Appeals Circular 15/12

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R (On the Application of Michalak) -v- General Medical Council [2011] EWHC 2307 (Admin)

Background

Disciplinary proceedings were brought against Dr Michalak in relation to the care of patients and her behaviour towards them. The matters came before a Fitness to Practise Panel ("Panel") which commenced hearing the case in June 2010. The Panel sat over a period of 34 days and heard evidence from 28 witnesses, called by the General Medical Council ("GMC") in support of the allegation against Dr Michalak.

Unfortunately after the hearing had progressed to that point, the medical member of the Panel became ill and it was clear that he would be unable to resume participation in any resumed hearing in the foreseeable future and therefore the issue arose whether the Panel remained quorate and what could be done about it.

In the circumstances, the Registrar decided to substitute another medical member so as to bring the Panel back to three members, which would be sufficient for the Panel to be quorate, and he believed it was in the interests of justice to make such a substitution.

The Panel reviewed the decision and concluded that substitution was proper and it would be in the interests of justice to allow the substitution.

The issue remained as to how the Panel should proceed. The Panel took the view that, having regard to the nature of the case and the evidence already presented to them, it would be necessary for the third member, in order to put them in the same position as the two original members of the Panel to hear the witnesses live. They therefore decided that the reconstituted Panel should hear all the witnesses again i.e. 28 witnesses over what would be a very similar if not exactly the same time scale.

Claim for Judicial Review

Dr Michalak issued a claim for judicial review challenging the substitution of a new panellist in principal – it being alleged that there was no power to make the substitution at all and, also, that the procedure now contemplated by the Panel was not a fair and/or rational one in all circumstances of the case.

The application was considered by Mr Justice Parker. He sets out the background to the application for judicial review in paragraphs 1 to 6 of his judgment.

He then turns, first, to deal with the question of substitution. The judge sets out the relevant rules in paragraph 8.

Mr Justice Parker confirms (paragraph 9) that the Registrar has the power to make the substitution in accordance with Rule 4 of the GMC Constitution of Panel and Investigation Committee Rules 2004 ('the Rules'). He notes that membership of the Panel shall comprise medical and lay members selected by the Registrar and that the power is not expressly limited to the appointment of a Panel at the outset of proceedings. The powers therefore, in principal, could be used to appoint Panel members at any time. The judge goes on:

> *'' Furthermore it is in the interests of practicality and the proper administration of these disciplinary proceedings that there should be no limitation in principle to that power. It is of considerable importance that if indeed the panel is potentially liable to be inquorate, either because of unavailability or ineligibility, that the Registrar should have the power to appoint a substitute."*

Mr Justice Parker notes (paragraph 10) that there are checks upon the exercise of the power and that it is clear from Rule 7(2) that the power conferred could only be exercised if it was in the interests of justice to do so. It therefore seems to the judge that the limitation Rule 7(2) should properly be read be across into Rule 4 to prevent in terms anomalous or unjustified substitution.

He goes on (paragraph 11):

> *'... the power would have to be used for a proper purpose. That constitutes a further check. Furthermore it also appears to me that, given the potential importance of the power, both as regards the GMC itself and the person before that proper procedures should be followed. In other words the parties should be told in advance what the situation is and what is contemplated and why it is considered to be in the interests of justice to make a substitution so that both parties may make, if they so are minded, appropriate representations about the exercise of the power."*

Mr Justice Parker confirms that the Panel itself is responsible for its own procedures and has a duty to ensure at all times that those procedures are fair and therefore in his judgment (paragraph 12):

> *'… there is power, which was exercised in this case, for the panel to consider whether indeed the substitution is for a proper purpose, the proper procedures have been followed and that it is in the interests of justice to make the substitution."*

He goes on (paragraph 13) to say that the point referred to above is reinforced by paragraph 3 of Schedule 4 of the Medical Act 1983 ('the Act') set out in paragraph 8 of his judgment.

The judge notes that the main argument raised by Dr Michalak (paragraph 15) is that the power should be limited to those cases where all, in this case three, members of the Panel are present and on some more occasions one of them is not present and is not designed for a case where someone has become completely unavailable or ineligible and a substitution is made of a completely new member.

The judge deals with this matter in paragraph 16 and confirms that this:

> *"…would defeat the purpose of the Rule and would have very detrimental consequences for the conduct of such disciplinary hearings. Furthermore that interpretation is not really consistent with the language which contemplates a panellist becoming ineligible during the course of a hearing and therefore not being present at a later stage. Therefore it seems to me that the language of the Rule contemplates the very case where someone becomes ineligible and there is a substitution."*

He concludes (paragraph 17):

> *'…on a proper construction of the Rules, taking account both of the language and the purpose of the provisions, that there was indeed a power in principle to make the substitution that was made in this case."*

The judge goes on to deal with the issue of the fairness and rational of the final conclusion reached by the Panel as to the way forward. These issues are dealt with in paragraphs 17 to 25 of the judgment.

He notes (paragraph 17) the situation which arose in this case i.e. where a member was to be substituted who would not have the same information and background as the other two members. He considers that this is a situation that occurs in practice with some regularity and the way in which it is solved is often to allow the new substituted member to have access and to read into the transcripts carefully so as to have the same kind of information as the originally constituted members. He goes on:

> *'It is generally acknowledged that that is not a perfect solution because in some cases the way in which the evidence was given can be significant and*

therefore a person who has not heard the witness may be at a disadvantage to those who have. Appellate courts time and again refer to the advantage that a first instance judge has had over an appellate court in the consideration of evidence because that first instance judge has heard the witness and has observed the demeanour and the manner in which that evidence has been given."

Mr Justice Parker goes on (paragraph 18) as follows:

"However, in some cases it is concluded that, having regard to the nature of the case and the evidence that has been given, the potential for injustice is relatively slight and that the advantages for the administration of justice in general countervail such slight disadvantage that has been perceived. The general advantages of course lie in the fact that it is then unnecessary for the hearing to be duplicated with all the additional cost, use of resources and anxiety to one or both parties of having to go through yet again a full hearing, when that is not strictly necessary because other measures can be taken."

The judge then goes on to note that this is not the course that the Panel thought was right in Dr Michalak's case (paragraph 19).

The judge concludes in paragraph 20 that:

"…I am not at all persuaded that there is any advantage whatsoever in the course proposed by the panel in comparison to an alternative by which a fresh panel entirely would be constituted to hear the case again. It has been suggested on behalf of the defendant that there would be advantages in terms of firstly the opening for example having already been heard by two members of the panel and therefore proceedings could be shortened by the course adopted and secondly that the two existing original panel members have the advantage of having been into the case already and have seen documents and are familiar with the documentation."

The judge was not persuaded that those are indeed "*substantial advantages*" (paragraph 21). In fact he goes on to say (paragraph 22) that this was a case where there appeared to be potentially substantial disadvantages in the course chosen by the Panel for entirely different reasons. The first of those is that, the ordinary policy for the GMC was to have a five-person Panel to prevent the very difficulties that have arisen in this case. He goes on (paragraph 23) to say that the matter has now become a lengthy one because the hearing began in June 2010. If it is resumed in the way that is proposed it will take a considerable period before a final decision is taken. He considers a freshly constituted Panel can get on with the case and make a decision as soon as was reasonably practicable.

The third issue which he raises (paragraph 24) had arisen relatively recently in that it did not appear from materials before the court that the Chair of the Panel was eligible to sit in such a capacity.

In the circumstances (paragraph 25) the judge determined to quash the decision made. He held that, in principle, there was a power to make a substitution and therefore the matter needed to be remitted to the GMC for it to consider what action should be taken as a matter of law and as a matter of correct policy to allow, if that be the case, the proceedings to continue.

Salient points

- There is a power for the Registrar under the General Medical Council (Constitution of Panels and Investigation Committee) Rules 2004 and paragraph 3 of Schedule 4 to the Medical Act 1983, as amended to appoint a new Panellist even after the proceedings have begun if it is in the interests of justice to do so.
- The Panel is responsible for its own procedures and has a duty to ensure at all times that those procedures are fair.