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Re: Banerjee v General Medical Council [2015] EWHC 2263 (Admin)

Abstract

Dr Banerjee applied for judicial review of the MPTS decision in relation to her second application for restoration to the medical register.

Mr Justice Walker dismissed the application for judicial review.

Background

The GMC investigation and Dr Banerjee's voluntary erasure

Dr Banerjee was the subject of a GMC investigation in 2011 as a result of allegations that she had falsified entries in her e-portfolio and tried to cover up her dishonest actions, and due to performance issues. Before the matter could be progressed further, Dr Banerjee applied for and was granted voluntary erasure (VE) from the register on 19 July 2011. In making her application for VE, Dr Banerjee stated that she no longer wished to pursue a career in medicine. The full details of the background are available in paragraphs 6 – 24 of the judgment.

The first refusal decision

On 7 March 2012 Dr Banerjee made her first application for restoration. This application was referred to the MPTS for a restoration hearing, which took place between 11 and 23 February 2013. In opposing the application the GMC relied on the performance issues, as well as two grounds of probity: firstly, the falsified e-portfolio entries and subsequent

dishonesty, and secondly, the statements in Dr Banerjee's VE application that she would no longer wish to pursue a career in medicine.

Whilst the first panel refused Dr Banerjee's application for restoration and barred her from applying again for 12 months, it was noted that this was on the basis of the first probity ground alone. The performance issues were not serious enough to raise concerns about her fitness to practise (paragraph 26). Mr Justice Walker refers to the panel's view of the second probity ground as "the no inference conclusion" (paragraph 29), and he sets out an extract from the first panel's determination:

You applied for voluntary erasure in June 2011, which was granted on an exceptional basis, partly on the basis of your repeated assurances that you no longer wished to pursue a career in medicine. However, the Panel has noted that, from April 2011 and alongside your application for VE, you were also considering seeking employment overseas as a doctor in New Zealand and Australia. Four weeks after your VE application was granted you applied for registration as a doctor in the Maldives and commenced employment four weeks later.

You told the Panel that you changed your mind about not pursuing a career in medicine following a short period of reflection and discussion with family and friends. Whilst the Panel has noted this sequence of events, it does not consider that there is sufficient evidence to suggest that this is evidence of a lack of probity, nor indeed has the GMC made a direct submission to such effect. It has therefore drawn no inference, positive or negative, from this matter.

The second restoration application

On 12 February 2014 Dr Banerjee made a further application for restoration, which was referred to a new MPTS panel on 2 and 3 July 2014. This application resulted in a second refusal, and a bar on further applications for a period of 24 months (paragraphs 30 – 34).

The full proceedings, including the discussions held by the parties before the hearing, are detailed at paragraphs 35 to 94 of the judgment. Additionally, Mr Justice Walker provides a detailed analysis of 23 'examples' of Dr Banerjee's exchanges with the panel in Annex 1 of his judgment.

Application for judicial review

At paragraph 137 Mr Justice Walker sets out the basis for the applicant's complaint:

... that overall unfairness could be discerned from a combination of six factors: (1) the number of questions asked ..., (2) the apparent closed mind(s) (by reason of the manner and wording of questions), (3) the style of questioning (language of a lawyer and in essence a prosecutor), (4) the questions being formulated by way of

cross examination – such as to obtain a concession against interest from the Claimant; (5) overall and in combination from all Panel members over the whole "trial" an appearance of unfairness and a real danger that the hearing was unfair; and (6) a movement into counsel's shoes when judged against the questioning by GMC counsel instructed to present the GMC case.

Supporting the application for judicial review were statements from both Dr Banerjee and her legal representative from the second hearing, Mr James Rowley.

Mr Justice Walker considers the six factors put forward by the applicant and dismissed them all. In doing so Mr Justice Walker makes reference to his analysis of the 23 'examples' in Annex 1.

Salient Points

Powers of the Panel

At paragraphs 125 to 130 Mr Justice Walker sets out the undisputed powers of the Panel:

First, the panel has an inquisitorial function. It does not merely hold the ring; panel members can ask questions in an inquisitorial way.

Second, despite what was said by both parties and the legal assessor during the "closed matters" discussion, the second panel was not bound by findings of first panel.

Third, in reaching its decision on the second restoration application the panel had a very broad discretion.

Fourth, the procedure on a restoration application differs from a misconduct hearing. It does not involve a separate fact-finding stage, and it does not entitle an applicant to an opening submission. There is no complaint about this.

Fifth, while the panel's discretion is a broad one, it has only two options as to its decision: it either allows the application or it refuses it. There is no half way house – it cannot allow the application subject to conditions.

Questions from the Panel

The applicant raised a number of criticisms and challenges to the number and style of questions posed by the Panel. Mr Justice Walker examined these exchanges and considered them in the context of the hearing, the lack of documentation, and the responses being provided by Dr Banerjee. At no point did Mr Justice Walker find any cause for concern in relation to the Panel's questions.

In supporting the Panel's approach, Mr Justice Walker highlights that the Panel often explained the purpose of their questions and used language that was appropriate in relation to the context and the applicant.

Recommendation on good practice

This JR focussed on the issue of panellist questions. It is true to say that Panels are inquisitorial; but Panels must always be mindful that they are not stepping into the shoes of the parties and are always acting (and appearing to act) impartially.

In some cases, Panels may find it helpful to discuss their questions during a brief adjournment, in order to confirm their approach. However, this should be appropriately balanced against the need for timeliness in hearings. The Legal Assessor may also be a useful sounding board when trying to identify the appropriateness of a line of questioning.

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