MPTS Medical Practitioners Tribunal Service

Appeals Circular A02/25

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General Medical Council & Professional Standards Authority for Health and Social Care v Dugboyele [2024] EWHC 2651 (Admin)

Learning points

- A finding of impairment may follow even where there has been adequate remediation and adequate reduction of future risk of repetition. In cases where there is a low risk of repetition, the tribunal must give proper consideration to all three limbs of the overarching objective[1].

- In cases of sexual harassment:

  - it is no less sexual harassment simply because the registrant had no intention to take matters further.
  - the tribunal must consider whether a finding of no impairment would leave the public with a sense that doctors can "get away with" years of sexually harassing their colleagues and/or that sexual harassment is not treated with sufficient seriousness by the tribunal.

- In the unusual case where a party cites principles from the Sanctions Guidance ('SG') at impairment stage (ie in sexual misconduct cases where the SG underlines the serious nature of sexual harassment, sexual misconduct and abuse of power), the tribunal should properly consider these submissions and address them in their reasoning so that it is sufficiently clear from the tribunal's reasons

1 (1) Protecting, promoting and maintaining the health, safety and well-being of the public. (2) Promoting and maintaining public confidence in the profession. (3) Promoting and maintaining proper professional standards and conduct.

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)

why the submissions on the SG failed, notwithstanding the fact that the sanctions stage has not yet been reached.

Background

This was an appeal brought by the GMC, pursuant to section 40A of the Medical Act 1983 ('the Act'), against a Medical Practitioners Tribunal's ('the tribunal's) decision dated 16 May 2023 that Dr Dugboyele ('Dr D's) fitness to practise was not impaired by reason of misconduct. The Professional Standards Authority for Health and Social Care ('the PSA') joined the appeal as additional appellant pursuant to Section 40B of the Act.

Dr D was employed by the Harrogate Trust ('the Trust') as a specialty grade doctor in obstetrics and gynaecology. It was alleged that during his employment, Dr D sexually harassed several female junior colleagues in that he kissed, stroked, hugged and touched them, even when they repeatedly made clear to him that this conduct was unwelcome. Dr D received a written warning from the Trust in 2018 for 'over familiarity' with colleagues, but the behaviour continued. In Autumn 2020, the Trust commenced disciplinary proceedings against Dr D having found sufficient evidence to point to gross misconduct. A disciplinary meeting was scheduled for October 2020, but Dr D resigned. However, he carried on working at the Trust until March 2021, after which time the Trust referred him to the GMC.

The GMC brought allegations against Dr D of unlawful sexual harassment relating to sex, by virtue of Section 26 of the Equality Act 2010, in that he engaged in unwanted conduct related to sex which had the purpose or effect of violating the dignity of or creating an intimidating, hostile, degrading, humiliating or offensive environment for seven female colleagues between 2016 and September 2020, with a minimum of 45 specific instances of misconduct. The GMC did not allege sexual motivation. At the hearing, when asked by the tribunal to clarify if they were alleging sexual motivation, the GMC confirmed that they were not.

Dr D admitted some of the allegations, and the ones that were not admitted were found proved by the tribunal. The tribunal went on to find that Dr D's fitness to practise was not impaired. Following this, the tribunal determined to issue a warning to Dr D.

Judgment

The GMC appealed on the following grounds:

- When considering impairment, the tribunal gave excessive weight to remediation and/or failed properly to consider or address in its reasoning the impact of no finding of impairment on (a) public confidence in the medical profession and/or (b) proper professional standards and conduct (Ground One).

- The tribunal failed to have regard to the guidance in the SG on the seriousness of sexual harassment, sexual misconduct and abuse of power and/or failed to

consider, or give adequate reasons for rejecting, the GMC's submissions on the SG (Ground Two).

- The tribunal's conclusion, that a finding of impairment was not necessary to uphold the overarching objective, was wrong (Ground Three).

The PSA supported the GMC's three grounds of appeal and advanced two additional grounds:

- The tribunal wrongly failed to address the evidence of Dr D's motive for his misconduct, consequently failing to consider its significance for the issue of impairment of fitness to practise and, in turn, the appropriate sanction (Ground Four).

- The tribunal failed to give adequate reasons for its decision (Ground Five).

Outcome

The appeal was heard by Mr Justice Murray.

- Ground One – the GMC submitted that the tribunal was wrong to focus its analysis almost exclusively on Dr D's remediation and the risk of repetition [48] and Mr Justice Murray found this and the submission that "where misconduct is particularly serious and not related to clinical competence, a finding of impairment is often necessary to uphold the overarching objective, even if the misconduct has been remediated, and there is no risk of repetition" 'persuasive' [49]. Mr Justice Murray agreed that:

    - the tribunal "appeared to jump from the conclusion that there is no risk of repetition to its finding of no impairment, namely, on the basis of the first of the three limbs of the overarching objective" [49].

    - "in addressing the second limb, the tribunal appear to have conflated public confidence in the profession with public confidence in Dr [D's] remediation" [49]. Mr Justice Murray went on to say that the tribunal did not appear properly to have considered whether a finding of no impairment in these circumstances would leave the public with a sense that doctors can "get away with" years of sexually harassing their colleagues and/or that sexual harassment is not treated with sufficient seriousness by the tribunal [49].

    - the tribunal did not properly consider the third limb of the overarching objective. He accepted the GMC's submissions that "in a case of serious professional misconduct, comprising many instances of misconduct against junior female colleagues, despite the protests of those colleagues over a number of years and after having been formally warned in relation to that conduct by a senior colleague, a decision that finds no impairment sends a signal to the profession that sexual harassment and abuse of power are not taken sufficiently seriously by the tribunal" [50].

He concluded that a finding of impairment may follow even where there has been adequate remediation and adequate reduction of future risk of repetition [51].

Mr Justice Murray stated that the tribunal failed to give proper consideration to the second and third limbs of the overarching objective and that a finding of impairment of fitness to practise was necessary notwithstanding full remediation and no risk of repetition [54].

The first ground therefore succeeded.

- Ground Two – The GMC submitted that although the SG was not directly applicable (as sanction was never under consideration), it was still relevant as it underlines the serious nature of sexual harassment, sexual misconduct and abuse of power and therefore the tribunal should have had regard to it at the impairment stage or give adequate reasons for departing from it. The GMC submitted that it did not know whether the tribunal considered whether the SG was irrelevant at the impairment stage and could be ignored or whether the tribunal had considered the GMC's submissions on the SG but decided, nonetheless, that this case justified a departure from the norm (56-58]. Mr Justice Murray said that:

  - had the tribunal properly engaged in its reasoning with limbs two and three of the over-arching objective (Ground One), "then assuming, after doing so, that it made a determination of non-impairment, it would have been sufficiently clear that the tribunal considered this case to be a departure from the norm, without its having explicitly engaged with the GMC's submissions on the SG" [60].

  - "however, that the tribunal should properly have considered the GMC's submissions on the SG, and had it done so, it is likely that it would, at least to some extent, addressed those submissions in its reasoning or it would, at least, have been sufficiently clear from the tribunal's reasons why the GMC's submissions on the SG had failed" [60].

The second ground therefore succeeded.

- Ground Three – Mr Justice Murray took the view that this was in essence a reformulation of Ground One and that the tribunal's conclusion on impairment was wrong for the reasons given in relation to the earlier ground [66]. The third ground therefore succeeded.

- Ground Four – As to motive, the PSA submitted that there were strong grounds for concluding that Dr D's motivation was sexual (although as indicated above, this had not been alleged by the GMC) [68]. Dr D asserted that his actions were not sexually motivated and instead demonstrated friendliness [69]. Mr Justice Murray:

  - stated that Dr D's "assertion that his conduct was motivated purely by "friendliness" is simply not capable of belief, given the factual findings of the

Tribunal, and bearing in mind the many protestations by the complainants to Dr [D] over a number of years and the official warning given to him by a senior colleague in 2018, all of which he ignored" [71]

- concluded that Dr D's conduct was "patently sexually motivated conduct" and was surprised at the GMC's concession [at the hearing] that it was not alleging sexual motivation [72].

- concluded that apart from one incident, most, if not all of the other instances of Dr D's serious professional misconduct found by the tribunal were sexually motivated*, as there was no credible innocent explanation for the conduct, given the factual findings of the tribunal. He also said "[I]t is no less sexual harassment simply because he had no intention to take matters further" [73-74].

The fourth ground therefore succeeded.

* Although Mr Justice Murray concluded that Dr D's conduct was sexually motivated, in the absence of a specific charge of sexual motivation brought by the GMC[2], a tribunal would have to consider the notice of allegation received by the practitioner[3] and therefore the case they are required to meet and in respect of which they have formulated a defence. If the tribunal considers amending the allegation at the hearing to include a charge of sexual motivation[4], it must give the parties the opportunity to provide submissions on the point, and the amendment can only be made if it can be done so *without injustice*.[5]

- Ground Five – Mr Justice Murray noted that this did not add much to Grounds One, Two and Four, all of which succeeded. He said "[T]he inadequacy of the tribunal's reasons for its finding of non-impairment despite Dr [D's] sexual misconduct is, in particular, an important aspect of Ground One. [76].

The fifth ground therefore also succeeded.

As all five grounds of appeal succeeded, Mr Justice Murray quashed the decision on impairment (and therefore the warning) and substituted a finding that Dr D's fitness to practise was impaired by his serious professional misconduct. The case was remitted to a differently constituted tribunal to consider the issue of sanction.

Kind regards

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[2] A decision on how to charge a case ultimately lies with the GMC. It should be noted that following this judgment, the GMC has updated its 'Guidance on drafting allegations' document to provide that in cases where it is are alleging sexual harassment as defined in s26(2) of the Equality Act, it should usually also include an allegation that the conduct was sexually motivated.
[3] Rule 15 of Fitness to Practise Rules 2004 (as amended)
[4] Rule 17(6)(a) of Fitness to Practise Rules 2004 (as amended)
[5] Rule 17(6)(b) of Fitness to Practise Rules 2004 (as amended)