus on the denials and the previous findings.
- Sanctions are not imposed to punish or discipline doctors although they may have a punitive effect. The main reason for imposing sanctions is to protect the public and if a Tribunal determines that a certain sanction is necessary to protect the public, that sanction must be imposed even where it leads to difficulties for a doctor.

### **Background**

This was an appeal by Dr Olumide Yusuff ('Y'), pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal') decision dated 25

August 2017 that, following a review hearing, Y's fitness to practise remained impaired and that his registration should be suspended for a further period of six months.

Y's original hearing before a Medical Practitioners Tribunal took place between September 2015 and March 2016. It was found proved that Y had:

- been dishonest in relation to an entry in a patient's medical records, in that he had attempted to destroy the relevant page and rewrite the notes with information that was not true;
- engaged in sexually motivated conduct towards a colleague (by making inappropriate and suggestive comments) and urged the colleague not to tell anyone about it;
- inappropriately communicated with a hospital housekeeper and had been dishonest by informing a manager that he had apologised to the housekeeper, when this was not the case; and
- breached an interim order (of conditions) placed upon his registration in that he failed to inform the GMC when he commenced a locum post and failed to notify his line manager of the interim order.

Y's fitness to practise was found to be impaired by reason of misconduct and his registration was suspended for a period of 12 months.

The first review hearing took place in March 2017. At this hearing, Y said that he accepted the findings of the original Tribunal. However, the review Tribunal found that he had demonstrated insufficient understanding of the seriousness of his misconduct and that there was inadequate evidence of regret and insight. Y's registration was suspended for a further period of four months "*...to allow you to gain genuine and full insight and thereby remediate your misconduct and to enable you to prepare for a review hearing.*"

A further review hearing took place in August 2017. The Tribunal determined that Y's fitness to practise remained impaired on the basis that:

- the evidence presented by Y that he had kept his knowledge and skills up to date was superficial and inadequate, as it was not accompanied by any meaningful reflection and, in light of Y's wish to return to practice as a speciality registrar, he had not taken any form of clinical attachment;
- Y's insight was partial, limited and superficial and it was not persuaded that he had "*gained insight into the effects that the matters in the allegations had on the individuals who were the subject of the misconduct.*"

Y's registration was suspended for a further period of six months to allow him to gain

genuine and full insight, remediate the misconduct and to prepare for a further review hearing.

## **Grounds of Appeal**

Y appealed against the Tribunal's August 2017 decision on the following grounds:

1. the Tribunal's determination on impairment was wrong and based substantially upon unfair questioning of Y about his previous denials of the facts;
2. in relation to the decision to suspend Y for a further six months:
  - a. the decision was wrong and disproportionate;
  - b. the Tribunal wrongly held that the public interest in continuing Y's suspension outweighed Y's interests;
  - c. the Tribunal failed to have regard to the public interest of allowing otherwise competent doctors to return to practice after suspension;
  - d. the Tribunal had been wrong not to impose conditions;
  - e. alternatively, the length of suspension imposed was excessive.

## **Judgment**

Mrs Justice Yip dismissed the appeal.

Having reviewed the relevant authorities, Mrs Justice Yip set out some general principles [paras 18 – 20] that at a review hearing:

- the findings of fact are not to be reopened;
- the registrant is entitled not to accept the findings of the Tribunal<sup>1</sup>;
- in the alternative, the registrant is entitled to say that he accepts the findings in the sense that he does not seek to go behind them while still maintaining a denial of the conduct underpinning the findings;
- when considering whether fitness to practise remains impaired, it is relevant for the Tribunal to know whether or not the registrant now admits the misconduct;
- admitting the misconduct is not a condition precedent to establishing that the registrant understands the gravity of the offending and is unlikely to repeat it;
- if it is made apparent that the registrant does not accept the truth of the

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<sup>1</sup> Amao v Nursing and Midwifery Council [2014] EWHC 147

findings, questioning should not focus on the denials and the previous findings;

- a want of candour and/or continued dishonesty at the review hearing may be a relevant consideration in looking at impairment<sup>2</sup>.

In relation to the specific grounds of appeal:

1. The finding of impairment - the Judge noted that:
  - a. the statement Y presented to the Tribunal, "...lacked detail in many respects". Y had previously denied the allegations against him but there was nothing to explain why at the review hearing he was admitting the misconduct against him, what had caused this change of heart and how he had developed remorse. The Judge also said that there was limited detail as to how he had reflected upon and applied learning from the training he had undertaken [para 29]. She said that she was not surprised that both the GMC and the Tribunal wanted to explore what lay behind Y's expressions of remorse and shame [para 30];
  - b. it emerged from questioning by GMC Counsel that Y did not in fact admit to the misconduct although he respected the Tribunal's findings and did not wish them to be reopened. This put him in a difficult position "but the difficulty was largely of his own making" [para 31]. In relation to Y's claim that he had been unfairly questioned about the original allegations and whether or not he accepted the truth of the findings, Mrs Justice Yip said that "[I]t perhaps would have been sensible to establish at the outset whether or not the doctor accepted the truth of the findings and then to frame the remainder of the questions based on his answer.....the doctor should be given a fair opportunity to demonstrate his insight into the gravity of the offending and his remediation" [para 33]. However she said that "...the legally qualified Tribunal Chair maintained proper control of the cross-examination and did ensure that [Y] was able to give his evidence in a way that was fair to him... Once [Y] had been given the opportunity to make any admissions or comments on the findings, Counsel was asked to move on...The real difficulty, it seems to me, was the inconsistency between his non-admission of the misconduct and his expression of genuine remorse over it. That, as I have said, was a difficulty he created" [para 35];
  - c. the responses from Y were "evasive, lacking in clarity and detail and at

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<sup>2</sup> Karwal v GMC [2011] EWHC 826 (Admin) at paragraph 11 and Irvine v GMC [2017] EWHC 2038 (Admin) at paragraph 83.

time rather odd" [para 36]. However, the Judge also said that the line of questioning by a lay member of the Tribunal caused her "some discomfort" [para 38]. At first he asked Y a question to try and ascertain whether or not the expressed remorse and shame were genuine. However, upon receiving somewhat confusing answers, he then asked directly about the findings made against Y and whether he accepted he had acted dishonestly and/or in a sexually inappropriate way. The Judge said that it would have been "...preferable to avoid questioning that may have appeared to have been reopening issues dealt with at the original hearing. Some of [the lay member's] questioning may have fallen into that category. However, I have to ask myself whether any of the questioning created material unfairness. Looked as a whole, I do not consider it did" [para 41];

- d. "the lack of clear evidence as to Dr Yusuff's understanding and remediation did not result from any unfairness in the questioning but rather reflected his inability to give such evidence. His attempt to express remorse and shame without admitting the misconduct may have contributed to this" [para 44]. The Judge therefore found that there had been no serious procedural irregularity or other unfairness at the hearing [para 45];
- e. the Tribunal had given clear reasons for their decision on impairment and for their finding that Y had provided inadequate evidence of keeping his skills and knowledge up to date (and sufficiently up to date to meet the responsibility of a more senior role than he had been in at the time of the allegations) which was not accompanied by any meaningful reflection [paras 46 and 47]. She agreed with the Tribunal's finding that the oral evidence given by Y was evasive and inconsistent [para 48]. In the circumstances, and having found that the questioning was not materially unfair, she found no basis for concluding that the impairment decision was wrong [para 48].

2. In relation to the sanction imposed by the Tribunal - the Judge said that:

- a. "sanctions are not imposed to punish or discipline doctors although they may have a punitive effect. Proportionality requires the Tribunal to weigh the interests of the public against those of the doctor. However, the main reason for imposing sanctions is to protect the public and if the Tribunal determines that a certain sanction is necessary to protect the public, that sanction must be imposed even where it leads to difficulties for a doctor. There is a public interest in allowing competent doctors to return to practice but only when it is safe for them to do so" [para 54];
- b. the Tribunal was entitled to conclude that conditions would not be workable given the doctor's continuing lack of insight and absence of full engagement with the recommendations made by the original Tribunal and

at the first review. The Tribunal had given proper regard to the *Sanctions Guidance* and “their approach was unimpeachable” [para 56];

- c. the Tribunal were entitled to be concerned about the continuing lack of insight and the extent to which Y had kept his knowledge and skills up to date. In these circumstances, she found that the Tribunal was “entitled (indeed bound) to order a further period of suspension” [para 57];
- d. it was not unreasonable to make the period of suspension longer on this occasion and that the suspension was “not designed to further punish...but rather to offer further opportunity for genuine insight and remediation” [para 58]. She said “[T]he total period of suspension which [Y] has now served may be seen as harsh viewed solely as a punishment and from his perspective. However, that is not the correct viewpoint. The Tribunal having adopted the correct approach, having regard to the Sanctions Guidance and the ordered decision-making required of them, cannot be said to have been wrong in imposing a further period of suspension for 6 months” [para 59].

Mrs Justice Yip said that there was no basis for overturning the Tribunal’s decisions in relation to impairment or sanction and that the review hearing was not unfair and the conclusions reached were open to the Tribunal on the evidence [paras 60-61]. Therefore, the appeal was dismissed.

Kind regards

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