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Re: Dr Samuel Nwogbo v GMC [2012] EWHC 2666 Admin

Background

Dr Nwogbo appeared before a Fitness to Practise Panel ("Panel") in April 2012 in relation to two separate areas of complaint: firstly that he had been charged and convicted of an offence of assault on his then wife, and secondly, that he was guilty of misconduct and that he had acted misleadingly and dishonestly by failing to notify relevant matters following on from that assault to various parties, specifically to the General Medical Council ("GMC") itself, to the Trust by whom he was employed on a permanent basis, to a number of Trusts for whom he had worked on a temporary basis as a locum, and to certain locum agencies with whom he had registered to obtain locum work.

The Panel found a number of allegations which have been made against him proved. They went on to find that as a result his fitness to practise as a doctor was impaired and determined that the appropriate sanction was to direct that his name be erased from the medical register.

Dr Nwogbo appealed against the Panel's determination under section 40 of the Medical Act 1983.

Appeal

Dr Nwogbo's appeal was considered by His Honour Judge Stephen Davies on 6 September 2012.

Although the grounds advanced by Dr Nwogbo were extremely wide ranging, the Judge considered the most two significant questions he had to decide were as follows (paragraph 2):

The MPTS makes impartial decisions in doctors' fitness to practise hearings. The MPTS is part of the General Medical Council, but it is operationally separate and it is accountable to Parliament.

'First, whether or not there was a proper reasoned basis for each of the eight separate findings of dishonesty made against the appellant by the panel; second, having regard to the allegations against the appellant which the panel found proved and which findings survive this appeal process, whether the decision on sanctions should stand should be varied or should be remitted to a fitness to practise panel for fresh determination'.

Following an introduction to the issues before him (paragraphs 1 - 9) HHJ Davies sets out a detailed chronology of relevant events in order to understand the issues raised on the appeal (paragraphs 11 - 23).

He then sets out the relevant legal principles in paragraph 24 - thereafter following re – numbering from the second paragraph 5 he adopts the position summarised by Langstaff J in Bhatt v GMC [2011] EWHC 783 Admin. He also states something about the nature and extent of the obligation on a Panel to give reasons for its decision (paragraph 7) referring to Leveson LJ's judgment in Southall v GMC [2010] EWCA Civ 407.

The Judge then goes on to consider each of the individual allegations which were the subject of challenge (paragraphs 13 - 51).

Although Dr Nwogbo made a general complaint that the whole process was unfair because the Panel, he said, had made up their minds in advance and was in effect going through the motions was, in HHJ Davies's judgment, an allegation which lacked any substance whatsoever (paragraph 13) he confirms:

'...it is quite clear in my judgment that they were nothing if not scrupulous, open-minded and conscientious in their approach to the case and to the evidence'.

He then turns to the deal with the allegation in relation to the conviction (paragraphs 14-20). He confirms it was not open to Dr Nwogbo as a matter of law to challenge the allegation that he had committed the offence, even though he sought to do so before the Panel, nor would it be open to him to challenge the Panel's decision on that point before him.

However, there was a question which Dr Nwogbo had raised as to whether or not the Panel was entitled to go on to make adverse findings against him in relation to the circumstances surrounding the assault and his response to his conviction (paragraph 14).

The Judge dismissed the individual complaints made by Dr Nwogbo in relation to the way in which the panel approached the circumstances of conviction and his subsequent approach to the assault and his conviction he confirms (paragraph 18):

'... firstly it seems to me that the panel was obviously entitled to place reliance upon the findings of the magistrates court, expressed in a memorandum of conviction, in relation to the circumstances of the conviction, and that all of those findings were fully justified in my judgment on the evidence presented to them by the police officers, which ... they were fully entitled to accept. I also consider that the panel was entitled to place reliance upon the contents of the pre-sentence report which had been placed before the magistrates in relation to, as they said, his continued unwillingness to accept the full facts of the assault and his conviction of the offence.'

He then turns to the individual allegations of misconduct (paragraphs 21-51). The Judge notes that although Dr Nwogbo had criticised a number of individual findings and had subjected the evidence of a number of witnesses called by the GMC to detailed and sustained criticism, it was not necessary for him to go through each and every one of his complaints. That was because there were a number of allegations which were found not established, also a number of allegations which, although were found proven factually, the Panel was not satisfied that the doctor's conduct in relation to them was dishonest, he did not need to consider those matters but only refer to those findings to understand the criticism of findings of dishonesty which were actually made (paragraph 21).

In relation to the first allegation where the Panel was satisfied as to dishonesty, that is the allegation that he failed to notify the GMC that he had been charged with a criminal offence (paragraphs 22-27). HHJ Davies determines that there are two factors which satisfy him that the Panel's decision on this matter cannot stand (paragraph 26):

'... first and foremost, the failure to put the allegation in terms to the appellant in cross-examination so as to give him the opportunity to deal with it; and second, their failure to state their conclusion, if such it was, that he knew in 2010 that he was obliged to inform the GMC that he had been charged and therefore he was dishonest in not doing so.'

He goes on (paragraph 27):

'... this is not a case where a panel is required to give anything like a full reasoned judgment, but I do consider that in order to find someone guilty of dishonesty the panel must demonstrate in its reasons that it has approached the issue on the correct basis and that they have addressed, fairly shortly, the substance of the defences put forward and explained why they have nonetheless found him to be dishonest.'

In relation to this matter the Judge concludes that the Panel failed to do this in relation to this allegation. In the circumstances he allowed the appeal in relation to that particular allegation.

HHJ Davies, in considering each of the other allegations of dishonesty, having considered each of them individually in relation to the arguments put forward by Dr Nwogbo, found that the Panel was clearly entitled to make such findings and that such findings were in his judgment sufficiently reasoned.

He therefore concludes (paragraph 51) that Dr Nwogbo's appeal succeeds in relation to the finding that he was dishonest in failing to notify the GMC without delay of his criminal charge, but rejects the appeals in relation to all the other findings of dishonesty.

The Judge then turns his attention to the finding of impairment (paragraphs 52-54). He concludes that the Panel were fully justified in finding Dr Nwogbo's fitness to practise was impaired by reason of his conviction as, on any view, it was a serious offence and one that from the sentence imposed, a term of imprisonment albeit suspended, was in the Judge's view one which was fully justified. Any suggestion that his fitness to practise was not impaired by reason of his conviction could not be *'seriously contended'*.

In relation to the issues of dishonesty the Judge notes the Panel's conclusions (paragraphs 53 - 54) and determines that all of them, in particular since they were made by a Panel with a greater specialist expertise than the court it is a conclusion the court cannot possibly fault. He confirms that even though he is allowing the appeal in relation to one finding of dishonesty nevertheless the Panel's conclusions that it was a pattern of dishonest behaviour over a period of time could not be impugned and the Panel is entitled to make the findings that they did and he therefore dismissed the appeal in relation to the decision on impairment.

HHJ Davies then deals with the issue of sanction (paragraphs 55 - 64) he notes that although the Panel dealt with sanction by reference to eight individual allegations of dishonesty which they found proved whereas he had allowed the appeal on one it did not seem to him it was so significant in context that it was materially relevant to the Panel's decision on sanction (paragraph 55).

He confirms that it is clear from the Panel's determination they had proper regard to the guidance contained in the Indicative Sanctions Guidance ("ISG"), they had addressed the appropriate sanction by considering them in ascending order of seriousness, the various options available, and the Panel had specifically considered the non-exhaustive list of ten factors which might make erasure appropriate (paragraph 82 of the ISG).

The Panel had identified five particular factors as being present which Dr Nwogbo challenged. The Judge also adds the doctor's complete failure to accept his offending or to face up to his criminal behaviour or to express any regret or remorse, either for that or his dishonesty. He is therefore unable to conclude that the decision was *'clearly inappropriate, or otherwise it was a decision that could be categorised as wrong'*. He goes on (paragraph 63):

'On the contrary, I am quite satisfied that the decision was plainly right, and, furthermore, insofar as it is necessary for me to exercise any judgment afresh on the basis of my findings on this appeal, I am quite satisfied in all the circumstances that the sanction of erasure is plainly the only sufficient and proportionate sanction in the circumstances.'

He dismissed the doctor's appeal.

Salient Points

- In cases where dishonesty is alleged as a distinct allegation, it is necessary for the allegation to be put to the doctor in cross examination in unambiguous terms so that there is a fair opportunity of dealing with it in evidence
- In order to find a doctor guilty of dishonesty the Panel must demonstrate in its reasons that it has:
 - approached the issue on the correct basis; and
 - addressed the substance of the defences put forward; and
 - explained why it has, nevertheless, found the doctor to be dishonest

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