Appeals Circular A16/12

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Re: Gabriele Depner -v- General Medical Council [2012] EWHC 1705 (Admin)

Background

Dr Depner's case was considered by the Fitness to Practise Panel ('panel') between 23 and 27 August 2010. The doctor did not attend the hearing and was not represented however, she submitted a substantial number of documents which the panel considered and she also made extensive written submissions.

The panel determined that Dr Depner's fitness to practise was impaired by reason of deficient professional performance and misconduct (in respect of a breach of a previously agreed undertaking), and determined to suspend her registration for a period of nine months.

Dr Depner appealed against the determination.

Appeal

Dr Depner's appeal came before Mr Justice Stadlen for hearing on 1 May 2012 (judgment delivered on 4 May 2012). The original grounds of appeal and skeleton argument challenged not only the finding of impairment and the sanction but a number of other issues which are set out in paragraph 3.

However, for the purposes of the appeal hearing, Counsel for Dr Depner ('Mr Hay') confined his challenges to the original performance assessment in 2007, which formed the background of the case, the decision of the panel that Dr Depner's fitness to practise was impaired and the sanction imposed by the panel of suspension (paragraph 5).

Mr Justice Stadlen sets out the background to the appeal in some detail in paragraphs 6 to 15 of his judgment and thereafter sets out in some further detail the matters which were considered by the panel and were the subject of challenge (paragraphs 16 to 25).

The judge considered that so far as it was possible to categorise the grounds on which Mr Hay sought to advance his challenge, it appeared to him that the first matter was a challenge to the 2007 performance assessment report, which is dealt with in paragraphs 27 to 37. He deals with each of the submissions made by Mr Hay but as appears from the summary which he gives in those paragraphs referred to above he concludes (paragraph 37):

> *'…the September 2007 assessment report was one which was, in my judgment, entirely proper both in its commissioning and in the manner in which it was prepared by the assessment team. In my judgment, there is no validity in the submission of Mr Hay that the report did not find her to be deficient due to her out-of-hours centre employment, that it went beyond the powers that should have been exercised, or that it was in any sense an illegitimate basis to form part of the conclusion reached by the FTPP in August 2010 that Dr Depner's fitness to practise was impaired.'*

Mr Hay then went on to advance arguments that the finding of impairment, so far as deficient performance was concerned, was invalid by reason of the fact that it relied, in addition, on the result of the test carried out by Dr Nayar in 2009, in respect of which Dr Depner achieved only a 33 per cent score, the pass mark being 50 per cent. Mr Justice Stadlen deals with this point in paragraphs 39 to 46.

In his view there was nothing in the point. Mr Hay also submitted that it was a requirement, or at any rate a normal requirement, that a person in a position of Dr Depner who failed such a test should be given and would be given an opportunity to resit at least once and probably twice (paragraphs 47 to 50).

Again, in Mr Justice Stadlen's judgment, the findings of the panel were amply justified by the evidence to which the judge had previously referred in his judgment and there was absolutely no substance or merit to Mr Hay's criticism of the panel in that regard (paragraph 50).

Mr Justice Stadlen then considered Mr Hay's argument that the requirement for a further performance assessment was impermissible (paragraph 51).

He deals with the criticism in paragraph 52 as it was, in his judgment, based on a complete misunderstanding of the basis upon which the report was sought to be obtained in May 2009. He then goes on to set out the relevant provisions of the Fitness to Practise Rules (paragraphs 53 to 57).

Mr Hay's next challenge related to the finding that the breach of undertaking constituted misconduct. This is dealt with in paragraphs 58 to 68. He argued that so far as undertaking 12 was concerned, in order for there to have been a breach it was a necessary precondition that an assessment team should have been appointed by the case examiner under rule 10(6) and schedule 1 paragraph 2, and that a date, as a further condition precedent, must have been required to be set for the performance before there could be an obligation to make good on the undertaking.

Therefore, on Mr Hay's suggested interpretation, no obligation arose on Dr Depner unless and until an assessment team had been appointed by the case examiner and a date had been specified by the case examiner.

In Mr Justice Stadlen's judgment the undertaking (clearly) required Dr Depner to notify, if invited to agree to an assessment, her agreement to such an assessment so that assessors could be appointed. He goes on (paragraph 63):

> *'The undertaking was capable of being breached either by a refusal or failure to co-operate after a team had been appointed and dates had been specified, or by refusing or failing to consent to an assessment after being invited to do so, and/or by a refusal to provide or a failure to provide the information requested by the GMC necessary to enable assessors to be appointed.'*

Mr Justice Stadlen then deals with a number of other criticisms made by Mr Hay but he concludes that, whatever view Dr Depner took about the necessity or lack of necessity for a reassessment, the GMC took the view that it was necessary and (paragraph 67):

> *'The whole point of the undertaking was not that a request for a reassessment would be subject to renegotiation or consent to be either given or withheld at will by Dr Depner at such point as a request was made. The point of the undertaking was that it was just that: if, in its discretion, the GMC considered that a reassessment was appropriate or necessary, she agreed in advance that she would co-operate.'*

Mr Justice Stadlen then goes on (paragraph 68):

> *'In my judgment, having regard to the fact that the reassessment was for the purpose of measuring her performance and either the deficiency or otherwise of it, and having regard to the obvious impact of a failure to agree to such a report on patient safety, it is, in my judgment, perfectly obvious that a unilateral refusal or failure to participate when requested in such an assessment, an undertaking to that effect having been given, is capable of constituting both misconduct and an impairment of fitness to practise by reason of such misconduct.'*

In the circumstances, Mr Justice Stadlen concludes that he could find nothing wrong with the findings of impairment by reason of misconduct and deficient professional performance having regard to the material that was available to the Panel.

He then goes on to deal with two additional points made by Mr Hay previously flagged up in the grounds of appeal in paragraphs 71 to 74 and he turns finally to the question of sanction in paragraphs 75 to 81 including setting out the principles governing the appropriate approach to sanction (paragraphs 75 to 78) in relation to the case law and the decision of the panel arriving at its decision.

Mr Justice Stadlen confirms:

Paragraph 79

> *'It is quite apparent that it approached the matter in the conventional and appropriate way following the guidance, starting at the lowest level of sanction and working its way up until it reached the minimum sanction which it regarded as necessary and appropriate. The reasons it gave for its conclusion that imposing conditions would not be appropriate in this case are, in my judgment, entirely sound.'*

Paragraph 80:

> *'In my judgment, if one asks the question, against the levels of performance that were found in the September 2007 report and the April 2009 test against the background of a doctor who had not by then been practising for some years, and a doctor in respect of whom Dr Nayar expressed the views in relation to risk to patient safety that he did, whether anything less than suspension would be justified, in my judgment, the answer speaks for itself.'*

Paragraph 81:

> *'When added to the flagrant failure to comply with undertaking 12, in my judgment the panel was entitled to reach the view that it is very important for maintenance of public confidence that where a practitioner gives an undertaking that he or she will agree to reassessment if invited to do so by the GMC, a failure to comply when asked should be treated as a potentially very serious matter and certainly one which, on the facts of this case, amply justified a finding both of misconduct and of impairment of fitness to practise thereby which justified a nine-month suspension.'*

In all the circumstances Mr Justice Stadlen dismissed the appeal on the basis that it had no merit.

Salient Point

- This judgment reinforces the importance of doctors complying with set performance undertakings, particularly when patient safety is potentially jeopardised by non-compliance.