Appeals Circular A04/16

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1 April 2016

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Re: General Medical Council v Adeogba; General Medical Council v Visvardis [2016] EWCA Civ 162

Abstract

The Court of Appeal (Leveson LJ, Gross LJ, Sir Stanley Burnton) considered the approach to be adopted by a professional regulator when a registrant does not participate in a disciplinary hearing 'convened to examine their behaviour'. This circular is limited to the issue of proceeding in the absence of the registrant.

i. GMC v Adeogba

Background

Originally from Nigeria, Dr Adeogba worked as a doctor in Germany, during which time he registered with the GMC to enable him to work sporadically in the UK.

In relation to his work in the UK, the GMC were contacted with concerns in relation to Dr Adeogba's fitness to practise as a doctor. Following investigation, the GMC referred the matter to the Fitness to Practise Panel (as it then was), and when dealt with by the Interim Orders Panel Dr Adeogba was present and had engaged with the proceedings. During this time, Dr Adeogba confirmed he had received notice to his registered German postal address and to his email address, both of which were registered with the GMC. An IOP suspended registration for 18 months pending the conclusion of the investigation, and in anticipation of a full fitness to practise hearing. Following the suspension in the UK, Dr Adeogba

decided to return to Nigeria although did not inform the GMC of this, and did not update contact details. During this time, a decision was made by the GMC to refer allegations to the Panel; notification was sent to Dr Adeogba at the address held by the GMC albeit no response was received and packages were recorded as undelivered. Dr Adeogba was invited to attend a case management teleconference, although failed to participate. A notice of hearing and bundle were sent to the registered address; Dr Adeogba did not appear and was not represented, and did not make any contact with the Panel regarding his absence. The Panel decided that service had been effected and proceeded with the hearing in the absence of Dr Adeogba, following which impairment was found and erasure deemed to be the appropriate sanction. Within the 28 day time limit in which an appeal could be lodged, Dr Adeogba returned to Germany and logged on to his email address, discovering the outcome of the hearing; he appealed to the Administrative Court (CO/ 218/2014) where one issue was whether the decision of the Panel to proceed was justifiable. Judge Wood QC, examining matters afresh, decided that 'there was no evidence, despite [Dr Adeogba's] non-engagement with the case management process, that [Dr Adeogba] was aware of the hearing, or that he had had sufficient opportunity to make arrangements to attend'. An appeal against this finding was lodged with the Court of Appeal.

Appeal

The Court of Appeal allowed the appeal and held that in considering whether all reasonable efforts had been taken to serve the practitioner with notice 'the GMC were perfectly entitled (and bound) to use the address provided [by Dr Adeogba] on his registration…and his email address'. It was said that the justification that Dr Adeogba had adopted 'an ostrich like attitude' does not start to do justice to the extent of the 'egregious failure to comply with his regulatory obligations' of providing the GMC with up to date contact details. The Court considered that 'Dr Adeogba knew that disciplinary investigations were in place, knew that his suspension would expire after 18 months and knew about the only means that the GMC had to communicate with him. He made no effort at all to contact them or to ensure that he could be appraised of what was going on' (para 58).

Whereas in the Administrative Court it was suggested that the GMC ought to have started to make enquiries of the German and Nigerian authorities as to Dr Adeogba's whereabouts, on appeal it was held that 'this is to put a burden on the GMC which is far beyond that which is appropriate'. The Court went on to confirm

that the responsibility of the GMC 'is very simple', stating 'it is to communicate with the practitioner at the address he had provided; neither more nor less. It is the practitioner's obligation to ensure that the address is up to date' (para 59).

Once satisfied that notice had been served, in exercising discretion to proceed in absence the Court stated that the Panel must do so 'with fairness to the practitioner being a prime consideration but fairness to the GMC and interests of the public also taken into account' (para 23).

In response to the emphasis placed by the Administrative Court on the fact that the Panel were dealing with the first hearing, on appeal it was thought by suggesting 'that the practitioner must be allowed one (or perhaps more than one) adjournment is to fly in the face of the efficient despatch of the regulatory regime' (para 61).

As to whether an adjournment would be disruptive or inconvenient, the Court considered that even for those witnesses who were not attending, the fact was that they had been informed of the date of the hearing and the appellate Court recognised 'the well-known anxiety associated with any forthcoming trial' until the witnesses had been stood down (para 61).

In concluding that 'any culture of adjournment is to be deprecated' the Court stated that 'no regulatory system can operate on the basis that failure to attend should lead to an adjournment on the basis that the practitioner might not know of the date of the hearing' (para 61). It was also recognised that 'although attendance by the practitioner is of prime importance, it cannot be determinative' (para 63).

ii. GMC v Visvardis

Background

Allegations were made to the GMC that, within his curriculum vitae, Dr Visvardis had stated that he had a place on the Specialty Registrar Training Programme in Medical Oncology and provided his National Training Number. In fact, both the place and the number had been withdrawn and this was known to Dr Visvardis at the time of submitting the CV for a locum position. During a telephone interview for that position, Dr Visvardis stated that he had opted to take time out of the

Oncology Programme and was intending to finish his Certificate of Completion of Specialist Training. An email was sent containing the same information.

The GMC investigated the aforementioned allegations and during this time, other allegations of potential misconduct came to light where Dr Visvardis had sent a misleading and dishonest application for a locum position elsewhere, accompanied by the same CV. Furthermore, in connection with this application, during a meeting Dr Visvardis stated that he had been granted an affiliate membership of the Royal College of Physicians, and thus met the criteria for the locum training post. Dr Vivardis was also alleged to have described himself as a 'Medical Oncologist [European Society for Medical Oncology] Certified'. GMC Case Examiners referred the case to a fitness to practise panel; it was considered that there was a real prospect that a pattern of dishonesty would be established.

Dr Visvardis contacted the GMC by telephone to express his discontent with this decision; this was followed up by an email to request details of persons involved in the case. Dr Visvardis held the opinion that the GMC had not adequately dealt with his email and until he received a proper response, he refused to participate in a teleconference to arrange a hearing date. The teleconference took place without Dr Visvardis' participation and minutes were sent to him by email. He was notified of a further teleconference to which he did not dial into and for which a copy of the minutes sent. Attempts were made by the GMC to send hearing bundles to Dr Visvardis at the address on record, although these were returned as not having been collected from the post office; an email copy of the bundle was sent and although Dr Visvardis did not acknowledge the emails, during the Administrative Court proceedings he confirmed receipt. Further, at the Rule 7 stage, a bundle had been served which contained all the relevant documents.

By means of post and email, the MPTS sent a notice of hearing; the posted copy was returned to sender. The notice set out the allegations and procedure for making an application that the hearing should be postponed, as well as a warning that the hearing might continue without him if he was absent. Although Dr Visvardis did not acknowledge the email, following this he sent an email repeating his earlier complaints regarding procedure. The GMC informed him that if he wished to pursue the complaints process, he might wish to apply to cancel the hearing. An application was made, albeit unsuccessfully and the decision was forwarded to Dr Visvardis on the morning of the scheduled hearing. Dr Visvardis stated that the refusal only came to his attention at the end of the following day.

The Panel were satisfied that the notice of hearing had been properly served and that Dr Visvardis had voluntarily waived his right to attend or be represented at the hearing and it ought to proceed. Dr Visvardis responded to the decision stating that the decision not to cancel was flawed, and after considering this the Panel confirmed their earlier decision and proceeded to find Dr Visvardis impaired.

Dr Visvardis appealed the decision to proceed in absence where HHJ Bird heard the matter in the Administrative Court (CO/2219/2014). It was agreed by both parties that all reasonable efforts had been made to serve the doctor with notice and the pre-condition was met to exercise the discretion to proceed. HHJ Bird concluded that the weighing of the competing factors in the exercise of discretion was flawed.

Appeal

The Court of Appeal disagreed with the decision of HHJ Bird. It was said that as well as recognising that the allegations were contested, the Panel were aware of the seriousness of the allegations before them, although failed to recognise that seriousness of the allegations was a consideration to be excluded (following Lord Bingham in *Jones*). The Court determined that Dr Visvardis had done nothing to comply with directions to disclose documents which was said to have amounted to a disruption – Dr Visvardis wasn't prepared to leave this issue to be determined by a Panel, instead wanting to challenge the decision to refer. The Court stated that although Dr Visvardis 'declined to attend on the first day (even if only to raise the issue of cancellation), when he received notice it would not be cancelled, it was open to him then to travel [from Greece], alert the Panel to the fact that he was attending on the following day and seek the re-commencement of the hearing or an adjournment of whatever length he then wished' (para 105). In response to the concern raised by HHJ Bird that the account advanced by the GMC would go unchallenged, the Court held that 'if such a consideration was to prevail above all others, cases would never be heard' (para 107).

The appeal was allowed and the order of the Panel restored. The case was remitted to the High Court for consideration of the grounds of appeal, confined to challenges relating to the evidence heard by the Panel.

Salient points

- The obligation is on the registrant to ensure that the address provided to the GMC is up to date
- In serving the registrant with the notice of hearing, if the GMC communicates with the registrant at the address provided nothing more is required in terms of service
- The principles set out in *R v Jones [2002] UKHL 5* provide a starting point for any direction provided, or decision made, under Rule 31 GMC (Fitness to Practise) Rules 2004 to proceed in the absence of a registrant (*see comments at para 17-23 of the judgment in Adeogba relating to the different considerations between criminal matters and regulatory proceedings*)
- Following *Jones*, seriousness of the allegation is not a factor to consider when exercising discretion to proceed in absence
- In exercising the discretion to proceed in absence, fairness to the registrant is a prime consideration, although fairness to the GMC and the public interest should also be taken into account
- It should be borne in mind that any culture of adjournment is to be deprecated

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