MPTS Medical Practitioners Tribunal Service

Appeals Circular A03/22

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Sawati v General Medical Council *[2022] EWHC 283 (Admin)*

Learning points

- Reiteration of guidance on how to approach the issue of good character from previous case law that:
  - cogent evidence of positive good character is relevant to consideration of dishonesty. It can go to credibility – how reasonable it is to believe or disbelieve what an individual says. It can also go to propensity – the probability that they have misconducted themselves.
  - the weight to be attached to it is in the end a matter for the tribunal undertaking the factual evaluation.
  - the significance of such evidence should not be overstated; it should not detract from the primary focus on the evidence directly relevant to the alleged wrongdoing.
  - the weight given to an unblemished record may properly be less in the case of a doctor at an early stage in their career than a doctor with an established track record – accepting also that inexperience may be a correspondingly weightier consideration in understanding what happened.
  - tribunals' decisions must be read fairly, as a whole, in context and having regard to their structure - as to good character in particular, it is sufficient to be able to infer from all the material that it has been taken properly into account.
- Doctors are properly and fairly entitled to defend themselves. When considering whether it is fair to use a doctor's 'rejected defence' when considering insight and/or to aggravate any sanction imposed on them, a tribunal may find it helpful to think about four things:

- how far state of mind or dishonesty was a primary rather than second-order allegation to begin with (noting the dangers of charging traps in adding 'dishonestly' to a primary allegation to aggravate it disproportionately, colour any denial of the primary allegation with dishonesty or characterise denial of the dishonesty as itself dishonest or lacking insight) – or not an allegation at all;
- what, if anything, the doctor was positively denying other than their own dishonesty or state of knowledge;
- how far 'lack of insight' is evidenced by anything other than the rejected defence; and
- the nature and quality of the defence, identifying clearly any respect in which it was itself a deception, a lie or a counter-allegation of others' dishonesty.

- Sanction must be proportionate to the gravity of the misconduct and impairment found. Erasure for dishonesty is not automatic, so these cases are not exempt from the general requirement to assess the seriousness of misconduct in every case before a sanction is imposed. Tribunals should also objectively and appropriately evaluate the offending behaviour by reference to the relevant aggravating and mitigating factors. The nature and extent of dishonesty may be variable and must be evaluated on a case by case basis.

Background

This was an appeal made by Dr Sawati ('S'), pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 17 August 2021 erasing her name from the medical register.

The allegations against S related to misconduct, in respect of six separate incidents over a period of four years between January 2014 and January 2018, and deficient professional performance arising during her foundation clinical training. The Tribunal found the majority of the allegations proved and that:

- the following matters amounted to misconduct:
  - patient records/dishonesty – she dishonestly retrospectively added to a note in a patient's record (without making clear it was retrospectively added), in a deliberate attempt to give the impression that she had spoken to her supervisor about Patient A's respiratory symptoms when in fact she had not and had only discussed the patient's aggressive behaviour. The patient died of respiratory causes the morning after S had seen him.
  - shift-swapping/dishonesty - in January 2017, S told the hospital rota manager she had agreed with another doctor to swap shifts. The Tribunal found that although S had discussed shift-swapping with another doctor, the other doctor had not agreed to swap the shifts and had positively refused to do so. The Tribunal rejected the idea that there could have been a misunderstanding and found S had therefore been dishonest.
  - unauthorised absence - on 7 March 2017, while on duty in A&E, S went missing and was found in the women's changing rooms lying down on a bench, wrapped in a blanket with her eyes closed. The Tribunal accepted she had been unwell but found she had been absent for around two hours without telling anyone she was ill.

- interview/dishonesty – during an interview for a core training position on 31 January 2018, having noted that two of her training certificates – advanced life support (ALS) and advanced trauma life support (ATLS) – had expired, she positively stated she was booked on the ATLS course, when she was not, and knew she was not and was therefore dishonest. (A similar allegation was made in relation to the ALS course, but it was found that she was indeed booked on the ALS course in May 2018.)

- S also demonstrated deficient professional performance, based on a GMC performance assessment carried out between November and December 2018 which found S's performance was:
  - 'unacceptable' in one area (record keeping) and
  - gave 'cause for concern' in four others (maintaining professional performance, assessment, clinical management, working with colleagues).

The Tribunal found S had limited insight and remediation of the misconduct and was impaired by reason of both misconduct and deficient professional performance. The Tribunal said that "*With regard to Dr Sawati's insight into her dishonesty, her insight remains partial at best. Her failure to tell the truth at the hearing is further evidence of her lack of insight*" and concluded that erasure was necessary in the public interest.

Grounds

S appealed the Tribunal's decision on two grounds:

- the dishonesty findings were unsustainable. S said that on the face of its determination, the Tribunal only considered her good character and her problems with communication after it found proved the first finding of dishonesty (patient record), which was procedurally wrong. S said that it was established that these factors are importantly relevant to whether there has been dishonesty in the first place and should therefore have been considered before any conclusion on dishonesty was reached. She also said that that mistake then infected the subsequent findings of dishonesty as well.

- that on any basis the sanction of erasure was wrong and/or procedurally unfair.

Judgment

The appeal was heard by Mrs Justice Collins Rice.

Ground 1 – S suggested that the Tribunal misapplied the law on the relevance of good character to approaching determinations of dishonesty by arriving at the view (in relation to the first misconduct allegation) that S knew how to make retrospective entries in the medical records, but had tried to conceal that the entry in the first misconduct allegation was made retrospectively before then taking into account S's good character and the evidence of the Performance Assessment in relation to her poor record keeping [51-52].

Mrs Justice Collins set out the correct approach to good character from previous case law as follows [53-56]:

- "'cogent evidence of positive good character' is *relevant* to consideration of dishonesty, although the *weight* to be attached to it is in the end a matter for the Tribunal."[1]
- The relevance of good character has two aspects: "First, it can go to credibility – how reasonable it is to believe or disbelieve what an individual says. Second, it can go to propensity – the probability that they have misconducted themselves. It may be considered less likely that an erstwhile blameless person has seriously misconducted themselves if they have never done so before. Again, the weight to be attached to good character is a matter for the Tribunal undertaking the factual evaluation."[2]
- The significance of good character evidence should not be overstated; "it should not detract from the primary focus on the evidence directly relevant to the alleged wrongdoing."[3]

Mrs Justice Collins said that in this case, S's good character "was a formally 'agreed fact' between the parties at the outset of the Tribunal proceedings"[57] and "the Tribunal had been provided with accurate written legal advice on three specific issues: witness credibility and memory, dishonesty, and good character" [58-59] and included a summary of this legal advice, including that S was "*entitled to a good character direction*", before turning to its analysis of the evidence and its factual findings [60]. She did not agree with the criticism that, effectively that the Tribunal had made up its mind about credibility before it considered good character because:

- taking into account the guidance from recent authorities about the approach needed on such a question[4] "[T]he Tribunal's decision must be read fairly, as a whole, in context and having regard to its structure….. Unless there is a compelling reason to the contrary, it is appropriate to take it that a tribunal has understood its functions and fully taken into account all the evidence and submissions. As to good character in particular, it is sufficient to be able to infer from all the material that it has been taken properly into account (Khan[5])." [63]
- "the Tribunal had clear and correct advice on good character, which it recited in an accurate summary at the outset of its determination of facts. It gave itself a self-direction….The challenge that it should have done so a few sentences or even paragraphs earlier, or did not sufficiently explain *how* it reached the conclusions it did consistently with its self-direction, is in my view an invitation to narrow textual analysis, and not sustainable in itself as a sign of serious procedural irregularity, unfairness or defective conclusion." [64]
- "The Tribunal properly maintained its 'primary focus' on the *specific* evidence directly relevant to the alleged wrongdoing" [65] and "[S], and other readers of the determination, can follow sufficiently why the Tribunal did not accept [S's] position." [66]

[1] Donkin v Law Society [2007] EWHC 414 (Admin)
[2] Wisson v Health Professions Council [2013] EWHC 1036 (Admin)
[3] Martin v SRA [2020] EWHC 3525 (Admin)
[4] Martin v SRA, supra and GMC v Awan [2020] EWHC 1553 (Admin)
[5] Khan v GMC [2021] EWHC 374 (Admin)

- The Tribunal did not apparently give the good character evidence conclusive, or perhaps significant, weight, but that:
  - "the Tribunal was entitled to weigh the *specific* factors relating to the actual events more decisively than the *general* factors relating to credibility and propensity, not least given it had seen and heard [S] for itself and, as is agreed, been properly directed on the correct approach to assessing credibility. The importance of general factors is not to be 'overstated.'" [68]
  - "the weight given to an unblemished record may properly be less in the case of a doctor at an early stage in her career than a doctor with an established track record – accepting also that inexperience may be a correspondingly weightier consideration in understanding what happened." [69]
  - "'decisions as to the weight to be attached to particular parts of the evidence are pre-eminently a matter for the fact finder and ought not to be disturbed on appeal unless the decision is one that no reasonable tribunal could have reached. (Martin v SRA at paragraph 54)" [70]

Mrs Justice Collins concluded that the Tribunal's decision on the first allegation of dishonesty (patient record) "is one that was at least open to it on the totality of the evidence, properly addressed" and there was no significant irregularity in the Tribunal's approach or reasoning "sufficient to render its decision opaque or unfair" and that the suggestion that this alleged defect must therefore also infect the other findings of dishonesty must also fail. [71]

Ground 2 – when considering whether the sanction decision was wrong and/or procedurally unfair, Mrs Justice Collins considered the case law dealing with the 'rejected defence' issue or "how a professional can have a *fair* chance before a Tribunal to resist allegations, particularly of dishonesty, without finding the resistance itself *unfairly* counting against them if they are unsuccessful" which arises at both impairment and sanction stage. [75] She set out the two possible routes to which a rejected defence could count against an individual:

1. as showing a 'lack of insight'. "As a general principle, insight – an acknowledgment and appreciation of a failing, its magnitude, and its consequences for others – is essential for that failing to be properly understood, addressed and eliminated for the future….If a doctor's performance or conduct is faulty, but they do not have insight into that, that can give good grounds for concern that they are unlikely to be able to address and remediate it, and hence that they pose a continuing risk." [76]

   However, she highlighted the potential trap where "the failing in question is a defect of honesty…..Dishonesty is often said in general to be 'difficult to remediate'; it tends to be viewed as a defect of character. But if a doctor whose career is on the line denies dishonesty and finds their defence rejected, they are at risk of being found for that reason to 'be in denial' about, or 'lack insight' into, their fault – and 'difficult to remediate' is converted into 'irremediable.' [77]

2. "'not telling the truth to the Tribunal'. How a professional responds to formal proceedings may be relevant to an overall assessment of their professionalism: putting the public's interests ahead of their own, integrity

and candour, and other important considerations may be engaged, as well as insight and remediability. Lying to Tribunals and putting forward disingenuous or meretricious defences cannot be expected to be consequence-free." [78]

Mrs Justice Collins identified the issue where a doctor unsuccessfully defends a dishonesty allegation, "they are at risk of being found for that reason not to have told the Tribunal 'the truth' (about being dishonest) and therefore to be compounding the dishonesty – a predicament labelled before now as Kafkaesque" [79]. She said there were "two important and fundamental public policy interests [are] in tension here. The first is the right to a fair trial for doctors facing charges involving dishonesty, with a proper opportunity to resist potentially career-ending allegations. The second is the necessity for protecting patients and the public, who place a huge amount of trust in doctors (as indeed they must), from practitioners on whose honesty and integrity they cannot rely. These principles may be simply stated. How the tension between them is resolved on the facts of individual cases may be difficult." [80]

She went on to say that "the way the courts reconcile the competing public interests engaged seems highly fact-sensitive" and that in order to consider how the law and principles about rejected defences applied to S's case, "it was necessary to examine the caselaw in some detail, looking at both the articulation of principle and the patterning of facts" [82]. She highlighted the following matters:

- "the danger of 'oppression' which lurks in putting doctors in a position not only of having to defend allegations of misconduct but also of having to defend their defences" articulated by Lord Hoffmann in Misra v GMC [2003] UKPC 7 at paragraph 17. She said "[T]hat danger of oppression needs to be recognised by Tribunals also, approaching evaluative judgments about sanction. The danger lies not only in bringing secondary charges of dishonesty. It lies also in the Tribunal's established ability to take into account conduct with which a doctor has not been formally charged at all." [82-83]

- Nicholas-Pillai v GMC [2009] EWHC 1048 (Admin) including:

  - the starting-point statement of principle at paragraph 19 that "the attitude of the practitioner to the events which give rise to the specific allegations against him is, in principle, something which can be taken into account either in his favour or against him by the panel, both at the stage when it considers whether his fitness to practise is impaired, and at the stage of determining what sanction should be imposed upon him" [84] and
  - (with reference to paragraph 17 of that case) the "distinction….between proceedings involving allegations of dishonest conduct ….and proceedings which do not involve allegations of dishonest conduct but where the allegations are defended dishonestly. The former may be considered in the round, including conduct at the hearing as part of the overall picture, but the latter ought fairly to be separately charged." [86]

- "Maintenance of innocence at a Tribunal should not automatically result in a finding of failure of insight: it is of potential relevance but its relevance should be

properly considered in context" (as considered in Motala v GMC [2017] EWHC 2923 (Admin) which was a case involving sexual impropriety). [87-88]

- Comments made in GMC v Khetyar [2018] EWHC 813 (Admin) that "no sanction was to be imposed on him for his denials as such; however insight requires that motivations and triggers be identified and understood, and if that is possible at all without there first being an acceptance that what happened did happen it will be very rare, and any assessment of ongoing risk must pay close attention to the doctor's current understanding of and attitude towards what he has done." [90-91]

- "an accused professional has the right to advance any defence he or she wishes and is entitled to a fair trial of that defence without facing the jeopardy, if the defence is disbelieved, of further charges or enhanced sanctions" (GMC v Awan [2020] EWHC 1553 (Admin)). Mrs Justice Collins said that "Consistently with that right, of course, a Tribunal has a duty to protect the public." [93]

- the principles derived by the High Court from the 'rejected defence' authorities on the question of 'denial of allegations, insight and sanctions' in Sayer v General Osteopathic Council [2021] EWHC 370 (Admin) at paragraph 25 as follows:
  - (1) Insight is concerned with future risk of repetition. To this extent, it is to be distinguished from remorse for the past conduct.
  - (2) Denial of misconduct is not a reason to increase sanction.
  - (3) It is wrong to equate maintenance of innocence with lack of insight. Denial of misconduct is not an absolute bar to a finding of insight. Admitting misconduct is not a condition precedent to establishing that the registrant understands the gravity of the offending and is unlikely to repeat it.
  - (4) However, attitude to the underlying allegation is properly to be taken into account when weighing up insight. Where the registrant continues to deny impropriety, that makes it more difficult for him to demonstrate insight.
  - (5) The assessment of the extent of insight is a matter for the tribunal, weighing all the evidence and having heard the registrant. The Court should be slow to interfere. [94]

- Mr Justice Mostyn's comments in Towuaghantse v GMC [2021] EWHC 681 (Admin) (where the case was one of clinical failure) that:
  - "In my judgment it is not procedurally fair for a registrant to face the risk of enhanced sanctions by virtue of having robustly defended allegations made against him before the MPT, or before another court." [95-96]
  - "were a defence to be rejected as blatantly dishonest, then that would say something about impairment and fitness to practise in the future. But there would surely need to be a clear finding of blatant dishonesty for that to be allowed. Absent such a finding it would, in my judgment, be a clear encroachment of the right to a fair trial for the forensic stance of a registrant in the first phase to be used against him in the later phases." [97]
  - "In my judgment a distinction should be drawn between a defence of an allegation of primary concrete fact and a defence of a proposed evaluation (or exercise of discretion) deriving from primary concrete facts. The former is a binary yes/no question. The latter requires a nuanced analysis by the decision-maker with a strong subjective component. If a registrant defends an allegation

of primary concrete fact by giving dishonest evidence and by deliberately seeking to mislead the MPT then that forensic conduct would certainly say something about impairment and fitness to practise in the future. But if, at the other end of the scale, the registrant does no more than put the GMC to proof then I cannot see how that stance could be held against him in the impairment and sanctions phases. Equally, if the registrant admits the primary facts but defends a proposed evaluation of those facts in the impairment phase then it would be Kafkaesque (to use Walker J's language) if his defence were used to prove that very proposed evaluation. It would amount to saying that your fitness to practise is currently impaired because you have disputed that your fitness to practise is currently impaired." [97]

- Consideration of the above case in Al Nageim v GMC [2021] EWHC 877 (Admin), where "dishonesty was front and centre of the allegations" and where the doctor "had advanced a 'positive defence' about believing he was entitled" to do certain things, in respect of which "[T]he Court held this defence involved an 'allegation of primary concrete facts' rather than being 'a defence of a proposed evaluation (or exercise of discretion) deriving from primary concrete facts'" [99-100]. Mrs Justice Collins acknowledged that "[O]n the face of it, it is not straightforward to recognise a defence centred on state of mind as being a denial of a 'primary concrete fact'. The 'primary concrete facts' might have been thought of as accessing the premises and keeping the money. But in a case about dishonesty, where the Tribunal had made clear findings of lies told during the doctor's evidence to the tribunal on five occasions" the Court considered that the Tribunal was not at fault "in having regard to this dishonesty when it came to assess the Appellant's level of insight. Its approach was in line with what Mostyn J said in *Towuaghantse*." [101]

- Most recently 'the issue of insight and remediation in a case where dishonesty is not accepted and an appeal against a finding of dishonesty is pursued' was considered in Ahmedsowida v GMC [2021] EWHC 3466 (Admin). The case involving many and complex allegations, centring on a doctor obtaining work by means of a falsified CV and then committing various clinical failings. Mrs Justice Collins said "[R]eflecting on the correct approach, Kerr J said this:

  - I do not think the principle is sophisticated or complicated. It is just ordinary due process. Contesting the charges, even robustly, should not be treated of itself as evidence of lack of insight; something more must be shown. A finding that blatant lies were told to the tribunal is one possibility. A long hiatus between the fact finding, and impairment and sanction stages may be a contributing feature.

    .....
  - Another way of looking at the issue is to ask whether in substance the tribunal has fallen into the trap of finding that a practitioner's fitness to practise is impaired because he has disputed that very proposition by not admitting to the dishonesty found against him; or, to use different words but similar reasoning, whether the practitioner "admits the primary facts but defends a proposed evaluation of those facts in the impairment phase" (Towuaghantse at [72]).

- I cannot accept….that inconsistency between facts found by the tribunal and evidence given by the doctor to the tribunal, not readily explicable as mistaken, is sufficient in itself to found a lack of insight finding through non-acceptance of the dishonesty. That submission does not meet the constitutional point that the doctor has a right to procedural fairness and in particular an unimpaired right of appeal….

…..

- In the present case, I have concluded that Dr Sowida did face the jeopardy of a more serious outcome because of having contested the charges and because of the manner in which he contested them.

…..

- There was no proper examination by the tribunal of the quality of the evidence given by Dr Sowida, as distinct from his resistance to and refusal to admit the charges. There were some findings about his credibility, but those were mixed with other findings accepting large parts of his evidence; notably, on the issue of mixed authorship of misleading documents and extant source material finding its way from earlier documents into later ones.

- Mr Mant was driven to invite me to infer that the tribunal must have been satisfied that Dr Sowida had lied in evidence, without the tribunal having to go to the trouble of saying as much. I do not think that is enough."" [102]

Mrs Justice Collins then set out the relevant factors in 'rejected defence' cases [103-110]. She said reconciling the principles of due process and of protecting the public from practitioners who cannot accept or deal with findings of fault, and are at risk of repeating their failings, may be difficult in an individual case and is undoubtedly fact-sensitive. She said from "the pattern of relevant factors to which the appellate courts have consistently attached importance" the following stand out: [103]

- "First: the primary allegations against the doctor. The proper place of dishonesty (or other states of mind such as 'deliberate' and 'knowing') in the scheme of the allegations matters. A rejected defence of honesty may be more fairly relevant to an overall assessment of conduct where dishonesty (the noun) is the primary allegation - deceit, fraud, forgery or similar – than where 'dishonestly' (the adverb) is a secondary allegation, aggravating a primary allegation of other misconduct which may or may not be done honestly – or not a formal allegation at all. As Lord Hoffmann emphasised, particular alertness is needed to the 'charging trap': adding 'dishonestly' to a primary allegation to aggravate it disproportionately, colour any denial of the primary allegation with dishonesty, or characterise denial of the dishonesty as itself dishonest or lacking insight. But even short of oppressive charging, the fair relevance to sanction of a doctor's rejected honesty defence depends on its relationship to what they were primarily defending." [104]

- "Second: what if anything the doctor is positively denying. There is a difference between denying 'primary facts' – what happened and what the doctor did or did not do – and denying 'secondary facts' – the evaluation of the primary facts through the lens of what the doctor knew or thought and the choices available to them. Resistance to the objectively verifiable is potentially more problematic

behaviour (and more relevant to sanction) than insistence on an honest subjective perspective. This is not of course an exclusive binary classification: what a doctor thinks or knows will often have to be deduced evidentially from objective circumstances. A secondary fact such as dishonesty may be inferred in some defended cases from an overwhelming accumulation of primary facts. If a doctor denies their alleged state of mind with a defence at the unreal, unreasonable or 'frankly ludicrous' end of the spectrum, that may be more fairly relevant to sanction than one where the only thing being denied is that dishonesty rather than honest mistake gives the better account of things." [105]

- "Third: whether there is evidence of lack of insight other than the rejected defence. Before a rejected defence is held to be relevant evidence of 'lack of insight', it is necessary to consider what other evidence of insight or lack of insight is present. There are cases, including some of the sexual impropriety cases, where being 'in denial' up to and including sanction proceedings is a richly evidenced course of conduct, in which a range of supportive and restrictive interventions have demonstrably failed to bring a doctor to a proper, fair and reasonable acknowledgment of the reality of their established problems and failings. At the other end of the spectrum, there are cases in which the only evidence of failure of insight seems to be robust defence at the fact-finding stage. Damascene conversions aside, a rejected defence which on a fair analysis adds to an evidenced history of faulty understanding is more likely to be relevant fairly to sanction than one said to constitute such faulty understanding in and of itself." [106]

- "Fourth: the nature and quality of the rejected defence. 'Not telling the truth to the Tribunal', when not freshly charged in separate proceedings as akin to perjury, has to amount to something more than a failure to admit to an allegation (especially a secondary allegation of dishonesty) or a putting to proof, before it can properly count against a doctor. It is likely to have to amount to more than offering an 'honest' alternative explanation of events alleged to be explicable as dishonesty, or it is hard to see how a dishonesty charge is to be effectively defended. It is going to require some thought to be given to the nature of the rejected defence. Was it a blatant and manufactured lie, a genuine act of dishonesty, deceit or misconduct in its own right? Did it wrongly implicate and blame others, or brand witnesses giving a different account as deluded or liars? Or was it just a failed attempt to tell the story in a better light than eventually proved warranted? [108]

Overall, she said that "[I]n short, before a Tribunal can be sure of making fair use of a rejected defence to aggravate sanctions imposed on a doctor, it needs to remind itself of Lord Hoffmann's starting place that doctors are properly and fairly entitled to defend themselves, and may then find it helpful to think about four things:

(i) how far state of mind or dishonesty was a primary rather than second-order allegation to begin with (noting the dangers of charging traps) – or not an allegation at all,
(ii) what if anything the doctor was positively denying other than their own dishonesty or state of knowledge;

(iii) how far 'lack of insight' is evidenced by anything other than the rejected defence and
(iv) the nature and quality of the defence, identifying clearly any respect in which it was itself a deception, a lie or a counter-allegation of others' dishonesty." [109]

She indicated that "[T]hese are all evaluative matters. Tribunals need to make up their own minds about them, and their relevance and weight, on the facts they have found. But they do need to direct their minds to the tension of principles which is engaged, and check they are being fair to both the doctor and the public. They need to think about what they are doing before they use a doctor's defence against them, to bring the analysis back down to its simplest essence." [110]

Applying the above to Dr Sawati's case, Mrs Justice Collins said that:

(i) of the six allegations of misconduct, two did not include allegations of dishonesty and four did, of which three were found proved. In respect of those three allegations Dr Sawati "was found to have committed all of these breaches of Good Medical Practice *dishonestly*" and so they looked like allegations of secondary rather than primary dishonesty.
(ii) considering what Dr Sawati actively denied, she admitted some of the facts alleged but denied knowledge and dishonesty. "Her positive denials, in other words, were not of primary facts but of secondary or evaluative/inferential facts relating to her state of mind."
(iii) as to insight into misconduct, "I cannot see that [the Tribunal] had before it, or at any rate that its determinations made reference to, a history of failure of insight into dishonesty. What it did have was three rejected defences of honest mistake and the proposition that 'dishonesty is hard to remediate'. The failure of insight in this respect appears to be constituted wholly or mainly in the rejected defences."
(iv) "although the Tribunal's sanction determination makes reference more than once to 'not telling the truth at or during the hearing' it does not identify what is being referred to. No aspect of her defences is singled out for criticism – indeed her defences are not otherwise criticised at all…..It is hard, reading the references to failure to 'tell the truth at the hearing' in this context, to infer anything other than that they refer to failure to admit dishonesty and having the 'temerity' to offer defences which were rejected ('on balance') on the evidence, other witnesses' evidence being preferred." [116-117]

Overall, she said that she did not think that the tribunal "gave its mind sufficiently to the issue [of rejected defences] at all…It did not ask itself whether there was any possible issue of oppressive charging in these dishonesty allegations (bearing in mind the relative lack of gravity of the primary charges, as discussed further below). It did not think about the balance between the primary misconduct alleged and the secondary dishonesty. It did not acknowledge that Dr Sawati was actively denying nothing other than dishonesty. It seems to have relied disproportionately and without analysis on her rejected defences to infer both failure of insight and tertiary dishonesty ('not telling the truth in the hearing') without giving any or any sufficient explanation of why; and having in two out of the three cases of dishonesty positively ruled out the relevance of paragraph 72 of Good Medical Practice and not mentioned it in relation to other misconduct" [118]. She said these were "serious failures of approach, analysis and explanation in handling a matter which the

authorities are clear needs to be handled mindfully because of the real risk of injustice and failure of due process inherent in aggravating sanction by reference to rejected defences, particularly to (secondary) dishonesty charges. I am not satisfied that Dr Sawati was treated fairly in this respect." [119]

In relation to the gravity of the misconduct, Mrs Justice Collins said that:

- "[S]anction must be proportionate to the gravity of the misconduct and impairment found. Failure properly to consider the *objective* features of a case, to demonstrate that their gravity had been fully assessed in context, and then to address and explain how aggravations and mitigations operate to justify sanction, is capable of amounting to a serious procedural irregularity rendering a sanctions decision unjust (*GMC v Stone [2017] EWHC 2534 (Admin), at paragraph 53*). The most secure route to a proportionate sanction is the 'authoritative steer' provided by the Sanctions Guidance." [121]

- "Erasure for dishonesty is not automatic, so it is not exempt from the general requirement to assess the seriousness of misconduct in every case before a sanction is imposed. The nature and extent of dishonesty may be variable, and must be evaluated on a case by case basis." [127]

- "The misconduct findings on which the Tribunal approached its sanctions consideration were, accordingly, dominated by its conclusions on dishonesty" [123-126]. "The Tribunal's task was to assess the seriousness of the three instances of dishonesty it had found in Dr Sawati's case. I cannot see from the sanctions determination that it did so, by proper reference to the Sanctions Guidance or at all. One factor alone gives any indication that the Sanctions Guidance was considered on this point – the reference to 'persistence'….. but as between a single isolated incident and 'persistence' there may be thought to be quite a spectrum of behaviours to be evaluated. I cannot see that the Tribunal gave its mind to that evaluation" [130-131]. Mrs Justice Collins also indicated that the Tribunal had not considered whether there were features about Dr Sawati's dishonesty "which brought it closer to the examples given by the Guidance" [134] or why Dr Sawati had acted dishonestly. [137]

Overall, she said there was "a failure by the Tribunal properly to assess and/or articulate the gravity of conduct before it, and hence correctly to apply itself to the question of sanction. That was the essence of the task before it. It is a serious error of principle and procedure leading to a failure of fairness." [138]

Conclusion

In conclusion, Mrs Justice Collins said

"The Tribunal's determination of sanction discloses serious irregularity and error of principle, sufficient in themselves to make it unjust. It failed properly to assess and/or articulate the gravity of the misconduct it had established, by failing to make any, or any sufficient, assessment of the seriousness of the primary misconduct by reference to Dr Sawati's actions and their consequences; and of the seriousness of

the dishonesty, including by reference to the 'authoritative steer' of the Sanctions Guidance and the examples given there. It failed to direct itself properly, fairly or at all to risks of injustice in regarding Dr Sawati's rejected defences to the allegations of dishonesty as grounds for aggravating sanction and it is not possible to be satisfied from its determination that it nevertheless avoided those risks. I am not satisfied that it handled Dr Sawati's case fairly, and reached a conclusion on sanction which was demonstrably just." [139]

The Tribunal erased Dr Sawati from the register on the basis of misconduct and deficient professional performance. Mrs Justice Collins said that the Tribunal "took an overall view of the appropriateness of erasure without distinguishing between the two strands – misconduct and performance – or indicating the relative weight it attached to each" [140]. As it was not possible to be satisfied that either erasure was so clearly the inevitable outcome on performance grounds, or conversely that erasure was inevitably the 'wrong' decision overall, the judge allowed the appeal in part, and quashed the Tribunal's sanction determination.

The matter was remitted to a differently constituted Tribunal for a fresh determination of sanction addressing the performance issues, and making a proper assessment of the seriousness of the misconduct on a basis which is considered and fair as regards Dr Sawati's rejected defences, considering also matters of insight and remediation on all the evidence before it. [141-144]

Kind regards
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