

Appeals Circular A19/15**17 August 2015**

To: Fitness to Practise Panel Panellists
Legal Assessors

Copy: Interim Orders Panel Panellists
Panel Secretaries
Medical Defence Organisations
Employer Liaison Advisers

Medical Practitioners Tribunal Service
Seventh floor, St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Tel: 0161 923 6263

Fax: 0161 240 7199

Email: enquiries@mpts-uk.org

Re: Schodlok v General Medical Council [2015] EWCA Civ 769**Abstract**

Dr Schodlok previously appealed against the MPTS' decision to impose conditional registration. However, this was dismissed by HHJ Sycamore in 2013. Dr Schodlok obtained leave from the Court of Appeal to appeal HHJ Sycamore's decision.

The Court of Appeal allowed the appeal and quashed the sanction. Vos LJ gave the leading judgment.

Background

Dr Schodlok worked at the Queen Elizabeth Hospital in Woolwich in 2009 and 2010. During this time a number of allegations were raised, mainly relating to Dr Schodlok's interactions with an orthopaedic technician working at the hospital.

The Fitness to Practise Panel (FTPP) hearing lasted 40 days between 10 July 2012 and 15 February 2013. When making their factual decision, the panel found four instances of serious misconduct and six instances of 'non-serious' misconduct. Full details of these instances, including the panel's decision, are at paragraphs 5 to 7 of the judgment. The panel went on to make a finding of impairment and imposed conditions on Dr Schodlok's registration for a period of 12 months.

On 11 June 2013 HHJ Sycamore dismissed Dr Schodlok's appeal against the FTTP decision. A copy of our previous circular on this judgment is available [here](#), with the judgment itself accessible via the following reference [2013] EWHC 2280 (Admin).

Black LJ gave Dr Schodlok permission to appeal HHJ Sycamore's decision to "restrict the scope of the appeal before him... to [the panel's] findings of serious misconduct..."

Appeal

Vos LJ sets out the issues for determination at paragraph 17:

i) Did the panel take into account the proven incidents of non-serious misconduct in determining whether Dr Schodlok's fitness to practise was impaired?

Vos LJ sets out the representations made by each party to the hearing. At paragraph 35 he states:

"... it seems to me that the Panel took into account the entire run of serious and non-serious misconduct findings in determining whether Dr Schodlok's fitness to practise was impaired; or at least those non-serious findings that related to colleagues or subordinate staff members... This was not in accordance with the Legal Assessor's advice, because the Panel had accepted that only serious misconduct could give rise to a finding of impairment."

He adds (in paragraph 36) that:

"... since the Panel did take into account its findings of non-serious misconduct in determining impairment, Judge Sycamore was wrong not to have allowed Dr Schodlok to argue those grounds on appeal."

ii) Was the Panel right to find each of the four instances of serious misconduct proved?

In paragraphs 30 to 57 Vos LJ analyses the evidence and the panel's findings in relation to the four instances of serious misconduct. In all four instances, Vos LJ finds that inferences were drawn which could not be supported by the evidential basis presented to the Panel.

iii) Was the Panel right to find that Dr Schodlok's fitness to practise was impaired as a result of the instances of serious misconduct that were proved?

In light of the decisions made by Vos LJ in relation to the findings of serious misconduct, he concludes that the Panel should not have made a finding of impaired fitness to practise.

However, he then goes on to consider (at the request of GMC Counsel) whether it would be possible for any future Panel to make a finding of serious misconduct on the basis of accumulated non-serious misconduct. At paragraph 63 he states:

"I do not think we should opine on the theoretical possibility that, in a particular case on different facts, a series of non-serious misconduct findings could, taken together, be regarded as serious misconduct. For my part, I would not think that the possibility of taking such a course in a very unusual case on very unusual facts should be ruled out, but I would prefer to leave the argument for a case in which such facts are said to arise. In the normal case, I do not think that a few allegations of misconduct can or should be regarded collectively as serious misconduct."

In his obiter comments, Beatson LJ examines this possibility further, stating at paragraph 72:

"My tentative and very preliminary view is that, provided it is clear from either the charge brought by the GMC or the way the case against the doctor is presented at the hearing, that any adverse findings by the panel on matters identified in the charges might be cumulated in this way, so that the doctor is aware this is a possibility, such an approach should in principle be open to the panel. I recognise that a small number of allegations of misconduct that individually are held not to be serious misconduct should normally not be regarded collectively as serious misconduct. Where, however, there are a large number of findings of non-serious misconduct, particularly where they are of the same or similar misconduct, I consider the position is different. In such a case, it should in principle be open for a Fitness to Practise Panel to find that, cumulatively, they are to be regarded as serious misconduct capable of impairing a doctor's fitness to practise."

iv) Was the sanction imposed one that could properly have been imposed?

In light of the findings made in relation to the factual and impairment decisions made by the Panel, it is concluded that the sanction of conditional registration should not have been imposed.

Outcome of the appeal

Vos LJ remitted the matter to the Panel for it to reconsider the allegations of non-serious misconduct and whether to (for example) issue a warning to Dr Schodlok. However, the allegations relating to the serious misconduct were not remitted for a re-hearing as it was decided that the lengthy evidence at the initial hearing did not support the allegations.

Salient Points

Evidence

Panels should be careful not to draw inferences without an appropriate evidential basis.

Impairment based on serious misconduct

As set out by the Legal Assessor in this case, Panels should only make findings of impaired fitness to practise on the basis of serious misconduct.

Whilst the Court of Appeal has provided tentative opinions in relation to 'accumulated non-serious misconduct' these comments are obiter and should be followed with caution.

We would advise Panels to consider (as set out by Beatson LJ) both the volume and the similarity of the non-serious misconduct, as well as the presentation of the case, before concluding that a series of non-serious misconduct can amount to a finding of serious misconduct.

Panel Development Team

0161 240 7292

PanelDevelopmentTeam@mpts-uk.org