MPTS Medical Practitioners Tribunal Service

Appeals Circular A02/22

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Learning points from recent appeals

Facts

- A review of previous case law and various principles arising from them at different stages in regulatory proceedings was undertaken in Henning v The General Dental Council [2022] EWHC 175 (Admin) including:
  - The consideration of how tribunals approach fact finding including a review of the principles arising from *Byrne v General Medical Council [2021] EWHC 2237 (Admin)*, *R (Dutta) v General Medical Council [2020] EWHC 1974 (Admin)* and *Khan v General Medical Council [2021] EWHC 374 (Admin)*
  - And the requirement to give reasons as considered in *Byrne v General Medical Council (*in particular in relation to 'credibility of witnesses') and *Southall v General Medical Council [2010] EWCA Civ 407*

- It is possible for the GMC to bring alternative charges against a practitioner even where the evidence for the potentially less serious charges is in contradiction to the more serious charges ('the primary case'). If so, it would be helpful for those alternative charges to be expressly identified as such. A tribunal can still consider the primary case, even where the practitioner has made admissions in respect of the alternative charges, where the admitted facts contradict the alleged facts underlying the primary case. Rahim v GMC [2022] EWHC 137 (Admin)

- When considering the test of dishonesty (as declared in *Ivey v Genting Casinos (UK) Ltd 2017] UKSC 67*), it is unnecessary (and potentially confusing) for a tribunal to refer to a "dishonest" state of mind at the first stage of the test, when it is considering the registrant's subjective state of mind about the facts, i.e. whether they believed the information they were imparting was untrue.

Recklessness (such as not being careful enough about ensuring the accuracy of the contents of a CV or application form) cannot be equated with dishonesty. Ahmedsowida v The General Medical Council *[2021] EWHC 3466 (Admin)*

- The second limb of the test in *Ivey* (the objective question) must be considered in light of findings made in relation to the first limb (i.e. what was the actual state of the individual's knowledge and belief as to the facts). Adequate weight ought to be given to each of the relevant aspects of a practitioner's state of mind. Maxfield-Martin v Solicitors Regulation Authority [2022] EWHC 307 (Admin)

Impairment and Sanction

- *Schodlok v GMC [2015] EWCA Civ 769* suggests that it may be permissible for a tribunal to undertake the exercise of cumulating findings of misconduct on some charges to make a determination of serious misconduct on others. If that is permissible at all, the exercise is supposed to involve the cumulation of *non-serious with other non-serious* misconduct findings; not *of one non-serious misconduct finding with another finding(s) of misconduct that is serious in its own right*. In the latter context, there is no good reason to cumulate; the quality of the conduct is already correctly expressed, without the need for any cumulation. Ahmedsowida v The General Medical Council *[2021] EWHC 3466 (Admin)*

- Tribunals should ensure that they are consistent with language used at the facts and impairment stages. Ahmedsowida v The General Medical Council *[2021] EWHC 3466 (Admin)*

- In cases where there has been a failure to reach proper standards in treating patients (rather than matters such as dishonesty or sexual misconduct), where a practitioner has retired:
  - it may be more difficult for a tribunal to assess current fitness to practise. A tribunal ought to fairly recognise the fact of the impact of retirement on the practitioner's ability to provide evidence of current practice but must assess fitness to practise (including insight and efforts at remediation) based on the evidence before it.
  - it may make a tribunal's decision on sanction difficult. A tribunal must consider whether any conditions are practical and workable, even if difficulties with practicality or workability are due to circumstances such as retirement. If conditions are not workable then a tribunal is entitled to consider whether suspension is the most appropriate sanction, in light of the public interest. Henning v The General Dental Council [2022] EWHC 175 (Admin)

- Sanction must be proportionate to the gravity of the misconduct and impairment found. Erasure for sexual misconduct is not automatic - tribunals should assess the seriousness of the misconduct on a case by case basis, and appropriately evaluate it against the relevant aggravating and mitigating factors before a sanction is imposed. General Medical Council v Ahmed [2022] EWHC 403 (Admin)

- Erasure is not the only conclusion that can lawfully be reached, even where serious and/or persistent dishonesty is shown. If erasure is not necessarily required, and therefore suspension could be a potentially legitimate outcome, a

tribunal can take into account the practitioner's skills including their longstanding competence in the role and their value to the profession (*Giele v General Medical Council [2005] EWHC 2143 (Admin)*). The weight to be attached to that is a matter for the tribunal. **Professional Standards Authority for Health and Social Care v Social Work England, Bennett [2021] EWHC 3593 (Admin)** [1]

- Undue weight should not be given to the fact that a doctor has been subject to an interim suspension order when imposing suspension as a sanction, but *Kamberova v NMC [2016] EWHC 2955 (Admin)*[2] makes clear that it is a factor that should, in fairness, nonetheless be taken into account, at least where the sanction is a short period of suspension. It is therefore a matter of judgment for the tribunal when making its multi-factorial decision as to the appropriate sanction. General Medical Council v Ahmed [2022] EWHC 403 (Admin)

Interim Orders

- In the unusual situation where the General Dental Council's Interim Orders Committee is asked to impose an interim order suspending a practitioner from practice, when a suspension order is already in place (in relation to unrelated matters) the IOC (and therefore the MPTS IOT under similar provisions within the Medical Act 1983 (as amended)) does have the power to impose a concurrent order of suspension, where it is necessary to promote public confidence. **Monica Bijlani v General Dental Council [2021] EWHC 3521 (Admin)** [3]

Kind regards
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[1] The link to the public judgment is not currently available.
[2] The link to the public judgment is not currently available.
[3] The link to the public judgment is not currently available.