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Lovett v Health and Care Professions Council [2018] EWHC 1024 (Admin)

Learning Points

Whilst this appeal considered several issues, the following are the learning points which we wish to highlight:

When deciding whether to proceed or continue in the absence of a practitioner:

- Tribunals are entitled to continue with proceedings even if the practitioner is absent for health reasons and/or lacks capacity to participate, as long as it is fair to do so;
- Tribunals may consider the following matters as relevant factors:
 - the stage which the proceedings have reached;
 - what evidence (if any) is still to be heard;
 - whether there are any other means by which evidence and/or submissions can be given; and
 - whether the practitioner is or was previously able to engage with the proceedings.

Background

This was an appeal by a consultant clinical psychologist ('L') against the decision of the Conduct and Competence Committee ('CCC') of the Health and Care Professions Council ('HCPC') dated 4 April 2017 in which the CCC found a number of allegations of misconduct against L found proved. The CCC also found that L's fitness to practice was impaired and that he should be erased from the HCPC register.

Amongst the allegations faced by L was that he did not provide the health records of two vulnerable patients (sisters) to their General Practitioner and also made false or unjustified statements about the psychological health of one of the patients in their records and to the GP of the other patient, that releasing the health records would cause harm to that patient.

The CCC hearing began in November 2013. On Day 13, L collapsed after the day's proceedings and was unable to return to the hearing due to worsening health. There were then a number of adjournments of the hearing (as a result of L's health) and applications made on behalf of L to stay the proceedings (which were partly successful). L also unsuccessfully challenged by way of judicial review the decision of the CCC on 14 March 2016 to continue the hearing, as it directed and in relation to certain allegations only.

In February 2017, the CCC again determined to proceed with the hearing. At this stage, L had no capacity and was not present. The HCPC's case had concluded and L was part-way through being cross-examined. After considering the legal principles derived from *Adeogba v General Medical Council [2016] EWCA Civ 162*, the CCC stated:

"It would run entirely counter to the protection, promotion and maintenance of health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process...[Dr Lovett's health] has clearly compromised his ability to engage fully with these proceedings, it does not accept that it has always precluded him from any constructive engagement...the hearing had reached the stage where his inability to attend in person did not preclude further progress. Every effort was made to facilitate his further participation in whatever ways may be possible. Despite these efforts there has never been any constructive engagement by Dr Lovett. Throughout, Dr Lovett has used the significant resources available to him not to engage but to avoid engagement."

In addition, if the hearing did not conclude by July 2017, the hearing process would have had to begin again as one of the CCC members was due to retire, which would have rendered the CCC inquorate.

The CCC provided its decision on the facts in March 2017 and its decisions on impairment and sanction were provided by April 2017.

Grounds of Appeal

L appealed against the CCC's decision on three broad grounds including that the CCC ought, at least, to have stayed the proceedings when it became clear that L had

limited capacity to participate further and even more so when it knew that L had no capacity at all. The failure to do so was unfair to L.

Judgment

The appeal was heard by Mr Justice Ouseley and was dismissed.

In relation to the ground of appeal mentioned above [paras 193 – 216], the Judge said that:

1. the CCC considered the issues at all stages “[N]otably it correctly recognised that the proceedings had to be fair to [L]; it could not proceed were that not to be so. It also directed itself, this time, in line with Adeogba.....This was important in at least two respects: it emphasised the particular public interest in the finality of disciplinary proceedings, and the obligation of the registrant to co-operate with the hearing” [para 201];
2. it was not unfair for the CCC to continue even when L had no capacity in relation to the case. L had previously had adequate capacity and opportunity to provide a statement of answers in re-examination, as suggested and then directed by the CCC and therefore the CCC’s conclusion that he had therefore chosen not to engage with the proceedings “is unanswerable on the medical evidence.” In addition, there was no evidence from any of the legal team of any actual difficulties in taking a statement from him, or providing him with information which he could understand for the purposes of doing so. The Judge said that “[A]ccordingly, were there to be any prejudice to his case as a result of his loss of capacity in autumn 2016, it was a prejudice brought about by his own refusal to comply with directions and to use the opportunities available to him. The Panel rightly pointed out that it would harm the public’s confidence in the profession and its disciplinary processes if a registrant could refuse to engage in the proceedings, contrary to his professional obligations, and then rely on the consequences of his refusal to thwart proceedings against him” [para 202];
3. the CCC “was under a duty to reach a decision on the allegations if it could do so without unfairness to [L], because of the gravity of these allegations, the interests of the two patients, and of the profession and its disciplinary standards” [para 208];
4. The CCC had been entitled to proceed in L’s absence and continue with the hearing [para 209]. The CCC had heard from the HCPC witnesses and had received the oral and written evidence-in-chief from L [para 210];

“I think that the Panel had probably reached a clear if not final impression of Dr Lovett from the evidence which it had heard, and were entitled to be skeptical about the extent to which further evidence could help him. It does

not say so, but it had recorded impressions of him, and forming some view of Dr Lovett by that stage was inevitable. So I do not regard the Panel as acting unfairly in continuing even though Dr Lovett could give no further oral evidence. Its suggestion and then direction as to a re-examination statement gave him a very fair opportunity to recover any ground he and his team considered had been lost. I am not persuaded that the absence of Panel questions was unfair. None of this was ideal; but it was not unfair" [para 212];

5. L had been represented throughout the hearing [para 212] and that the CCC's decision on continuing with the hearing had been careful, detailed and thorough [para 216].

Accordingly, the appeal was dismissed.

Kind regards

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