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To: Fitness to Practise Panel Panellists
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Re: Dr Sumido Fernando v General Medical Council [2014] EWHC 1664 Admin

Background

Dr Fernando appeared before an MPTS Fitness to Practise Panel ('Panel') between 2 to 6 December 2013. He faced 14 allegations, most of which related to, or followed on from, his presenting a fraudulent prescription. In addition, Dr Fernando had allowed his Professional Indemnity cover to lapse between 1 March and 7 August 2012.

The Panel found his fitness to practise was impaired and determined to erase his name from the Medical Register.

Dr Fernando appealed the sanction under s40 Medical Act 1983.

Appeal

The appeal was considered by Mrs Justice Patterson on 9 May 2014 (judgment was given on 21 May 2014).

The Judge sets out, in some detail, the factual background to the case (paragraphs 6 to 20). She thereafter sets out the legal framework (paragraphs 21 to 27).

Dr Fernando did not dispute that his fitness to practise was impaired, but submitted that the Panel had imposed a disproportionate sanction, namely, erasure. He submitted that suspension was the appropriate sanction in the circumstances.

Mrs Justice Patterson sets out Dr Fernando's counsel's submissions (paragraphs 28 to 48). He submitted that, at its heart, the Panel was faced with a single occasion of when the doctor presented a false prescription and that there were a number of personal factors concerning his medical treatment and personal circumstances which contributed to acute embarrassment on the doctor's part, and he therefore sought to conceal the fact that the prescription was for him (paragraph 28).

The MPTS makes impartial decisions in doctors' fitness to practise hearings. The MPTS is part of the General Medical Council, but it is operationally separate and it is accountable to Parliament.

Counsel also submitted that the doctor's conduct following his arrest, in which he downplayed his conduct, showed bad judgment and dishonesty, and that whilst it was necessary for the medical profession to be held to a high standard of account, it was unrealistic to expect doctors to be immune from human emotions (paragraph 29).

Dr Fernando's counsel summarised the allegations against the doctor (paragraph 30), and submitted that it was not conduct such as to warrant erasure.

He also submitted that the Panel failed to have due regard to the underlying causes of the doctor's misconduct, namely his extreme unwillingness to admit to, and seek help with his medical condition and the absence of any evidence or desire for personal gain (paragraph 36). He also submitted that the Panel placed insufficient weight on the doctor's candour during the fitness to practise proceedings (paragraph 39), and that the Panel failed to draw any distinction between his conduct prior to his full disclosure and subsequently (paragraph 42).

Counsel further challenged the manner in which the doctor's forensic history was treated and relied upon, namely the conviction and caution in 2001 and 2002 respectively, as both offences were committed whilst he was an undergraduate student and before he commenced his medical studies (paragraph 43).

Counsel for the doctor also considered that the Panel had unfairly placed reliance upon his application to register with Hampshire PCT (paragraph 44). The final challenge was in relation to insight on the part of the doctor into his conduct and the Panel's findings that there is a very real risk of repetition (paragraph 45). Counsel submitted that the Panel misdirected itself and that there was no burden on the doctor to prove that he did have insight, and contended that he was therefore disadvantaged (paragraph 47):

- because in the assessment of insight, the Panel focused on his conduct prior to the hearing rather than his conduct at the hearing;
- whilst charged with acts of dishonesty relating to his obtaining the prescription and failing to volunteer that conduct to his colleagues, the Panel focused on other conduct not forming part of the charge; and
- in relation to the request for discretion from the PCT, the Panel made adverse findings in relation to matters which would never have been understood by the doctor to be in issue.

Dr Fernando concluded that the differing criticisms were cumulative and they revealed a fundamental failure to have regard to the cause of his misconduct, and as a result the decision was wrong (paragraph 48).

Mrs Justice Patterson considered the submissions on behalf of the General Medical Council ('GMC') (paragraphs 49 to 69).

The submissions included that the doctor had given evidence to the Panel and therefore they had an opportunity to ask him questions and form a judgment about him (paragraph 49). In relation to the duty to give reasons, the Counsel for the GMC submitted (paragraph 54):

...the obligation on the panel was not to produce a judgment as if it came from the Chancery Division but to provide a determination for a doctor who receives not only that, but the full transcript of the evidence. He is, therefore, able to look at it as a whole. The ultimate question is whether the doctor is able to understand why he was

treated as he was. It is clear here that the seriousness of the misconduct and the effect of the public confidence in the profession were such as to warrant erasure'.

In relation to testimonials, the GMC submitted that, in Dr Fernando's case, they were part of the overall evaluation, but were of limited weight when set against clear evidence of his repeated dishonesty.

He also submitted that the doctor had been provided with a copy of the Indicative Sanctions Guidance, and it was noted that dishonesty had its own section, and in particular the fact that a doctor's dishonesty may have no direct effect on the patient does not detract from its gravity (paragraph 57).

Counsel for the GMC also noted that the background to the challenge, based on the medical condition, was a contention that the Panel failed to have regard to. The more that the doctor relied upon his condition the more concerning was the issue of self medicating rather than seeking independent advice. His condition was a matter going to mitigation. As the case had been about the public interest, and that was the reason for the imposition of the sanction, his condition and personal mitigation was of less relevance (paragraph 60).

Counsel for the GMC reminded the Judge that the Panel was required to take into account the doctor's dishonesty, examples of which were widespread over time (paragraph 62). Counsel concluded that, in light of the evidence overall, the Panel were quite entitled to arrive at the conclusion that they did (paragraph 65). Counsel for the GMC made submissions on the question of insight that it had to be taken into consideration at the date of the hearing which required the Panel to consider the whole of the doctor's conduct, and in a case involving dishonesty the Panel will inevitably have regard to past conduct as an indication of the doctor's probity (paragraph 69).

Mrs Justice Patterson then considered the issues and drew her conclusions (paragraphs 70 to 96).

She reminded herself, (paragraph 70) that, in considering the submissions, the principal purpose of a sanction imposed by a Panel is the preservation and maintenance of public confidence in the medical profession. As a result, it was necessary to accord special respect to its judgment.

The Judge noted that the decision on impairment which had been made was not challenged, and her sole concern is the issue of the appropriate sanction. She confirms that (paragraph 71):

'...in so considering, the assessment on the seriousness of the misconduct is essentially a matter for the panel in the light of its experience. In this case the committee comprised a chair and two medical members. The medical members were able to question the appellant when he gave his evidence as to his underlying condition and its implications. They would be well qualified also to understand what measures were required to maintain the standards and reputation of the profession. It is clear from their determination that the issue of proportionality was expressly part of their judgment and that having set that out that erasure was the appropriate sanction'.

Mrs Justice Patterson referred to paragraph 82 of the Indicative Sanctions Guidance which sets out a non exhaustive list of factors where erasure may be appropriate, which she had set out earlier in her judgment (paragraph 56). She noted that on the factual findings made by the Panel the Dr Fernando had contravened five of them (paragraph 73).

She further noted that the Panel had recorded that the case involved numerous acts of dishonesty and that the Panel considered that the doctor's dishonest acts had been persistent and covered up. In the circumstances, the issue of probity was, therefore, fundamental to the consideration of the appropriate sanction (paragraph 74).

Mrs Justice Patterson noted that the Panel had been criticised by the doctor for giving 'bare acknowledgment' to the fact that he had given evidence about more extensive dishonesty than he faced on the charges before the Panel (paragraph 75). It was clear that the Panel took into account the full admissions made by the doctor, including those which were not the subject of charges (paragraph 76).

She also confirmed that the Panel had noted the apology, testimonials and that no issues had been raised at any time with regard to the doctor's clinical performance (paragraph 77), but she went on to state that it was not correct to describe the approach of the Panel as a 'bare acknowledgment'. The matters were all set out as material considerations relevant to the Panel's determination, and they were also matters relating to the doctor's personal circumstances.

She went on to say that it was the duty of the Panel to weigh the matters in favour of the doctor against matters that were adverse to him. She confirms, (paragraph 78):

'There was, in my judgment, no higher duty... in the circumstances of this case for the Panel to give greater weight to matters in favour of the appellant or, if not doing so, to provide its reasoning as to why the evidence was not accepted. The problem with that submission is that it rests upon a hypothesis which is not accurate. The Panel clearly did accept the evidence in favour of the appellant and regarded it as true. What it did not accept was that greater weight should attach to matters of personal mitigation. The weight to be attributed to personal mitigation was a matter entirely and properly within the discretion of the Panel.'

The Judge noted that the Panel accepted the remediation work that the doctor had done and that he had seen counsellors in an attempt to understand why he had behaved as he had, and how to correct his behaviour. However, weighed against the acts of dishonesty, which were many and covered up, meant that the Panel was unable to conclude that the doctor had developed sufficient insight into the gravity of what he had done. She confirmed (paragraph 79):

'Far from there being anything wrong in the approach of the panel it seems to me that it approached its task of balancing the material considerations in an impeccable and fair manner.'

In relation to the issue of the underlying medical cause, which the doctor submitted that the Panel failed to have due regard to, Mrs Justice Patterson did not accept that submission, having considered Panel's determination (paragraph 80).

She confirmed that the reasoning of the Panel on this point was short but recorded what the doctor did, namely presenting a false prescription which led to his detection. It was that act rather than seeking prior appropriate independent medical advice which the Panel found to be extremely poor judgment and self serving as well as a clear abuse of his position as a doctor. Their conclusion was thus reached taking into account the underlying medical condition and the reasoning based on the doctor's behaviour was clear, and there was therefore no legal error in the approach of the Panel (paragraph 81).

In relation to the issue of candour Mrs Justice Patterson confirmed (paragraphs 82 to 84) that the Panel clearly took the extent of the doctor's admissions into account as one of the factors in his favour. However, as the Judge noted, this was only one side of the balance and there was a considerable history of lack of candour. The Panel was, therefore, quite entitled to take the earlier matters into account in coming to its ultimate conclusion. She noted that it overlapped with the criticism of the doctor as to the treatment of his forensic history (paragraphs 85 to 86).

Mrs Justice Patterson confirmed it was open to the Panel to conclude as it did, that the doctor had not learnt from his earlier encounters with the criminal justice system by his behaviour in 2009, 2011 and 2012.

Regarding the cancellation of his indemnity insurance, without putting a replacement in place, she considered that to be more relevant to the issue of impairment which had already been determined (paragraph 87). Mrs Justice Patterson rejected the submission. The Panel had found that although the doctor knew of the need for insurance cover he failed to ensure that it was in place, contrary to the mandatory requirement in Good Medical Practice. The Panel had cited that as a further example of very poor judgment. She considered it was equally apposite, therefore, to the prospect of repetition and the question of sanction (paragraph 88).

In the circumstances, the Panel, in setting out the various factors which they took into account as part of their overall judgment on the gravity of the doctor's behaviour to determine the appropriate sanction meant that they could reach an overall judgment balancing the considerations of private mitigation against public interest, including the degree of insight demonstrated by the doctor and the considerable risk to the public that could ensue if he remained in practice (paragraph 89).

Mrs Justice Patterson considered the Panel's reasoning was quite *'clear and adequate, it measured the appellant against the standards set out in GMP which the Panel found had been recklessly disregarded'*.

In the circumstances, she could find no flaw in the way that the Panel had approached its assessment.

Mrs Justice Patterson concluded (paragraphs 91 to 93):

'I have found that each of the criticisms that have been made by the appellant is entirely without foundation. Together, in the circumstances of this case, it is impossible to conclude that the criticisms have any greater weight than they do individually and that there has been any fundamental failure.'

In my judgment, the panel approached the exercise on sanction with care. They went through all matters that were raised. They came to a conclusion that they were entitled to on the evidence before them, and provided adequate reasoning for the task which they had to discharge. They were entitled to look beyond the charges that the appellant was facing to take into account his overall professional history to come to a conclusion which was fair and in the public interest.

A decision on the part of an FPP is to deal with the principal controversial issues that are raised and not to provide a fully detailed judgment on every single point. The FPP

went through the sanctions as they had to do starting with the least serious and progressing through them in an escalating fashion to examine the risk to the public. It concluded that the risk of repetition and lack of insight on the part of the appellant were critical factors that led to its conclusion that the defendant's probity could not be relied upon so that suspension was not the appropriate sanction. Erasure was then the remaining and appropriate option. On a proper and fair reading it is evident to the appellant why they concluded that erasure was the appropriate sanction in this case'.

Mrs Justice Patterson dismissed the appeal and confirmed that the determination by the Panel was *'unimpeachable'*.

Salient Points

- A Panel does not have to give greater weight to matters in favour of a doctor (i.e. personal mitigation) or, if not doing so, to provide its reasoning as to why the evidence is not accepted. The weight to be given to personal mitigation is a matter entirely within the discretion of the Panel (paragraph 78).
- A Panel is entitled to look beyond the charges that the doctor is facing to take into account his overall professional history to come to a conclusion, on sanction, which is fair and in the public interest (paragraph 92).
- A Panel, when deciding on the appropriate sanction, is required to deal with the 'principal controversial issues' that are raised but not to provide a 'fully detailed judgment' on every single point (paragraph 93).

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