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**Re: Dr Y v General Medical Council [2012] EWHC 2779 Admin**

***Background***

Dr Y appeared before a Fitness to Practise Panel ('Panel') in October 2011 in relation to allegations of sexually motivated and indecent behaviour in relation to Patient A.

The Panel found Dr Y impaired by reason of sexual misconduct and directed that his name should be erased from the medical register and that his registration should be suspended with immediate effect.

Dr Y appealed under Section 40 of the Medical Act 1983 as amended.

***Appeal***

Dr Y's appeal was heard by Mr Justice Kenneth Parker on 5 October 2012 with judgment being handed down on 18 October 2012.

Mr Justice Kenneth Parker sets out in detail the factual background to the case (paragraphs 2 - 18). He thereafter sets out the powers of the High Court on an appeal making reference to the relevant case law (paragraphs 19 – 27).

By the time of the hearing of the appeal the issues before the court were in essence (paragraph 28):

*i) Were the Panel's findings of fact perverse?*

*ii) Did the Panel fail to give adequate reasons for its findings of fact?*

*'ii) Did the Legal Assessor fail to direct the Panel appropriately on the evidence?'*

As Mr Justice Kenneth Parker notes at the heart of the appeal is the contention, strongly advanced by Counsel on behalf of the doctor that contrary to the findings of the Panel, Patient A was plainly not a credible witness, and no reasonable Panel could have found otherwise. That contention, in turn, is founded on a critical examination of how her complaint of sexual misconduct on the part of Dr Y had evolved over time (paragraph 29).

In the circumstances the Judge sets out in some detail how Patient A's account evolved:

- a) NHS Direct – paragraphs 31 - 34;
- b) The police interview – paragraphs 35 - 37;
- c) GMC interview and witness statement – paragraphs 38 - 40;
- d) Evidence to the Panel – paragraphs 41 - 44.

He then goes on to consider the Panel's treatment of Patient A's credibility. The Judge considers it is important to set out in full how the Panel addressed the question of Patient A's credibility (paragraph 45). He also considers it is important to cite the Panel's consideration of Dr Y's credibility (paragraph 46).

Mr Justice Kenneth Parker then considers each of the grounds of appeal as follows:

**The First Ground of Appeal: Perversity** (paragraphs 47 - 57).

Counsel for Dr Y submitted that given the marked differences in the various accounts that Patient A gave, and the inconsistencies between the various accounts, no reasonable Panel could have found her credible, and no reasonable Panel could have had sufficient confidence to conclude that Dr Y had behaved, on either of the two visits, in a sexually inappropriate manner (paragraph 47).

Counsel for the GMC submitted that the Panel had had the considerable advantage of seeing and hearing how Patient A responded to questioning and referred in support to the case of *Chyc v GMC* [2008] EWHC 1025 Admin (paragraphs 48 - 50).

The Judge notes that Patient A was examined in chief for the entirety of a day, then cross-examined by the doctor's Counsel until mid afternoon the following day after which she was cross-examined by all three members of the Panel and further cross-examined by Dr Y's Counsel. During that questioning the Panel had the opportunity to see how she dealt with the points going to her credibility based on her various statements as well as her reaction when it was put to her that nothing improper to place during either visit (paragraph 51).

In Mr Justice Kenneth Parker's view there was *'in these circumstances sufficient evidence, arising from what Patient A had said in examination in chief and under cross-examination, to support the essential findings of the Panel that were adverse to Dr Y'* (paragraph 52).

The Judge was not particularly impressed by an argument that the fact that certain details of Patient A's description of the act of gross indecency varied over time or that the Panel declined to find that Dr Y had digitally penetrated Patient A on the first visit, fatally undermined her evidence. On the first element, referring to the case of *Mubarak v GMC* [2008] EWHC 2830 Admin, the task for the Panel was to consider whether the core allegations were true. It was stated in that case that it was commonplace for there to be inconsistency and confusion about details of varying importance.

On the second aspect, it was not unusual for a tribunal of fact to reject one allegation of misconduct by a complainant but to find the other allegations to have been proved (paragraph 54).

The Judge goes on to say that in considering this ground of appeal it was also very important to bear in mind that the Panel did not find that Dr Y was a credible witness and in the appeal it was not suggested that the Panel had no reasonable basis for such a conclusion (paragraph 55).

The Panel's conclusion was based primarily on Dr Y's own account, including his evidence concerning the first visit taken against his clinical notes of it, the reasons he gave for returning to visit Patient A, none of which the Panel found credible, his evidence to the Coroner regarding Patient F, and his evidence to the Panel regarding Mrs F (paragraph 56). Those findings have been reached after Dr Y had been cross-examined by Counsel for the GMC for half a day and the Panel members for a further hour therefore the Panel had the opportunity to see how Dr Y responded to questioning, particularly when it suggested that something improper had occurred (paragraphs 57).

### **The Second Ground of Appeal: Inadequate Reasons** (paragraphs 58 – 63)

Mr Justice Kenneth Parker confirms that having heard submissions from the parties that he is *'deeply troubled by this aspect of the case'*. He confirms (paragraph 59):

*'In my judgment, this was not just an exceptional case (within the language of the authorities) but a very exceptional case, where justice required somewhat more developed reasoning on this central issue of Patient A's credibility than would ordinarily be required'*.

He states this for two reasons as follows:

1. This was not a case where, on close analysis, the details of Patient A's account had varied over time. This was a case where Patient A, over time, had

developed a fundamentally different description of what she said had happened to her.

2. This was a case where on some occasions Patient A's evidence, tending to incriminate and to prejudice Dr Y, could be objectively tested, and, when it was so tested, it did not then stand up well to scrutiny (paragraphs 59 - 60).

The judge confirms (paragraph 62) that the:

*'The crucial issue, therefore, is whether against this background the reasons given by the Panel for finding Patient A a credible witness were adequate. In my view, they were not. The Panel stated that Patient A did not disclose "the full details" of her complaint from the start, and that "the details have escalated over time". With great respect to the Panel, this was not a case of changing "detail"...what occurred here was that Patient A fundamentally changed, over time, the nature of the sexual misconduct on the part of Dr Y, culminating in her evidence to the Panel that he had actually raped her on the second visit. In my view, the treatment of her evidence by the Panel does not with sufficient clarity and precision indicate that the Panel truly recognised the difficulty posed by such a fundamental shift, particularly in the light of the second set of matters that I have mentioned in paragraph 61 above. It appears to me that the reasons had squarely to address that difficulty and to explain, even if briefly, the basis upon which the Panel deemed it safe, notwithstanding the radical shift, to accept the account as developed by Patient A and as given in her evidence to the Panel. On this latter aspect the Panel simply stated that it was "not surprising" that "the detail of Patient A's complaint was made on a piecemeal basis and that she did not provide exactly the same account to each of the individuals who have interview". Again, that would suggest that the central core of Patient A's account remained basically consistent, and that only "detail" was developed and varied over time. However, that was not the position here'.*

In the circumstances the Judge confirms that he does not find the Panel's reasoning on what was a crucial issue was in all the circumstances *'legally adequate'* (paragraph 63).

### **The Third Ground: The Adequacy of the Legal Assessor's Advice** (paragraphs 64 – 70)

Mr Justice Kenneth Parker firstly refers to the case of *Gopakumar v GMC* [2008] EWCA Civ 309 and the role of the Legal Assessor. Thereafter, he confirms that he could see no force in any of the criticisms of the Legal Assessor's advice and therefore he could deal with that ground of appeal quite shortly (paragraph 65).

Firstly, he confirms that the Legal Assessor properly advised the Panel that the standard of proof was the civil standard, that is, the balance of probabilities, and also what was required of the Panel when assessing the probabilities (paragraphs 66 - 68).

Secondly, he confirms that the Legal Assessor did specifically direct the Panel on the need to address inconsistencies in Patient A's evidence and the effect of those inconsistencies in evaluating reliability and credibility (paragraph 69).

Finally, the Legal Assessor also directed the Panel on the need to give reasons (paragraph 70).

### ***Conclusion***

The Judge concludes (paragraph 71) that the second ground of appeal succeeds i.e. lack of '*legally adequate*' reasons, therefore the decision of the Panel to find Dr Y guilty of sexual misconduct towards Patient A cannot stand. The case is to be remitted to the GMC to consider whether or not it was appropriate to refer the complaint to a fresh Panel.

### ***Salient Point***

- Reminder that the need to give clear and precise reasons, at the fact finding stage, is particularly important where the issue is as to the credibility of a witness

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