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**Re: Dr Fazal Hussain v General Medical Council [2013] EWHC 3865 Admin**

***Background***

Dr Fazal Hussain appeared before a Medical Practitioners Tribunal Service Fitness to Practise Panel ('Panel') in 2013. The Panel determined that Dr Hussain's fitness to practise was impaired by reason of misconduct, in relation to certain findings made against him set out in paragraph 4 of the judgment, and determined that his name should be erased from the Medical Register.

Dr Hussain appealed against the findings of dishonesty, the decision on impairment and the imposition of a 'disproportionate' sanction imposed under s40 Medical Act 1983.

***Appeal***

The appeal was considered by His Honour Judge Bird in September and October 2013 with judgment being given on 5 December 2013.

HHJ Bird set out the allegations made against Dr Hussain which proceeded to a final determination in paragraph 4. He dealt with the submission of 'no case to answer' in paragraphs 6 to 8 and then set out the background in relation to the case in paragraphs 9 to 11.

The Judge thereafter set out, in some detail, the Panel's findings in relation to the each of the matters set out in paragraph 4 as follows:

- Allegation 2 – paragraphs 12 - 18;
- Allegation 4 - paragraphs 19 - 32;
- Allegations 5, 6 and 7 – paragraphs 33-44; and
- Allegation 9 - paragraphs 45-46.

HHJ Bird also noted the form of the allegations (paragraphs 47-52).

The Judge summarised the relevant legal principles (paragraphs 53-56) and that for the purposes of his judgment he would treat the words used - 'false' and 'falsely' in allegations 2(a), 2(b) and 4(c) as meaning 'inaccurate'.

Counsel for Dr Hussain submitted that the Panel:

- a. Erred in its assessment of the evidence in relation to dishonesty;
- b. Incorrectly applied the test to determine dishonesty;
- c. Wrongly approached the issue of plagiarism;
- d. Wrongly concluded that Dr Hussain's current fitness to practise was impaired; and
- e. Applied a disproportionate sanction.

She also submitted that there ought to be a different test for dishonesty in fitness to practise proceedings (paragraphs 57 and 58).

HHJ Bird confirmed that the question that he needed to ask, in relation to the issue of dishonesty, was whether the Panel's finding of dishonesty was *'wrong or unjust because of serious procedural or other irregularities'* and that the test to be applied was that stated in the case of **R v Ghosh [1982] QB 1053** (paragraphs 59-60). The Judge then sets out the submissions made by the parties in respect of the issue of dishonesty (paragraphs 61-65).

He then looked at the findings of fact made by the Panel (paragraphs 66-73). He noted that the Panel carefully considered the credibility of the witnesses. In doing so it expressed a balanced view of the evidence heard from Dr Hall. Whilst the Panel expressed some reservations about Dr Hall's training style he could see no fault in the Panel's approach to the exercise of assessing credibility.

He also noted that the Panel's reasons for preferring Mrs Wilson were *'sparsely but clearly expressed'* (paragraph 68). In considering Dr Hussain's evidence the Panel considered a number of factors and they were prepared to make allowances for them, in particular they gave 12 distinct examples of how Dr Hussain's evidence was inconsistent and self-contradictory and why they concluded that he was evasive. The Judge considered those findings needed to be considered in context as they went to credibility and stand as examples of why the Panel felt able to reject Dr Hussain's evidence (paragraph 69).

The Judge also noted that the Panel clearly had in mind that it was important to consider evidence in context (paragraph 70). In his judgment the Panel was entitled to make each of the findings set out. Having made those findings the Panel was entitled to conclude, when weighing Dr Hussain's evidence against that of other witnesses that his evidence should be rejected (paragraph 71).

He concluded (paragraph 72):

*'In my judgment the findings of fact made by the Panel should not be disturbed. The Panel had the benefit of hearing the evidence at first hand and were, without doubt, in the best position to judge which version of events in respect of each allegation they preferred. Whilst a different Panel might have come to a different conclusion, I am unable to conclude that the findings made in respect of allegations 2, 4, 5, 6 and 7 are wrong or should be upset for some other reason.'*

The Judge confirmed therefore that the *'real thrust of the appeal'* was that the Panel was wrong to find Dr Hussain dishonest (paragraph 73).

The Judge then looked at the conclusions on dishonesty in relation to the CV, the multi-source feedback ('MSF') and plagiarism (paragraphs 74-84).

### ***CV (paragraphs 75-77)***

In considering the totality of the evidence before the Panel in relation to the CV the Judge doubted that reasonable and honest people would regard what Dr Hussain did as dishonest. He confirmed that it certainly was *'wrong, careless and regrettably misleading'* but it was not dishonest. The rejection of Dr Hussain's version of events and finding that he was not a generally credible witness was not sufficient on its own to warrant a finding of dishonesty (paragraph 75).

He noted that it was regrettable that the Panel may have dealt with 'dishonesty' in respect of the CV under the rubric of 'falsity'. This possible confusion alone, in HHJ Bird's judgment, would justify the conclusion that the Panel's attribution of dishonesty was unsustainable.

### ***The MSF (paragraphs 78-81)***

The Judge agreed with Counsel of the GMC's classification of this allegation in relation to MSF as the *'most serious'*. In his judgment the Panel was entitled to conclude, on the evidence they heard, that, according to the standard of reasonable and honest people, Dr Hussain's conduct was dishonest. The fact that the GP Practice accepted that Dr Hussain had learned from experience did not detract from the Panel's findings.

He confirmed that the Panel was in a much better position to determine the facts of the background against which the MSF was entered and the fact that Dr Hussain was ignorant about the process of collecting MSF was irrelevant. He considered, in this instance, the nature of the misconduct that the finding of the Panel was inevitable (paragraph 80) and they were also entitled to conclude that Dr Hussain must himself have realised that what he was doing was, by those standards, dishonest (paragraph 81).

### ***Plagiarism (paragraphs 82-84)***

Despite the absence of any evidence of express guidance on plagiarism, HHJ Bird considered that the Panel were entitled to conclude that by sharing the work entered onto the e-portfolio Dr Hussain knew he would be assessed on it. It was, in his judgment, important to remember that the plagiarised entries appeared under the heading 'What did you learn?' The onward transmission of the e-portfolio entries by trainee GP's could only to be seen as a representation that what they contained was the work of the trainee.

The Judge was satisfied that the Panel were entitled to conclude on the evidence they heard that according to the standard of reasonable and honest people, Dr Hussain's conduct in respect of plagiarism was dishonest (paragraph 83). In his judgment the Panel was also entitled to conclude that Dr Hussain must himself have realised that what he was doing was by those standards dishonest (paragraph 84).

HHJ Bird then went on to deal with the issues of impairment and sanction (paragraphs 85-90).

The Judge was satisfied that Dr Hussain showed a complete and total lack of insight into his conduct before the Panel. He was also satisfied that the Panel was entitled to reach the conclusion

there was *'serious misconduct'* and Dr Hussain's fitness to practise was (*'at the time of the Panel hearing'*) impaired.

In his judgment the finding that the Panel was wrong to conclude that Dr Hussain had acted dishonestly in respect of the CV did nothing to detract from the finding, in respect of misconduct, nor the conclusion that Dr Hussain's fitness to practise was impaired (paragraphs 88-90).

In view of his findings the Judge was satisfied that the Panel's conclusion that erasure was the proportionate response and could not be criticised. In the circumstances the appeal was dismissed.

***Salient Point***

- Reminder that if a statement is made to a third party that is known to be false and is relied on by the third party in some material way, there is almost certainly dishonesty. The presence of materiality and reliance may therefore assist a Panel to conclude that there is dishonesty. However, materiality and reliance are not pre-requisites to establishing dishonesty, particularly where there is a general obligation to be honest.

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