Appeals Circular A16/15

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To: Fitness to Practise Panel Panellists
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Re: TZ v General Medical Council [2015] EWHC 1001 (Admin)

Abstract

TZ, who at the time of the allegation was a Locum Senior House Officer in the Emergency Department of a London Hospital, was found by the MPTS to be impaired, and as a result was erased from the register. The central issue in this appeal related to the Panel's refusal to consider TZ's application to adduce evidence following the provision of an embargoed draft of its finding of fact.

The Administrative Court allowed the appeal on the basis that the Panel had been incorrectly advised on the issue of admissibility of evidence. The panel's decision was quashed, and the case was remitted to the Registrar for consideration of referral to a new fitness to practise panel.

Background

The allegation in this case centred on Patient A's account that TZ had performed a vaginal examination that was not clinically indicated, in the absence of a chaperone, and that this conduct (along with other conduct detailed in the particulars of the allegation) was sexually motivated. This allegation was denied by TZ. Further detail in relation to the case before the Panel, and the evidence presented in Patient A's account and that of TZ is detailed in paragraphs 8 to 31.

Of particular importance is the detail in paragraph 12 in relation to criminal proceedings in relation to the same matter, wherein TZ was acquitted in December 2011. At those proceedings the court heard evidence from a Health Care Assistant (HCA) and Witness B

(the then boyfriend of Patient A). Neither of these persons were called to give evidence at the MPTS proceedings, nor were their statements placed before the Panel.

In order to put these matters into context, the following timeline is provided:

Date	**Key events**
20 January 2014	Hearing commences
25 April 2014	Panel Chair announces that a determination on the facts will not likely be completed, and that therefore in camera deliberations will continue on 28 April 2014, with no need for either party to attend. It was confirmed that an embargoed draft determination on facts would be served on both parties in advance of the resumed hearing. See paragraph 36.
28 April 2014	Draft determination of the facts is sent to the parties. See paragraph 39.
1 May 2014	TZ writes to the MPTS, seeking to adduce the evidence in relation to the HCA and Witness B. See paragraph 40.
24 June 2014	The hearing resumes, but TZ is neither present nor represented. At that time however, the Panel considered the correspondence from TZ dated 1 May as well as his application for an adjournment. GMC Counsel submits that the Panel does not have jurisdiction to adduce further evidence on the facts or to re-make its decision on the facts. See paragraph 42 to 45.
26 June 2014	The determination on facts is formally handed down, in the absence of TZ who is neither present nor represented. See paragraph 46 to 47.
26 August 2014	The Panel reconvenes and TZ is present, but not represented. TZ makes further attempts to adduce the evidence in relation to the HCA and Witness B. There follows a discussion around TZs ability to make reference to his application and / or whether the Panel has the power to re-open the consideration of the fact stage. Advice was received from the Legal Assessor throughout, which concluded (at paragraph 55) with *'… firm and unequivocal advice… that there is no jurisdictional power'* to reopen the facts as the decision had been announced. See paragraph 48 to 56.
28 August 2014	Hearing concludes

Appeal

The grounds of appeal were summarised by Mr Justice Gilbart at paragraph 72:

> *i) The Panel's analysis of the patient's and* [TZ's] *credibility was wrong;*
>
> *ii) The Panel's reasons for why it accepted the patient's evidence over* [TZ's] *were inadequate;*
>
> *iii) The Court should admit the evidence of the HCA and / or of* [Witness B]*, in the light of which the Panel's finding of fact were wrong;*
>
> *iv) The Panel's failure to investigate an allegation of possible impropriety amounted to a serious procedural failing.*

Mr Justice Gilbart deals with grounds (i), (ii) and (iv) in paragraphs 119 to 122. The contextual background to the final ground of appeal is detailed in paragraphs 57 to 60.

At paragraph 73 Mr Justice Gilbart states:

> *I intend to deal with the third ground first, as if it succeeds it has a great effect upon the factual findings of the Panel.*

Mr Justice Gilbart's consideration and allowing of the third ground is detailed in paragraphs 77 to 118. In allowing the appeal on this ground Mr Justice Gilbart confirms that the Panel had not 'announced' its decision in handing down an embargoed draft determination, and that it should have been advised to consider using its discretion to adduce information in the interim between being made aware of TZ's request dated 1 May 2014, and the announcement of the determination on 26 June 2014.

In the judgment the jurisprudence on the admission of fresh evidence is explored through examination of the principles set out in *Ladd v Marshall [1954] 1 WLR 1489* and *Muscat v Health Professions Council [2009] EWCA Civ 1090*. See paragraphs 92 to 94. In considering this Mr Justice Gilbart states at paragraph 95:

> *I regard Muscat as important in its recognition of the factor that it is not in the public interest that a qualified health professional, capable of giving good service to patients, should be struck off his professional register, and that this is a factor which, in an appropriate case, can justify departure from what Smith LJ pithily described as "the old Ladd v Marshall straightjacket".*

He goes on to state, at paragraph 98:

> *It follows that the true issue in this case is not whether I should consider if, in the exercise of my appellate jurisdiction, the evidence passes the appropriate tests in Ladd v Marshall as subsequently applied in the context of decisions about health professionals but whether, had it exercised its discretion, it has been shown that the Panel would have refused to admit it, or that if it had admitted it, it has been shown that it would have made no difference to the findings of impairment made by the Panel.*

In concluding on this matter Mr Justice Gilbart states, at paragraph 114:

> *The Panel acted on the legally erroneous assumption, in part because of the submissions made to it, and the advice it received, that it had announced* [its] *decision, and thus had no discretion to receive the evidence. It follows that I cannot conclude that a properly directed Panel would have decided not to allow the evidence to be called pursuant to the Appellant's application to it.*

Salient Points

Announcing the decision

The use of the word "announce" within Rule 17 of General Medical Council (Fitness to Practise) Rules 2004, is consistent with its commonly used definition, and that findings are "*announced" so that all interested in the outcome of the hearing… know what has been concluded and why.* See paragraph 80.

It is confirmed that once the factual decision is announced, the Rules do not permit the admission of evidence. See paragraph 82.

Adducing evidence

The discretion to adduce fresh evidence between closing speeches and the announcement of the finding of fact, is not expected to be used often. However, when the panel is considering whether to exercise that discretion it should have regard to the following issues:

- What is the relevance of the new evidence?
- Why has it not been called before?
- What significance did it have in the context of the "draft findings" of the Panel?
- What effects would its admission have on the conduct of the hearing and in particular on
    - The need to recall witnesses
    - The length of the hearing
- Taking all matters into account, would justice be done if it were not received and heard?

Recommendation on good practice

In normal circumstances it would not be good practice to provide a "draft determination" on the facts to the parties. Whilst the intentions of the panel in this case were explained, it resulted in considerable difficulties for the panel and the parties involved.

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