

19 November 2012

To: Fitness to Practise Panel Panellists
Legal Assessors

Copy: Investigation Committee Panellists
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: Dr Tubonye Harry v General Medical Council [2012] EWHC 2762 (QB)

Background

On 4 April 2012 the Interim Orders Panel ('IOP') imposed an interim order of suspension on Dr Harry's registration.

Dr Harry made an application, pursuant to Section 41(A) (10) of the Medical Act 1983 to terminate the suspension. Dr Harry's application for termination was considered by Mr Justice Burnett on 19 September 2012 when he confirmed his decision immediately to terminate the suspension but gave his reasons in a written judgment on 12 October 2012.

Application

Mr Justice Burnett confirms that the application had been brought by way of Part 8 proceedings and he reminds himself of the role of the court in dealing with such applications (paragraph 2). He confirms that the court would only terminate an order of suspension if it was satisfied that the order was wrong. He goes on to say however:

'...the court will always be mindful that it is being asked to overturn a decision of a specialist disciplinary panel and thus accord considerable respect to a reasoned decision of the Panel. Inadequacy of reasoning does not in itself provide a ground for terminating an order of suspension. But if the reasoning is inadequate or opaque the weight to be attached to the professional opinion of the Panel will be diminished'

The Judge also reminds himself of the statutory scheme and the relevant case law.

Mr Justice Burnett then sets out the background to the application (paragraphs 4 - 8).

In December 2010 Dr Harry was suspended from his NHS post and disciplinary proceedings were instigated by the Trust. There were five allegations against him:

1. That he put blood samples through the Trust pathology laboratory for patients who were not patients of the Trust;
2. That he raised NHS prescriptions for non-NHS patients;
3. That he transported human blood samples in breach of regulations governing their transportation;
4. That he used NHS resources for overseas private patients;
5. That he requested a member of staff to amend the records of his patients.

In summary (paragraph 5) allegations 1, 2 & 4 were all variations of a single theme: namely that he did not properly insulate his private practice from his NHS practice and therefore wrongly provided NHS benefits to some of his private patients. It is however allegations three and five which primarily featured in the IOP's decision to suspend.

The Trust's disciplinary panel found the allegations proved and set out its reasoning in a letter dated 18 January 2012. The Trust referred the matter to the General Medical Council ('GMC'). On 21 March 2012 a letter was sent to Dr Harry inviting him to appear before the IOP.

Mr Justice Burnett sets out details of the proceedings before the IOP in the remainder of his judgment (paragraphs 9 - 18).

The Judge confirms the test to be applied by the IOP and the Guidance provided to the it, which is designed to promote *'consistency and transparency in decision making relating to interim orders'*. He notes that the Guidance makes clear that suspension is not always appropriate and the overarching question identified by the Guidance is that *'if patient safety is not directly engaged, is to ask what the reaction of the public would be in the event of the allegation being established and discovering that suspension was not imposed in the interim'* (paragraph 10).

The Judge then goes on to consider the IOP's decision and its core reasoning (paragraph 12).

Counsel for the doctor submitted that the reasons given by the Panel were *'inadequate'*. Mr Justice Burnett confirms (paragraph 13) that *'to my mind the reasoning is thin'* and that *'the reasons draw on formulae found in the Guidance'*.

The Judge notes that Dr Harry's case raises no concerns about *'patient safety'*. The risk in his case concerns the possibility that, as a result of the inappropriate transportation of blood samples in December 2010 and in the event of damage, a member of the public might have come into contact with infected blood. A continuing risk would only rise if Dr Harry was to repeat the error that he had made in the past.

Mr Justice Burnett confirms that there was nothing in the material before the IOP or in the papers before the court which supported the proposition that in the face of all that has occurred, Dr Harry realistically might have again transported blood contrary to the regulations in place. In his judgment there is no real risk to members of the public in Dr Harry's continuing to practise.

The Judge could not see that the inappropriate transportation of blood samples, accepted by Dr Harry in the way he explained, coupled with the improper request to his colleague, also accepted, could justify his suspension in the public interest pending the resolution of the disciplinary proceedings pending the resolution of disciplinary proceedings. He confirms that the reasons provided no explanation of why the public interest required Dr Harry's suspension, still less why suspension was proportionate in all the circumstances (paragraph 16).

The Judge goes on:

'...my conclusion is that public confidence would not be damaged were he able to continue to practise pending the resolution of the disciplinary proceeding. This is a case in which the Fitness to Practise Panel, which in due course will determine all five allegations, will be able to consider where the public interest lies when it comes to deal with sanction. Whether or not any of the allegations denied by Dr Harry is established, those material to the conclusion of the Panel to suspend are in effect admitted albeit that there may be arguments about the details of what occurred and any mitigation. An informed and reasonable member of the public would not, in my judgment, be offended by Dr Harry's continuing in practise in the meantime.'

Mr Justice Burnett states that even if he was persuaded that the public interest called for suspension (paragraph 17):

'I am very doubtful whether it would have been proportionate in this case. In the light of all that is known of Dr Harry and the allegations he will face before the Fitness to Practise Panel of the GMC I conclude that the suspension was heavy handed and disproportionate.'

The Judge then deals with the issue of the period of suspension imposed, that of 18 months. He confirms (paragraph 18):

'The question of proportionality arises not only at the stage of considering whether to suspend but also for how long. There will almost always be some "uncertainty of the time needed to resolve all the issues" in a case, although Dr Harry's case appears relatively straightforward given the work already done by the trust. The pressure on the Fitness to Practise Panel of the GMC is well known. It has many cases outstanding and limited resources. However, the indication from counsel was that if interim suspension is ordered it is likely to be for 18 months. It should not be overlooked that Parliament has provided that 18 months is the maximum period of suspension that the Panel can impose. There will be many cases in which suspension is proportionate for a short period but not for as long as 18 months, given the very serious consequences it has upon the doctor concerned. 18 months should not become a default position'.

In the circumstances Mr Justice Burnett terminated the interim order of suspension.

Salient Points

- Reminder that reasons must be given which are clear and explain how the decision was reached and not 'formulaic', including reasons for the length of the initial order imposed – see paragraphs 41 and 42 of the Guidance
- Reminder that the test of '*necessity*' attaches to the protection of the public, not the public interest limb of the test applied by the IOP, nonetheless, there is some implication of necessity or desirability – see also *Sheikh* and *Sandler*
- Reminder that although 18 months is the maximum length for the imposition of the initial order there are many circumstances in which an order for a shorter period would be a proportionate response, therefore the imposition of a period of 18 months must not be the default position

Panel Development Team
0161 240 7292
pandevteam@mpts-uk.org