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**The General Medical Council v Dr Maher Khetyar [2018] EWHC 813
(Admin)**

Learning Points

- When considering insight and remediation, a tribunal must pay close attention to the doctor's current understanding of and attitude towards what s/he has done and whether the insight shown and/or remediation undertaken addresses the true gravamen of the case found proved against the doctor.
- A Tribunal should consider all relevant parts of the *Sanctions Guidance*:
 - When considering suspension and/or whether a doctor does not pose a significant risk of repeating behaviour, depending on the seriousness of the conduct in question, a small but nonetheless real (not fanciful) chance of re-occurrence might be significant;
 - if a tribunal departs from the *Sanctions Guidance* clear reasons must be given for doing so;
 - If paragraph 109 of the *Sanctions Guidance* applies, although it does not mean erasure must follow, a tribunal ought to consider erasure very seriously (especially if it applies on multiple grounds) in which case powerful case-specific reasons ought to be required if a decision against erasure is to be justified.

Background

This was an appeal brought by the General Medical Council ('the GMC') pursuant to section 40A of the Medical Act 1983 against a Medical Practitioners Tribunal ('MPT') decision dated 26 October 2017 to suspend Dr Khetyar's registration for a period of 12 months and to order a review hearing.

The allegations against Dr Khetyar were that he had engaged in sexually motivated harassment of a nurse in October 2004 and had sexually assaulted a patient in July 2012 and, in July 2013, a paramedic, to whom he was providing medical treatment at the relevant time. The 2012 and 2013 assaults related to sexually motivated cupping and squeezing of the patients' breasts in the guise of a medical examination. The MPT found the facts proved in relation to all three incidents (including medical practice failings and sexual motivation) and ultimately determined that Dr Khetyar's fitness to practise was impaired (on the basis of the sexually motivated conduct only).

When considering whether and what sanction ought to be imposed, the MPT stated that Dr Khetyar had displayed genuine remorse, was developing insight, had taken steps to learn from his failings and it was satisfied the risk of repetition was not high. The MPT noted that Dr Khetyar *"respected but did not accept the Tribunal's findings on facts and impairment, in relation to sexual misconduct"* and recognised that *"it is difficult to demonstrate insight when denying the sexual misconduct occurred."* The MPT determined that a sanction of erasure would be disproportionate as the public interest could be best served by allowing Dr Khetyar, in due course, to continue to serve patients in geriatric medicine and that an order of suspension would also send a sufficient signal to Dr Khetyar, the profession and the public that such misconduct was unacceptable and would underline the gravamen of his misconduct.

Grounds of Appeal

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

1. The MPT failed to have proper or sufficient regard to the *Sanctions Guidance*;
2. The MPT's findings in relation to Dr Khetyar's insight were flawed and wrong;
3. The MPT's findings in relation to the risk posed by Dr Khetyar were flawed and wrong;
4. The sanction of suspension failed to reflect adequately the nature and seriousness of the misconduct found proved.

Judgment

The appeal was heard by Mr Justice Andrew Baker.

1. In relation to Ground 2, i.e. the MPT's findings in relation to insight, Mr Justice Baker said that:
 - a. if Dr Khetyar's only misconduct had been his failures in communication (in explaining the examination he purported to conduct) and the use of chaperones, then he could see how the MPT could reasonably have concluded that he had insight and did not present any significant risk of repetition. However, the circumstances provided "no basis at all for any conclusion that Dr Khetyar had insight or even was developing insight in relation to his serious sexual misconduct as found by the Tribunal, or for a conclusion that there was not a significant risk of the behaviour being repeated" [para 48];
 - b. "insight requires that motivations and triggers be identified and understood, and if that is possible at all without there first being an acceptance that what happened did happen it will be very rare, and any assessment of ongoing risk must pay close attention to the doctor's current understanding of and attitude towards what he has done" [para 49]. In particular the Judge said:
 - i. the courses undertaken by Dr Khetyar (which were relevant to the clinical practice failings and maintaining professional boundaries, in relation to his conduct towards the nurse) had "no real relevance to the true gravamen of the case proved against him" [para 49]. There was no real basis to conclude that Dr Khetyar was developing insight in relation to "sexually assaulting patients in the guise of a medical examination" [para 50]; and
 - ii. the apologies from him to the patients "had nothing to say as to insight or risk or even as to remorse in relation to the sexual assaults found proved" [para 49]. The limited scope of his apologies "rendered them of no value in considering the proper sanctions in relation to the sexual assaults" [para 51];
2. In relation to Ground 3, i.e. the MPT's finding that the risk of repetition was 'not high', the Judge said that paragraph 97(g) of the *Sanctions Guidance* called for consideration of whether the risk was 'significant'. He went on to say "[D]epending on the seriousness of the conduct in question, a quantitatively small but nonetheless real (not fanciful) chance of re-occurrence might be significant." He said that the MPT's conclusion was "consistent with there being a substantial risk of repetition; in other words, on any view, a significant

risk" and that in any event the MPT's assessment of the risk posed by Dr Khetyar was flawed because:

- a. the MPT said "*the incidents occurred from 13 to 4 years ago and ... there has been no repetition*". In fact there had been two incidents (the 2012 and 2013 incidents) of sexual assault of patients only a year apart, since when Dr Khetyar had only worked for about nine months; and
- b. the 2013 incident was a repetition of "disturbingly similar behaviour" [para 52] to the 2012 incident.

The Judge observed that paragraph 97(f)¹ of the *Sanctions Guidance* is expressed "in the singular" for good reason and it did not apply here. As a result of the above, the MPT was "bound to conclude" that neither paragraph 97(f) nor 97(g) of the *Sanctions Guidance* applied and the conclusion that suspension was the appropriate sanction was therefore undermined [paras 52 and 53].

3. In relation to Ground 1, i.e. that the MPT failed to have proper regard to the *Sanctions Guidance* the Judge said that:

- a. the MPT "provided a generalised assertion that erasure would be disproportionate without taking account of the very clear steer² given by the Guidance that erasure, far from being disproportionate, would be both proportionate and probably appropriate." He said that the MPT's general reference to having had "*particular regard to the guidelines set out in SG*" was "equally inadequate to explain, let alone justify, a decision not to follow that steer" [para 54]. He also said:

"The steer provided by para.109 of the Guidance is that erasure may be appropriate if any one of the factors listed is present. That does not mean erasure must follow whenever para.109 applies; it does, though, mean a tribunal ought to consider erasure very seriously when para.109 does apply, especially if it does so on multiple grounds, in which case powerful case-specific reasons ought to be required if a decision against erasure is to be justified" [para 55(1)].

He then set out why he considered all of the subparagraphs of paragraph 109 of the *Sanctions Guidance* applied [para 55(2)];

¹ 97(f) "*...no evidence of repetition of similar behaviour since incident*"

² By paragraph 109 of the *Sanctions Guidance*

- b. the MPT's view that a period of suspension would send a sufficient signal to the profession and the public was based on its "flawed conclusion that the Guidance indicated that suspension was indeed sufficient, and had no regard to the advice in the Guidance upon multiple grounds that it was insufficient and that, to the contrary, erasure was indicated" [para 57].
4. When considering the final Ground of Appeal, the Judge considered that the correct outcome was so clear that there would be no point in remitting the matter and so decided that the MPT's decision on sanction should be quashed and replaced with a direction that Dr Khetyar's name be erased from the medical register. He said that the only case-specific factor identified by the MPT as suggesting that erasure might be disproportionate was a public interest in Dr Khetyar being able to serve geriatric patients in the future. However, the Judge said:

"there was nothing to indicate, with respect, that there is anything special about Dr Khetyar's case in that respect. It is a sadness to lose any otherwise good clinician from the profession, but it is a fundamental tenet of the sanctions regime, reflecting the statutory overarching objective, that the reputation of the profession as a whole is more important than the interests of any individual doctor. In my judgment, there is nothing in the case-specific circumstances of this appeal capable of justifying the Tribunal in departing from the very clear steer towards erasure it should have identified from the Sanctions Guidance" [para 60].

The Judge therefore, allowed the GMC's appeal and the direction for suspension was quashed and substituted with a direction that Dr Khetyar's name be erased from the register.

Kind regards

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