Appeals Circular A02/17

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Re: Dr Squier v GMC [2016] EWHC 2739 (Admin)

Summary

The court reviewed factual findings made by the Medical Practitioners Tribunal (tribunal) who erased a consultant neuropathologist for impaired fitness to practise on 21 March 2016 because of her conduct as an expert witness. Mitting, J went on to find that the tribunal decision was in many significant respects flawed, quashed some of the factual findings, and on that basis quashed the erasure decision and substituted a sanction of conditions for a period of three years.

The court also commented that in long, complex cases, or in those which focused on the preparation and giving of expert evidence, it was preferable for the tribunal to be chaired by a lawyer with judicial experience.

Abstract

The appellant consultant neuropathologist appealed against a decision that her fitness to practise was impaired and that her name be erased from the medical register.

Background

The appellant had practised as a neuropathologist since the mid-1970s. In the late 1980s she developed a medico-legal practice, providing reports as an expert

witness to solicitors and giving evidence in court. A significant part of her work concerned cases involving babies who had died from suspected non-accidental head injuries. The majority medical opinion at that time was that the combination of subdural haemorrhage, retinal haemorrhage and encephalopathy was at least strongly indicative of a non-accidental head injury. By about 2002, the appellant came to doubt the majority view. A complaint was made to the General Medical Council about reports she had provided and evidence she had given between 2007 and 2010 in relation to six babies. The heads of charge included that she had failed to discharge her duties as an expert by failing to work within the limits of her competence, failing to be objective and unbiased and failing to pay due regard to other experts' views.

The tribunal made findings of fact upon which it based its decision to erase. The tribunal held that the appellant was ‘dogmatic, inflexible, evasive... unreceptive’, and that her ‘determination to pursue [her] own opinion was such that it led [her] to make...an outrageous and untruthful assertion’. The tribunal also held, in effect, that she had committed perjury in the tribunal proceedings because of her failure to answer a question from GMC counsel. The court was required to review the tribunal's factual findings.

Appeal

Held: Appeal allowed.

(1) While the tribunal proceedings were a "judicial proceeding" for the purposes of the Perjury Act 1911 s.1(2), the tribunal's finding that the appellant had committed perjury was unjust because of a serious irregularity. During her examination-in-chief, she had given an answer which GMC counsel wished to question her about. The tribunal's Legal Assessor indicated that counsel's question was potentially proper, but that the answer might provide information which could be used against the appellant in subsequent disciplinary or criminal proceedings. He advised that she should be warned of that fact, and that if she chose not to answer the question, her failure to do so could not be held against her.

Although the tribunal did not expressly endorse the Legal Assessor’s advice, they did not say that they did not accept it and can be taken to have done so. She was, therefore, told unequivocally that if she chose not to answer the question because “she feels it might prejudice her later” in relation to criminal or disciplinary proceedings, her choice could not be held against her and would have

no consequences adverse to her. She declined to answer the question. Having exercised that right, she was entitled to assume that she would not be found to have committed an act of perjury as a result. The tribunal gave no advance warning that they might adopt this course. This was a serious irregularity. [paras 11-12].

(2) Many of the tribunal's findings regarding the appellant's conduct in the six cases were justified. However, the overall determination was flawed in many significant respects, such that the decision on impairment would need to be re-taken. Some of the tribunal's errors revealed a lack of understanding and overstatement about what had occurred. Several of the sub-charges should not have been found proved. The flaws included the tribunal (a) finding the appellant to have strayed outside her expertise when giving evidence in criminal proceedings, when she had been pressed to answer a question by counsel in cross-examination and had twice stated that she was not an expert in the field [para 25]; (b) misstating expectations as to the citation of research papers [para 43,59,60,62]; (c) finding that the appellant had failed to pay due regard to the views of other witnesses when she had not [para 49]; (d) finding aspects of the appellant's evidence misleading when it was not [para 50]; (e) making inappropriate findings about dishonesty and deliberateness [para 54]; (f) inaccurately summarising the appellant's reasoning [para 135].

(3) From the perspective of both case management and understanding the context in which expert evidence was given in civil, family and criminal proceedings, it would have been desirable for the tribunal to have been chaired by a lawyer with judicial experience. Under the General Medical Council (Constitution of Panels, Tribunals and Investigation Committee) Rules 2015 Sch.1 r.4, the tribunal was obliged to maintain a list of tribunal members, including lay members. Under r.6(4), it was obliged to maintain a list of persons eligible to serve as tribunal chair, including "lay" members. A lawyer with judicial experience fell within the definition of a "lay member". There was nothing in the rules to prevent a lawyer with judicial experience from being appointed to chair a complex case, and it would have been better if such a power had been exercised in the instant case [para.138].

Salient points

- It is not enough for a tribunal to say that a witness lacked some credibility. It should state what conclusion it was reaching about the evidence that witness gave, and give reasons for reaching that conclusion [para 9].

- Where the legal assessor has given advice that a refusal by the witness to answer a question on the grounds of self-recrimination cannot be held against her, the tribunal cannot then hold a refusal to answer that question against the witness unless it had, before the question was put to the witness, stated that it was rejecting the legal assessor's advice. Otherwise, the witness was entitled to refuse to answer the question without the refusal being held against her [para 12].
- In a long and complex case it would be desirable for a lawyer with judicial experience to be appointed as chair [para 138] [NB this is not a reference to a Legally Qualified Chair].
- Where in an MPT hearing a witness has disclaimed expertise in an area and has answered a question only when pressed by counsel to do so, it is unfair to criticise her for straying outside her expertise [para 25].

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