Appeals Circular A02/24

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12 April 2023

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Professional Standards Authority for Health and Social Care v General Medical Council (Battah) [2022] EWHC 2075 (Admin)

Learning points

- Tribunals should ensure that they consider the gravity of a registrant's conduct. A deliberate and knowing breach of IOT (or any regulatory) conditions (for example a failure to notify others about the conditions or continuing to work when required by the conditions to stop) is a type of dishonesty which raises a prima facie case of considerable gravity going to each of the three limbs of the overarching objective. Such conduct is inherently serious (reiterating principles from *General Medical Council v Donadio [2021] 'Donadio'*). [1]

- A failure to comply with conditions or other restrictions imposed in the interests of patient safety could be significant when considering remediation and the gravity of the conduct, but also when considering which sanction may be most appropriate. The fact that a registrant's conduct *could* be capable of remediation is unlikely to be enough to impose a sanction of suspension rather than erasure. A tribunal should take care to assess the actual level of insight, remediation, or engagement with the regulator (or lack thereof), as opposed to the mere hope of a change of approach by the registrant.

- Tribunals should make clear that they have had proper regard to the issues/factors raised in *all* relevant paragraphs of the Sanctions Guidance ('SG') (even if the GMC's submission is for a lesser sanction) and ensure that they adequately explain their decisions on sanction.

[1] EWHC 562 (Admin)

The MPTS makes impartial decisions in doctors' fitness to practise hearings. The MPTS is part of the General Medical Council, but it is operationally separate and it is accountable to Parliament.
The GMC is a charity registered in England and Wales (1089278) and Scotland (SC037750)

- When departing from the Sanctions Guidance, clear reasons for this departure should be given. Tribunals should avoid relying on generalised statements that erasure would be a disproportionate sanction.

Background

This was an appeal brought by the Professional Standards Authority for Health and Social Care ('the PSA') pursuant to section 29 of the NHS Reform and Healthcare Professionals Act 2002, against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 10 November 2021, suspending Dr Battah ('B') from the medical register for a period of 12 months.

B was a locum consultant gynaecologist. The General Medical Council ('GMC') opened an investigation following complaints regarding his quality of care and record keeping.

On 19 September 2017, the Interim Orders Tribunal ('IOT') issued interim conditions on B's registration. B did not attend at the IOT, but service was fairly effected and he received a copy of the interim conditions and decision rationale. The interim conditions included express requirements that B:

- must be supervised in all of his posts by a clinical supervisor;
- must not work until his responsible officer (or their nominated deputy) had approved his clinical supervisor;
- must inform his employer and/or contracting body of the conditions on his registration.

Further concerns came to light during the course of the GMC's investigation, and B was referred to the Medical Practitioners Tribunal (MPT) on the grounds of misconduct based on around 100 clinical failures in relation to 13 different patients and that he failed to notify his employing Trust that his registration:

- may become subject to interim conditions and
- was subject to interim conditions from 19 September 2017.

B's employing Trust confirmed that B had not informed the Trust of the interim conditions and continued to work unsupervised. However, on 27 September 2017, the Trust had put their own restrictions on B's practice at local level, which prevented him from performing major gynaecological procedures without supervision.

At the hearing before the MPT, the GMC did not make any specific allegations as to B's state of mind in failing to notify his employing Trust of the interim conditions, that B worked without supervision during any part of the period when the interim conditions was in place (ie in breach of the terms of the interim conditions) or make any reference to the source of any obligation or duty to notify his employer of the interim conditions. The GMC provided the Tribunal with a redacted version of the interim conditions, but this did not show the requirement that B must not work until he had an approved supervisor.

B did not attend the Tribunal hearing or make representations. The Tribunal found nearly all of the clinical charges in relation to the 13 patients proved, having regard to the GMC's expert witness

evidence.

The Tribunal also found that, despite being aware of the obligation to do so, B failed to notify his employing Trust that his registration was subject to interim conditions from 19 September 2017. The Tribunal held that this was in breach of Paragraph 76 of Good Medical Practice ('GMP'), which states that doctors must, without delay, inform any organisations for whom they carry out medical work that they have had restrictions placed on their practice. The Tribunal did not find that B failed to notify his employing Trust that he may become subject to interim conditions, as it could not find any duty on the part of B to report the fact that he was under investigation by the GMC.

The Tribunal subsequently determined that B's fitness to practise was impaired by reason of misconduct, that he had no insight and had made no attempt to remediate his behaviour. The GMC submitted that suspension of B's registration would be the most appropriate sanction. The Tribunal decided to suspend B's registration for a period of 12 months and directed a review hearing, because, amongst other reasons, the conduct was capable of remediation.

Grounds

The PSA appealed on the basis that, in concluding that the appropriate sanction was a 12-month suspension rather than erasure, the Tribunal's decision did not sufficiently recognise the gravity of B's conduct.

The PSA's appeal was brought on three grounds:

- Ground 1 - The failure (by the GMC and/or the Tribunal at the hearing itself) to charge B with the following three additional matters amounted to a serious procedural irregularity:
  - dishonestly or recklessly failing to report the interim conditions to his employer and others whom he was expressly required to notify
  - continuing to work and treat patients when he knew that this was contrary to the terms of the interim conditions (for example not ceasing to work while arrangements were put in place for him to be supervised by a clinical supervisor who had been approved by his responsible officer)
  - that B's conduct amounted to a regulatory breach.
- Ground 2 - That the GMC wrongly decided to show the Tribunal a heavily redacted version of the interim conditions rather than the full version, or alternatively the Tribunal should have asked to see it. The redacted version presented to the Tribunal did not reveal any of the reasoning which led to the imposition of the interim conditions, the statutory grounds for doing so or the actual conditions which had been imposed on B. The PSA submitted that the terms of the interim conditions were relevant as there was a charge against B that he had failed to inform his employers of the interim conditions, which the Tribunal was required to determine.
- Ground 3 - The Tribunal failed to apply the Sanctions Guidance ('SG'), or sufficiently to explain its application of the SG, or alternatively failed to give adequate reasons for departing from it.

Judgment

The appeal was heard by Mr Justice Linden. B did not attend and was not represented.

Mr Justice Linden considered Grounds 2 and 3 first, as the GMC made concessions in relation to those grounds, and then considered Ground 1.

Ground 2 – The redacted interim conditions

Mr Justice Linden accepted the GMC's concession that the full terms of the interim conditions ought to have been drawn to the attention of the Tribunal at stages two and three of the hearing; when considering impairment and sanction [9 and 54]. He also accepted that there was no need to show the Tribunal the terms of the interim conditions at stage one, as the matter was not charged as breach of the interim conditions (albeit erroneously; see Ground 1).

However, the Judge said that the Tribunal ought to have seen the full terms of the interim conditions for two reasons:

- First, "it is one thing for a doctor to fail to act in accordance with the generally applicable rule in paragraph 76 of the GMP; it is another for them to fail to comply with an express condition set out in an interim conditions to which they are subject and of which they are aware, bearing in mind that notification was required as a condition of B being licensed to practise, and in the interests of patient safety"[31].
- Secondly, "it was highly relevant that the conditions in the interim conditions required [B] to stop work until arrangements for his clinical supervision were approved, whereas there was no evidence that he did so" [31]. At paragraph 182 of the determination, the Tribunal found that B did not stop working, and further, the Tribunal found that B knew of his obligation to inform, but deliberately did not do so. However, the Tribunal did not consider whether B had worked without the relevant supervision arrangements being put in place pursuant to the interim conditions (ie a further regulatory breach) [32].

Ground 3 – Failure to apply the SG

Mr Justice Linden accepted the GMC's concession that Ground 3 was well-founded and that an important flaw in the Tribunal's decision was that having found that B was aware of the terms of the interim conditions, but continued working and did not inform his employer, it failed to consider the gravity of B's conduct and the seriousness of such a case, as explained by Justice Collins Rice in *Donadio [55]:*

> *"62. …this was not just any regulatory breach…it was a breach of an order imposed directly on Dr Donadio after regulatory and legal process…. The necessary preconditions for the protection of the public and for public confidence in the professions were not fulfilled…*
>
> *63. It was a breach which was knowing and deliberate….the lack of submission to a regulatory*

process he was already personally subject to…adds to the gravity of the breach of the order itself….

64. These facts, as found by the MPT, raised a prima facie case of considerable gravity, going to the issues of public wellbeing, public confidence and the maintenance of professional standards. Moreover, the particular conditions imposed by the IOT on Dr Donadio included transparency conditions. They expressly required him, by way of anti-avoidance, to declare the conditions imposed on him to those with a proper professional interest in knowing about them. Non-disclosure was itself, therefore, not only a species of dishonesty but a further breach of the explicit requirements of the IOT order."

- Mr Justice Linden noted that this issue hardly featured in the decision on B's impairment of fitness to practise, and in his view, "it was clearly relevant in that it indicated a willingness to practise in a way which was inconsistent with the applicable regulatory framework, and to do so by failing to comply with conditions which were imposed in the interests of patient safety" [55].

- For the reasons explained in Donadio, Mr Justice Linden concluded that the Tribunal were wrong not to have regarded the interim conditions issue "as significant in relation to the question of the scope for remediation, nor relevant to seriousness for the purpose of deciding whether B's behaviour was fundamentally incompatible with being a doctor" [56].

- However, the Judge agreed that the deficiencies in the charge, and in particular the failure to highlight the fact that there had been breaches of the terms of the interim conditions itself, and that they were knowing and deliberate, may well account for the Tribunal's approach to the question of seriousness [80].

The Judge also agreed that in relation to B's conduct as a whole, the Tribunal did not have sufficient regard to the SG in reaching its decision and/or did not sufficiently explain why this was not erasure case [57]:

- Mr Justice Linden noted that the Tribunal referred to paragraphs of the SG which suggested situations where suspension may be appropriate, although it did not set them out [58]. He said paragraphs 93 and 97 "suggest that suspension may be appropriate where there is evidence of insight and remediation, no evidence of a failure to engage with the regulatory process, and no significant risk of repetition" but that "[t]hey do not suggest that the mere hope of a change of approach by the registrant, if the sanction is suspension rather than erasure, is enough" [60]. He said the Tribunal's findings on the issues of insight, remediation, lack of engagement with the regulatory process and risk of repetition all therefore supported the conclusion that this was <u>not</u> a suspension case [60].

- When considering the GMC's submissions at the hearing that "*the case did not quite reach the level that would be required to erase the doctor's name from the medical register, because the conduct could be capable of remediation*" [34], the Judge was surprised at this position, given that the Tribunal had already found that B demonstrated no insight or remediation. The Judge considered that Tribunal's approach, based on the mere *possibility* that B's attitude might

change if he was given a further opportunity, appeared inconsistent with the SG. He said "this does not appear to have been appreciated by the Tribunal. If it was appreciated, [it] did not explain the reasons which led it to conclude that, nevertheless, the sanction should be suspension" [60].

- The Judge confirmed that the Tribunal's error was compounded by the fact that the section of the SG on erasure (paragraphs 108 and 109), to which to Tribunal did not refer, includes for example: "*Erasure may be appropriate even where the doctor does not present a risk to patient safety, but where this action is necessary to maintain public confidence in the profession. For example, if a doctor has shown a blatant disregard for the safeguards designed to protect members of the public.*" In relation to the section of the SG dealing with "Failing to provide an acceptable level of treatment or care" (paragraphs 129,130 and 132 of the SG), he also said that on the basis of the Tribunal's findings "as to insight, remediation, and risk of repetition, these passages also pointed towards erasure" [61-63]. Mr Justice Linden stated that the Tribunal did not adequately explain its decision on sanction in light of these sections of the SG [63].
- The Judge also had regard to the views of Mr Justice Murray in the case of General Medical Council v Saeed [2020][2] ('Saeed') who said "*The Tribunal is obliged to have proper regard to the Sanctions Guidance and, when departing from it, to do so for sound reasons and to state those reasons clearly in its decision … it is not sufficient to rely on a generalised assertion that erasure would be a disproportionate sanction*" [50]. Mr Justice Linden said that in this case, the Tribunal's "statements that the case did "*not cross the threshold for necessitating erasure*" and "[*B's] registration is not fundamentally compatible with continued registration*" were the sort of generalised statement which was said to be insufficient by Murray J in the case of Saeed" [63].

Whilst Mr Justice Linden considered that the reasoning of the Tribunal on sanction in particular was wrong, he acknowledged that the GMC's submission was for a sanction of suspension, and the Tribunal "can therefore be forgiven for focusing on the parts of the [SG] which dealt with suspension, and whether this was an appropriate sanction." However, he did conclude that Ground 3 provided a basis for allowing the appeal [64].

<u>Ground 1 – Undercharging</u>

Mr Justice Linden then considered Ground 1 and each of the potential additional charges in turn:

- He first considered the GMC's failure to charge B with dishonestly and recklessly failing to report the interim conditions to his employer. Whilst he accepted that it would be good practice to specifically allege that a failure was deliberate and knowing, he doubted the PSA's contention that that an allegation of dishonesty or recklessness should be made in this type of case as a matter of good practice and said that he would not have allowed the appeal on the basis of the failure to charge, in terms, B's state of mind. In arriving at this decision, Mr Justice Linden:

[2] EWHC 830 (Admin), at Paragraph 77

- agreed with Collins Rice J's comments made at Paragraph 58 of Donadio, in that a "deliberate and knowing failure to notify, or otherwise comply with an interim conditions is a type of dishonesty. To introduce into the charge an additional or alternative contention that the behaviour was dishonest or reckless may therefore distract from the real issue in relation to the charge". In summary, the question of why a registrant deliberately and knowingly acted in breach of an interim conditions may not add much (either in the registrant's favour or against) in the run of cases [72].
- acknowledged that the Tribunal in this case dealt with the matter on the basis that this was an allegation of knowing and deliberate failure to notify [74].

- The Judge next considered the GMC's failure to charge B with a specific regulatory breach. He stated that he would not have allowed the appeal on the basis of this failure to charge. In arriving at this decision, the Judge:
  - agreed with the GMC, that a regulatory breach is implicit in any regulatory charge
  - concluded that there was no unfairness to B, as B was in a position to meet the case by putting in evidence that he was not aware of any other regulatory or other requirement to notify his employer
  - acknowledged that the Tribunal understood that there was an allegation of regulatory breach as they concluded that B's failure to notify the employer of the conditions amounted to a breach of paragraph 76 of the GMP (and rejected the allegation that B failed to notify his employer of the fact of an investigation on the grounds that it could not identify any duty to) [75].
- Mr Justice Linden did, however, conclude that there was undercharging in relation to the GMC's failure to allege that B worked in breach of an Order to stop work until such time as approved arrangements for clinical supervision were in place [76]. The failure to charge this was material and amounted to a serious procedural irregularity [79]. The Judge:
  - rejected the GMC's submission that it was implicit in an allegation of failure to notify an employer that an order has been made, that it was alleged that B had also continued to work when he was prohibited by the interim conditions from doing so [76].
  - stated that if B worked when he was required to stop work (ie in breach of the conditions), this increased the seriousness of the allegation against him, as patient safety would have been at risk (in contrast to a case where a registrant may for example fail to notify his employer, but is on holiday during the relevant period and did not work, which would be significantly less serious [76].
  - stated that in the interests of fairness, it is important that an allegation that, in breach of an interim conditions, a registrant continued to work in when the appropriate supervisory arrangements were not in place, is pleaded. This is because it affects the scope of the relevant evidence [77]. Although in this case the Tribunal made a finding

that B had worked without informing his employer of the interim conditions, it "did not appreciate, in making that finding, that [B] had worked in breach of the express terms of the interim conditions because this had not been charged and it had not been shown the full terms of the interim conditions" [78].

- said "[T]he real point was that there was evidence that [B] had knowingly and deliberately breached the terms of the interim conditions, which included conditions which required to be fulfilled if he was to remain licensed. Not only had he not informed his employer; if he had worked, he had done so in circumstances which, in the view of the Interim Orders Tribunal, gave rise to a risk to patient safety, and he had done so knowing, it appears on the evidence, of the express terms of the interim conditions" [79].
- said that even if the Tribunal "had seen the terms of the interim conditions and had fully appreciated that the effect of its findings was that [B] had knowingly and deliberately acted in breach, any decision maker would be reluctant to sentence on a basis other than that which was charged" [81].

Overall Mr Justice Linden concluded that in his view "the protection of the public, and the maintenance of confidence in the profession and of professional standards, all support the conclusion that deliberate breach of an interim conditions should have been specifically charged in this case and that the outcome of the proceedings before the MPT, whatever it was, should have taken proper account of this aspect of the case" [82].

Outcome

Mr Justice Linden allowed the appeal, but stated that he was not in a position to say that a full appreciation of the interim conditions aspects of the case on the part of the Tribunal could not have tipped the balance from a suspension case to an erasure case [82]. He remitted the matter back to the same Tribunal (if reasonably practicable), so that the charge regarding the interim conditions breach could be reframed (and B could provide evidence if he chooses to do so), all relevant findings in relation to the interim conditions to be revisited at all stages in light of that and for the Tribunal to consider the issue of sanction in light of any findings, the appeal judgment and the judgment in Donadio. Mr Justice Linden highlighted that a conclusion needed to be reached having regard to the case as a whole, not just the interim conditions issue.

Kind regards
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