Appeals Circular A15/18

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The General Medical Council v Patel *[2018] EWHC 171 (Admin)*

Learning Points

- Dishonesty is a serious matter of misconduct whether a doctor commits such an act in the course of their practice or outside.
- In non-clinical cases such as those involving dishonesty, evidence of remediation will usually be of limited relevance.
- The purpose of a tribunal imposing a sanction is not punitive, but for the protection of the public. The impact of any sanction on the career of the medical practitioner must be looked at in that context and will be of limited relevance: the reputation of the profession is more important than the fortunes of any individual member.
- If a tribunal is considering taking no action against a medical practitioner, it must ensure that exceptional circumstances are made out and that they strike the appropriate balance between the public interest and any remediation undertaken by the medical practitioner.
- When considering what sanction, if any, to impose, a tribunal should ensure that it takes into account its earlier findings (at facts and impairment stages) and explain any changes of view in relation to those findings, including the credibility of the medical practitioner.

Background

This was an appeal by the GMC, pursuant to section 40A of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal') decision dated 12 May 2017

to take no action on a practitioner's ('P') registration, having found his fitness to practise was impaired as a result of his misconduct.

P (an ST5 anaesthetic registrar) was contracted by the NHS to work on-call at Charing Cross Hospital between 6 and 9 March 2015. However, P also agreed to provide locum cover at the private unit of Charing Cross Hospital on three of those days (he did not work on the other day due to ill health). P subsequently submitted a claim form for undertaking private locum work on all four days and this duplication of work was uncovered. P was investigated by the Imperial College Healthcare NHS Trust and referred himself to the GMC.

The Tribunal found that P had claimed for locum work on one day when he had not worked and when he had worked overlapping NHS shifts on three nights. The Tribunal found that P's employer had been misled by his actions and that P had been dishonest in making a false claim for payment and in agreeing to provide private cover when he knew he was already contracted to work for the NHS.

After finding that P's fitness to practise was impaired, the Tribunal determined that because of the existence of exceptional circumstances, it was appropriate not to impose any sanction on P's registration. This was based on the following:

1. P had taken 'significant steps' to remediate his misconduct and that he "*could have done no more in this respect*". The Tribunal heard that P had undertaken coaching training, had previous good character, had received a number of supportive testimonial documents and that there had been no repetition of the behaviour in question. It found that *"[T]he far-reaching impact that these proceedings and the remediation undertaken*" have had, in a case where there were no clinical issues, *"led to an improvement in [P's] overall abilities and qualities as a person and as a professional*". The Tribunal concluded that the public interest would be best served by allowing P to return to practice;
2. After receiving some evidence about P's training programme, the Tribunal concluded that "***any*** *suspension in these proceedings, for* ***any*** *length of time, will result in the loss of your national training number*" and that P may be able to apply to re-enter the programme, but he would be obliged to re-enter at a lower level. The Tribunal considered that if P's registration was suspended, given his current seniority in the training programme, this would set his career progression back by at least 5 years and could damage his opportunities to become a consultant at all in the future (as he would have to compete with other candidates to regain a place). The Tribunal concluded that to suspend P would have "*far-reaching adverse consequences for [P's] career which would be disproportionate in all the circumstances*" when, from the evidence submitted, he was a competent and trusted trainee.

The Tribunal concluded overall that a finding of impaired fitness to practise would

remain with P and it was satisfied that taking no action would not undermine public confidence in the profession or the need to maintain proper standards in the profession:

"*Fully informed and reasonable members of the public would know about* [P's] *misconduct but equally, they would know about the steps* [P had] *taken to put things right, the positive impact of these steps on* [P's] *skills and abilities as a doctor, and the devastating consequences for* [P] *and* [P's] *potential patients, if* [P's] *national training number was removed.*"

Grounds of Appeal

The GMC appealed against the Tribunal's decision on the following grounds:

1. The Tribunal misdirected itself as to the evidence before it and placed too much weight on the alleged impact that suspension would have on P's career. In addition, the effect of any suspension is, in any event, of limited relevance given that it focusses upon the impact upon the doctor rather than on the purpose for which sanctions are imposed (namely to uphold the objectives of the GMC's functions) and also failed to take proper account of the guidance given by the Court of Appeal in *Bolton v The Law Society* [1993] 1 WLR 512, about maintaining the reputation of the profession.
2. The Tribunal had placed too much weight on the issue of remediation in its decision making on sanction and the fact that there had been remediation should not have led the Tribunal to conclude that in this case there were exceptional circumstances which justified no action being taken.
3. The Tribunal made no references to previous case law on dishonesty concerning doctors, or on the emphasis placed on dishonesty in the *Sanctions Guidance*.

The GMC invited the Judge to quash the decision to take no action and remit the case to a Tribunal to consider sanction.

Judgment

His Honour Judge Dight CBE allowed the GMC's appeal and remitted the case back to the Tribunal for further consideration. He said:

1. "There is no doubt that dishonesty is a serious matter of misconduct whether a doctor commits such an act in the course of his practice or indeed outside" and that in this case, "the dishonesty was in relation to his employers... was... premeditated, and deliberate" and that there could not be any doubt that "the decision to put himself potentially in two different places at the same time in the same hospital created a risk of harm to the patients whose care he had at the material time." [para 59];

2. Ground 1 - the Tribunal misdirected itself as to the evidence and had placed too much weight on the impact that suspension would have upon P [para 60]. He said that in its sanction determination, the Tribunal assumed the worst outcome that suspension could have, when this was not the correct analysis of the evidence presented[1]. The Judge said that the Tribunal failed to follow the guidance in *Bolton*[2] and that the effect of a suspension on P was of "limited relevance" and had to be looked at in the context that "[T]he over-arching purpose of the imposition of a sanction is not punitive, but for the protection of the public" [para 63];

3. Ground 2 - that the Tribunal placed too much weight on P's remediation at the sanction stage. The Judge noted that the *Sanctions Guidance* says that remediation will be taken into account on the question of impairment, but that the Tribunal "wrongly" relied on it very considerably at the sanction stage and in reaching the conclusion that P's case was exceptional. The Judge said that the Tribunal struck the wrong balance between P's remediation and the public interest; the correct approach is set out in *Yeong*[3], which he said applied equally to allegations of dishonesty as it does to inappropriate sexual contact between doctor and patient [para 64];

4. That "[O]ne has to take into account that the misconduct here was for financial gain. It was premeditated, and it put patients at risk. That should, in my judgment, for the reasons given by Mitting J in the Nicholas-Pillai[4] case, lead to a serious sanction" [para 65]. The Judge went on to say that "[W]hile of course it is possible for a panel to reach different views about credibility at different stages of the process it is a change of view which needs to be explained". He said the Tribunal had not reflected in their decision that they had on the face of it changed their view, "failed to take into account in looking at sanction the adverse findings that they had made in respect of the question of misconduct itself at the earlier stage" and did not explain it [para 66].

Overall the Judge said that the Tribunal had been incorrect to conclude that exceptional circumstances[5] existed to warrant taking no action [para 67]. He said the Tribunal's decision was insufficient to protect the public, following its findings on dishonesty and the "mere fact" fact that the regulatory process had been undertaken "does not send a sufficient signal either to the public or to the members of the profession" [para 68].

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[1] The evidence presented:

- was based on the premise that P's training number would be removed, but the witness was not asked whether this it would in fact be removed and therefore, that P would lose his place on the training programme;
- did not lead to the inevitable conclusion that P's career would be automatically ended if the training number were removed.

[2] that 'The reputation of the profession is more important than the fortunes of any individual member.'

[3] Dr Yeong v General Medical Council [2009] EWHC 1923 (Admin)

[4] Nicholas-Pillai v General Medical Council [2009] EWHC 1048 (Admin)

[5] Which are "unusual, special, or uncommon" [para 67]

The appeal was allowed and the case was remitted back to the Tribunal to reconsider sanction [para 69].

Kind regards

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