Appeals Circular A 17/14

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Re: Dr Benjamin Obukofe v General Medical Council [2014] EWHC 408 (Admin)

Background

Dr Obukofe's case came before the Fitness to Practise Panel ('Panel') initially between 23 and 26 April 2012 in relation to his conviction at Leicester Crown Court of three counts of sexual assault.

The Panel found the doctor's fitness to practise to be impaired and determined to impose a period of 12 months suspension.

The matter was reviewed by a differently constituted Panel on 18 April 2013. The second Panel determined his fitness to practise to be impaired. Owing to lack of time the case was adjourned and the decision on sanction was made on 20 June 2013 which was to impose a further period of 12 months suspension with a review.

Dr Obukofe appealed the decision of the second Panel that his fitness to practise was impaired and the imposition of a further period of suspension under s40 Medical Act 1983 (as amended).

Appeal

Dr Obukofe's appeal was considered by Mr Justice Popplewell on 28 January 2014.

Mr Justice Popplewell sets out the background and details of what happened at the first hearing and the review hearing which was the subject of the appeal (paragraphs 2-20).

Dr Obukofe settled his own grounds of appeal and raised a large number of arguments, however, Mr Justice Popplewell addressed what he regarded as Dr Obukofe's main points by grouping them under three headings (paragraph 21):

> *'(1) The first heading is "Process" which involves a number of arguments that the 2013 Panel's process and procedure was legally flawed and/or was unfair and/or was in breach of his Article 6 or other rights.*
>
> *(2) The second heading I will use is "Impairment" to deal with arguments by which Dr Obukofe challenges the Panel's findings that his fitness to practise remained impaired.*

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(3) The third heading is "Sanction" under which heading I will deal with arguments relating to challenges to the imposition of the further 12 months suspension with a subsequent review'.

Process (paragraphs 22-39)

Dr Obukofe argued that it was not open to the 2013 Panel to consider afresh whether Dr Obukofe's fitness to practise continued to be impaired, because that involved *'illegitimate reopening'* of the decision of the 2012 Panel (paragraph 22).

Mr Justice Popplewell confirmed that the 2013 Panel correctly followed the procedure required by the Medical Act 1983 and the Fitness to Practise Rules 2004 (paragraphs 23-24). He noted that the Rules made it clear what was envisaged by way of procedure - that the Panel should first consider and determine, with the benefit of evidence and submissions, whether the practitioner's fitness to practise remained impaired as a first step before going on to consider whether to extend a period of suspension (paragraph 25).

The Judge considered it to be a fair and sensible procedure and did not involve going behind or re-opening the determination which resulted in the suspension being imposed in the first place (paragraph 26).

The next point taken by Dr Obukofe was that there was an unfair procedure in relation to what had been described as a 'Philippic' against his representatives. The complaint was that, at the beginning of the review hearing in 2013, the Panel questioned Dr Obukofe's representative in a way that was intimidating and disruptive and gave rise to an appearance of bias which was (submitted by Dr Obukofe) disruptive to his representative's ability to represent the doctor at the hearing (paragraph 30).

Mr Justice Popplewell confirmed that what took place, at the beginning of this hearing, was that it was made clear by Dr Obukofe that he wished to be represented by Professor Salako. However, there was no absolute right to such representation but a discretion to be exercised by the Panel as to whether to allow it.

In the circumstances, the Panel asked a number of questions of Professor Salako to investigate his suitability. Having heard his explanation, which was not given with any great clarity, the Panel exercised its discretion under the Rules to allow him to represent Dr Obukofe (paragraph 31).

Mr Justice Popplewell confirmed (paragraph 32):

> *'It is clear from the transcript that there was nothing in the questioning which could properly be regarded as hostile or inappropriate. There is nothing in the questioning to suggest any appearance of bias. What the Panel was doing was merely eliciting information about Professor Salako which was necessary to inform its decision as to whether to allow him to act as a representative.'*

In a related issue, Dr Obukofe submitted that there was no discretion to exercise in 2013 because the 2012 Panel had already made a decision that Professor Salako should be permitted to represent him and the matter had therefore been finally determined and could not be re-opened (paragraph 33).

Mr Justice Popplewell confirmed that he had *'considerable doubt'* as to whether the decision to allow representation under Rule 33 can properly be regarded as a preliminary legal argument. But

even assuming that it could, the decision which was made in 2012 was a decision as to representation at that hearing, not at any subsequent hearing; a separate decision fell to be made pursuant to Rule 33 in relation to representation in 2013 (paragraph 35).

The next argument raised by Dr Obukofe since was that he was denied an opportunity to comment on the decision of the Court in **CHRE v General Dental Council and Another [2005] EWHC 87 (Admin)** referred to as the 'Fleischmann case' which was referred to by the Legal Assessor and his advice to the Panel (paragraph 36).

Mr Justice Popplewell confirmed there was no procedural unfairness in the way the Fleischmann case was referred to. After the Legal Assessor had referred to it, in the course of the hearing, and identified the passages he considered relevant and the propositions which were to be derived from it, Professor Salako was invited to comment if he wished. He indicated that he did not wish to do so (paragraph 37).

The next point that Dr Obukofe raised was that the Panel compelled him to answer questions in a way which breached his privilege against self-incrimination. Mr Justice Popplewell confirmed that there is nothing in the point for three reasons (paragraph 38):

> *'First, the Panel did not compel to him to answer any questions. He chose to give evidence because it was in his interests to do so. Secondly, he was represented and advised by Professor Salako, who was legally qualified. It was for Professor Salako to give him advice in relation to the privilege against self-incrimination if it were a matter for any materiality, for the Panel to do so. Thirdly, it would not in any event have assisted Dr Obukofe if he had invoked the privilege and refused to answer questions which were designed to give the Panel a further understanding about his insight into his offending and his understanding of professional boundaries'.*

The Judge goes onto say that as it was made clear by Mr Justice Blake in the case of **Abrahaem v GMC [2008] EWHC 183 (Admin)** that in a review hearing there is an evidential burden on the doctor to demonstrate those matters which the Panel imposing the original sanction has identified will need to be addressed as part of the review, such as, for example, keeping up with medical knowledge and development in practice.

Impairment (paragraphs 40 -47)

The first argument raised by Dr Obukofe that was the 2013 Panel was wrong to make another finding of impairment as he had complied with and evidenced the concerns raised by the 2012 Panel (paragraph 40). However, the Judge noted that the 2012 Panel identified what would be necessary for Dr Obukofe to address at the review hearing. Of central importance was evidence to show that he had reflected on, and gained insight into, his actions; and evidence as to his understanding of professional boundaries and how those could impact on his relationships in the workplace (paragraph 42).

The 2013 Panel found that Dr Obukofe had not met the concerns expressed by the 2012 Panel. Mr Justice Popplewell confirmed that this was a finding of fact on an issue of law which properly fell to be considered by the Panel (paragraph 43).

He goes on (paragraph 44):

> *'In my view the findings of continued impairment of fitness to practise was plainly a conclusion which the Panel could reasonably reach and was properly reached on the*

> *basis of their findings of fact. It was not only a case of Dr Obukofe continuing to deny that he had engaged in any criminal conduct. The tribunal found that he had only limited appreciation of the impact his conduct had had on the two females and that although he recognised that he had crossed boundaries in the workplace he did not recognise how that might affect other people'.*

In the circumstances the Judge found the challenge to the Panel's findings of fact was *'untenable'.*

The next point raised by Dr Obukofe was the 2013 Panel had made an error of law in treating the certificate of conviction as conclusive evidence of guilt. The Judge confirmed there was nothing in this point as Rule 34(3) provides that the Panel is bound to treat a certificate of conviction as conclusive evidence of the offence to which it relates (paragraph 45).

The next point raised by Dr Obukofe was the 2013 Panel had erred in law and misdirected itself by equating Dr Obukofe's protestation of innocence with a lack of insight. Mr Justice Popplewell rejected that submission. The Panel's decision was not based solely on the fact of the convictions and upon his continued denial of the offences, but also the Panel's own assessment of Dr Obukofe's ability in practice to recognise boundaries in the work place based on the evidence given to the Panel (paragraph 46).

The last argument advanced in relation to impairment by Dr Obukofe was that the Panel gave inadequate reasons for their findings on insight or an inadequate analysis of exactly what was meant by insight. Mr Justice Popplewell disagreed. He confirmed (paragraph 47):

> *'It was not necessary for them to indulge in an analysis of what was meant by insight of the kind which Dr Obukofe suggests, which I have to say verges on the metaphysical'.*

<u>Sanction (paragraphs 48 – 64)</u>

The first point raised by Dr Obukofe was that the imposition of a further 12 months' suspension violates the principles of double jeopardy. Mr Justice Popplewell confirmed that this was a misunderstanding of the nature and effect of a suspension which is subject to review and the process of a review under 35D of the Medical Act and Part 5 of the Fitness to Practise Rules 2004 (paragraph 48).

The next point raised was that the suspension imposed was a disproportionate sanction amounting to an unfair interference with Dr Obukofe's right to practise and to earn a living (paragraph 50).

On this point Mr Justice Popplewell looked at the relevant principles in relation to the issue of sanction (paragraphs 51 and 52). The first strand is to differentiate the function of a Panel imposing sanctions from that of a Court imposing retributive punishment. And the second is the special expertise of the Panel in making the required judgment.

Bearing those two matters and applying the judgment which is *'distinctly and firmly a secondary judgment'* (paragraph 54) Mr Justice Popplewell could see no basis for treating the sanction which was imposed by the 2013 Panel as being in any way unfair or disproportionate notwithstanding the effect which it had on the ability of Dr Obukofe to earn his living.

He confirmed (paragraph 54):

'It was reasonable for the Panel to take the view, in the light of the seriousness of the offences, and the attitude and insight which they found Dr Obukofe to have, that a further period of suspension was necessary for someone who had not yet fully recognised and understood the significance of his past behaviour in the workplace, for the purposes of guiding and informing his future behaviour as a doctor.'

The next point raised by Dr Obukofe was that the Panel erred in treating the Fleischmann case as analogous and relying on it in reaching its conclusions on sanction.

The passages to which the 2013 Panel had been referred by the Legal Assessor were those set out at paragraphs 52 to 54 of the Fleischmann judgment. What the Legal Assessor said about them was that the case was not analogous, on its particular facts, but that they supported a proposition that it was inappropriate generally speaking, for a Registrant to return to practice when there was something still outstanding in the form of a criminal sentence (paragraph 56).

Mr Justice Popplewell confirms (paragraph 58):

'It appears to me that the important element of the reasoning of Newman J in paragraphs 53 and 54 of his judgment relate to the sex offender's treatment programme to which Dr Fleischmann was subject for three years rather than his subjection to the notification requirements of the Sex Offenders Register for 5 years. If, in this case the Panel had thought that the Fleischmann case required it to continue suspension until Dr Obukofe's criminal sentence had been completed (including the period during which he remained subject to notification requirements of the Sex Offenders Register) that would, in my view have been an error of law. But it seems clear to me that that was not the way in which the Panel relied on the Fleischmann decision. It is clear from the passages that I have read that this Panel exercised its judgment on the sanction which ought to be imposed quite independently of the element of the sentence on Dr Obukofe that related to the Sex Offender's Register. In any event, in my view the sanction was clearly an appropriate one for the reasons which are contained in the determination'.

The final point raised by Dr Obukofe, in relation to sanction, arose out of the fact that there was a 2 month extension of the suspension in April 2013, followed by a further 12 month extension of the suspension (paragraph 59).

In relation to that matter there are two points advanced by Dr Obukofe, the first that he was being prejudiced by there being two sequential suspensions because it deprived him of the benefit of paragraph 11 schedule 4 to the Medical Act.

In that regard the Judge considered that paragraph 11 would no doubt apply to Dr Obukofe.

In relation to the second point that there was in fact a 14 month extension of suspension and, therefore, it was only open to the Panel when it came to its decision in June 2013 to impose an unexpired portion of the 12 months (paragraph 63) the Judge is unable to accept the argument (paragraph 64):

'The terms of section 35D(5) do not contain any express limitation on the circumstances in which suspension may be extended. There may be circumstances in which it is desirable and indeed necessary, for a suspension to be extended in the context of review proceedings, for what might be generically described as administrative reasons connected with the availability of the parties or the Panel, or

other administrative arrangements: illness on the part of the practitioner would be an obvious example. If a review hearing was arranged to take place before the expiry of an existing suspension, then the medical practitioner is unable to attend it for reasons which commanded sympathy so that the hearing could not take place before the expiry of the existing suspension, the Panel would have power under Section 35D(5) to extend the period of time. That is itself a free-standing jurisdiction and the 12 month maximum would apply to that extension. When it comes to the substantive review hearing Section 35D(5) gives the Panel the full ability to impose up to the maximum 12 months, on that occasion. Such an interpretation of the Act does not in my view open it to abuse. It would be open to a practitioner to seek to appeal any extension under Section 35D(5) if imposed for administrative reasons. In this case, the two month extension was made without objection on the part of Professor Salako and was not the subject matter of any appeal. There is nothing inimical to the scheme of the Act in a suspension in fact operating for a period of more than 12 months. That may be the effect of paragraph 10 of Schedule 4 of the Act in the case of suspension which takes effect after an unsuccessful appeal'.

In the circumstances the appeal was dismissed.

Salient Points

- Reminder to Panels that at a review hearing they cannot go behind or re-open the previous determination
- It is for each panel to determine whether to exercise their discretion to allow a doctor to be represented by a person of their choice under rule 33(1)(c). They are not bound by the decision of a previous panel.
- It is generally inappropriate for a doctor to be returned to unrestricted practice when there is something still outstanding in the form of a criminal sentence. Notification requirements as set out in s80-102 Sexual Offenders Act 2003 may be distinguished from a court imposed sentence.

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