Appeals Circular A 04 / 15

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08 May 2015

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Re: Dr Eric Brew v GMC [2014] EWHC 2927 Admin

Background

Dr Brew appeared before a Fitness to Practise Panel of the Medical Practitioners' Tribunal Service ('Panel') in November 2013. The matters related to the falsification of 18 clinical assessment entries on his e-portfolio on four separate occasions giving the impression that the named assessors had been involved in the completion of those entries.

The Panel found Dr Brew's fitness to practise was impaired and determined to erase his name from the Register.

Dr Brew appealed the Panel's determination under Section 40 of the Medical Act 1983 on the basis that the decision to erase his name from the Register was unjust and disproportionate and further that, as a consequence of the negligent advice he received from the barrister who appeared for him, the original hearing was procedurally unfair leading to an unjust conclusion.

Appeal

The appeal was considered by HHJ Gosnell on 28 August 2014 and judgment was handed down on 10 September 2014.

The Judge sets out the underlying facts (paragraphs 2-3); details of the hearing before the Panel (paragraphs 4-5) and thereafter details in relation to the law applicable to the appeal (paragraphs 6-7), in particular how to approach an appeal brought on the basis of incompetent representation.

Dr Brew's case was summed up in the amended grounds of appeal (paragraph 8) as follows:

1. It was not necessary, taking into account all relevant material considerations, to erase him from the Medical Register;
2. It was not a proportionate sanction;
3. There is a want of reasoning as to the Panel's statement that erasure was necessary;
4. The incorrect advice given to the doctor, by his counsel at the hearing, affected the overall fairness of the hearing and the disposal of the case; and
5. The decision as to sanction was wrong.

Dr Brew contended that the Panel's impression and assessment of him was detrimentally affected by the way he had denied the most serious charge relating to dishonesty in that the approach his counsel had taken had prejudiced his best point (paragraph 9).

The GMC did not necessarily accept that Dr Brew was given negligent legal advice, but even if he was, submitted that parties are not obliged to accept legal advice which is contrary to his own case (paragraph 10).

HHJ Gosnell sets out his analysis of the grounds of appeal (paragraphs 11-31). The Judge confirms that although Dr Brew was given permission to introduce fresh evidence he was:

> *'somewhat uncomfortable about his assertion that he was advised that he had to dispute the issue of dishonesty in order to be able to explain to the court why he had behaved in the way that he had'* (paragraph 11).

He goes on to say that if Dr Brew was advised to dispute the third charge as set out then this would be negligent advice and Wednesbury unreasonable. The only issue would then be whether the consequence of the advice led to the hearing being unfairly conducted and the conclusion unjust (paragraph 12).

Counsel for Dr Brew at the appeal hearing took the Judge through much of the evidence which Dr Brew gave at the first stage of the hearing and accepted that Dr Brew had denied being dishonest about creating false entries but this was due to a misunderstanding on his part (paragraph 14):

> *'If this was the only evidence which had been given to the panel I would have accepted the appellant's submission that the incorrect legal advice had irredeemably damaged his case. He did have the opportunity however to put this misunderstanding right when he gave evidence at the third stage of the tribunal hearing (no evidence was given at the second stage when impairment was considered). When the appellant gave evidence at the sanction stage of the hearing he told the panel that he had suffered sleepless nights for the last couple of days and had not really said what he wanted to say.... When the chairman of the panel understandably asked the appellant why, given his*

recent evidence, the panel had spent a day determining whether he was dishonest as he had disputed the third charge he replied that it was because of legal advice which had been given. He was reminded that the content of the advice was privileged and the panel went into no more detail'.

Dr Brew contended that whilst the truth did eventually emerge at the hearing his case was already damaged as the Panel had, at the second stage of the hearing, found that the doctor did not yet have full insight into the seriousness of the allegations. In the circumstances HHJ Gosnell confirmed the issue was really whether the Panel did take into account the reasons why the doctor had disputed the dishonesty, when it would appear that he accepted for some time that he had been dishonest, and the relevance of that information to the issue of whether he had full or partial insight.

The Judge highlighted two passages of the Panel's determination which answered the question (paragraph 15). The first passage shows that the Panel did record and accept the evidence which he had given about his reluctance to concede dishonesty being based on legal advice and further, the Panel accepted that he showed more insight than his evidence on the previous proceedings had suggested.

In the circumstances HHJ Gosnell concludes (paragraph 16):

'This seems to me to be conclusive evidence that the panel were prepared to accept and take into account the explanation put forward by the appellant about his unwise decision to contest dishonesty and to determine the issue of the appropriate sanction on the basis of the totality of his evidence, not just the evidence given on the first few days. The panel dealt with the difficulty in the fairest way that they could, by admitting and accepting the evidence at the third stage of the hearing and then by recording in their decision that they had taken it into account'.

The doctor also contended that his evidence led the Panel into making an incorrect assessment of the extent to which he had insight into his past behaviour; however HHJ Gosnell found there was no evidence in the Panel's written reasons to support the assertions.

The next issue considered by the Judge was whether there was a lack of reasoning in the Panel's decision to impose a sanction of erasure (paragraph 17).

The Judge questioned whether the appeal ground could be seriously pursued in the light of the detailed reasons in the determination but Dr Brew's Counsel complained that the reasons why suspension, with or without a review, was not preferred to erasure were not adequately expressed.

The Judge reminded himself of the relevant case law and there were two essential requirements ie it must be apparent to the parties why one has won and the other has lost and the judgment must enable an appellate court to understand why the tribunal reached the decision that it did. He confirmed, in this case, both these requirements were adequately met in the Panel's written decision (paragraph 18).

One of the major complaints by Dr Brew was that the Panel either misinterpreted the evidence about whether he had insight about his past behaviour or gave the positive evidence about his developing insight insufficient weight. The Panel in its determination in relation to sanction referred to *'the absence of full insight'*. Therefore the question arises whether this is a finding the Panel were entitled to reach on the evidence before them.

Dr Brew contended that from the moment he left the ARCP Panel meeting he realised he had done wrong and took steps to remediate his actions. However, it did raise the question why he did not realise he had done wrong when he was creating the forged entries. The Judge noted that the Panel clearly did not accept this contention entirely and felt that his insight was not full, and it was therefore necessary to examine the material they had before them and decide whether it was a finding which was open to them on the evidence. This is set out in some detail in paragraphs 21 to 26. HHJ Gosnell considered there was more than adequate material available for the Panel to conclude that Dr Brew had less than full insight into the seriousness of his actions.

He confirmed that the real issue was whether the Panel was wrong to impose the sanction of erasure because that was too severe or was a disproportionate sanction (paragraphs 27-31).

He confirmed that it was clear from the guidance that the decision whether to impose a sanction of erasure or suspension was a matter of judgement for the Panel depending on their view of the seriousness of the doctor's conduct. He confirmed it was a value judgement to be made in every case, depending on the facts of the individual case before the Panel, and therefore he did not find the comparable cases put before the Panel by the doctor particularly helpful (paragraph 28).

The Judge was also conscious that the experience of the Panel in this case in deciding what was the appropriate sanction for misconduct exceeded his own; further that their decision was taken to uphold the standards of training in the medical profession and protect the reputation of the profession before the public. He therefore gave due deference to their particular expertise and noted that where the issue is what the appropriate sanction should be for misconduct based on facts which the Panel were entitled to find on the evidence, an appeal court is likely to give the appropriate deference to the Panel's views whilst retaining an overview and an ability to overturn the decision if it is shown to be wrong (paragraph 29).

He suspected the decision was finely balanced. Having read the transcript of the Panel hearing he noted that the Panel had gone to great lengths to investigate the case thoroughly, they asked a number of telling questions which were particularly well directed to the important issues in the case and he was impressed with the thoroughness with which they approached their task. He further noted that they gave the doctor every opportunity to impress them but their decision that he did not show full insight into his wrongdoing cannot be impugned. He felt that that it was possible to argue that the case could qualify for either suspension or erasure but which side of the line it falls is a matter of judgement for the tribunal concerned having considered all the facts and their experience of applying professional standards to those facts (paragraph 30).

HHJ Gosnell concludes (paragraph 31):

> *'The fact that this decision was, in my view, finely balanced makes it much more difficult for the appeal to succeed. Where a case falls truly on the cusp of two alternative results it is very difficult for an Appellate Court to say that the original tribunal was wrong to reach either decision. In my view the decision to erase the Appellant from the Medical Register was one which the panel was entitled to reach on the evidence before them even if another Panel might possibly have reached a different view. For myself I cannot find the decision was wrong and so I am bound to dismiss the appeal although not without expressing some personal sympathy for Dr Brew'.*

Salient Points

- Negligent advice and/or representation by an advocate will not necessarily constitute procedural unfairness rendering the decision unjust.
- The court must firstly consider whether the conduct of the advocate was such that he or she took decisions and acted in a way which no reasonable advocate might reasonably have been expected to act. If they so find, the Court must then go on to consider whether that inadequate conduct affected the fairness of the process.
- Reminder that Panels are entitled to make decisions based on the individual circumstances of the case and do not need to consider the outcome in similar cases.
- Reminder that Panels need to explain why the parties 'won or lost'.

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