Appeals Circular A05/15

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26 May 2015

To: Fitness to Practise Panel Panellists
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Re: Dr Kofi Adu v General Medical Council [2014] EWHC 4080 Admin

Background

Dr Adu, a paediatrician, was referred by his employer to the General Medical Council (GMC) in relation to his performance. His case was considered by a Fitness to Practise Panel of the MPTS ('Panel') following an assessment of his performance between 8 – 22 May 2013.

Dr Adu was present but not represented. The Panel found Dr Adu's fitness to practise was impaired by reason of his deficient professional performance and concluded that the appropriate sanction, in the public interest, was erasure from the Medical Register.

Dr Adu appealed the Panel's determination under Section 40 of the Medical Act 1983.

Appeal

The appeal was considered by Mrs Justice McGowan on 16 October 2014.

The Judge sets out the background to the case including details of the Panel (paragraphs 1 – 18).

The grounds of appeal considered by Mrs Justice McGowan were set out in Counsel for doctor's Skeleton Argument in summary as follows:

1. Whether the Panel's decision had been affected by bias due to the participation of the legal assessor;

2. Whether the Panel's decision had been affected by bias due to the role of K & A;

3. Whether the procedural unfairness had arisen due to the error in the statistical analysis;

And then whether the sanction had been disproportionate.

Ground 1 (paragraphs 19 – 31)

Mrs Justice McGowan sets out the issue in relation to whether the legal assessor should continue to advise the Panel following a declaration that he had personal experience which involved a failing on the part of another paediatrician in another hospital some nine years previously. Dr Adu did not apply for the legal assessor to stand down during the course of the hearing (paragraph 21).

The Judge considered the authority of R (on the application of Compton) – v – Wiltshire Primary Care Trust [2009] EWCA Admin 1824. It was acknowledged that there was no suggestion that there had been actual bias the question rested solely on the doctrine of apparent bias. Cranston J dealt with this in the Wiltshire case at paragraphs 81 - 91 when he reviewed all the previous authorities. He confirmed at paragraph 87 as follows:

> *'The essence of the doctrine of apparent bias is that justice must be seen to be done. Both parties agree that the crucial question is whether the fair minded and informed observer having considered the facts, would conclude there was a real possibility of bias…*'

This is set out in paragraph 24 of Mrs Justice McGowan's judgment. She also went on to refer to a further passage in Cranston J's judgment in paragraph 25 where she referred to paragraph 91 of the Wiltshire case as follows:

> *"In my view the principle is clear: the bias of advisers is capable of vitiating a decision when there is a real possibility that it has adversely infected the views of the decision-maker. That seems to me to turn on at least three considerations. First, there is the nature of the advice itself. Advice to my mind falls along a spectrum from the provision of information, which may or may not have a bearing on the ultimate decision, to a strong recommendation that a particular course be taken. Secondly, there is the matter to which the advice pertains. That may be tangential to the decision to be taken, or it may be an essential component without which no decision is possible. Thirdly, there is the relationship between the adviser and the decision-maker and whether it is so close that there is a real possibility that the bias of one will infect the other.'*

Mrs Justice McGowan noted that in the Wiltshire case the facts were very different from that arising in Dr Adu's case (paragraph 26).

She confirms (paragraph 28) as follows:

> *'The Panel quite rightly adopted a cautious, even conservative approach in considering a number of issues. They considered the role of the legal assessor, as a person providing information solely in the form of legal advice to the Tribunal. They recognised that although not a member of the decision-making Panel he was a part of the judicial process in which they were engaged. They recognised that they were not bound to accept that advice, which would in any event be given openly and be susceptible to challenge. They moved on to consider the issue of real bias, which they discounted as a possibility. In considering the question of apparent bias using the fair-minded and informed observer test, again, they discounted that such an objective person would perceive bias. They observed that the experience of the legal assessor was wholly and totally unrelated to this case.'*

The Judge goes on to say that, in any event, all the findings reached by the Panel were findings of fact in which the legal assessor would have played no part and all appeared to be obvious and reasonable conclusions on the admitted facts and the evidence before the Panel.

She confirmed that there was no basis upon which the doctrine of apparent bias applied and that any fair-minded and informed observer would conclude that a totally unrelated experience nine years earlier had no real or apparent bearing upon any advice given to the Panel (paragraph 30). In the circumstances Ground 1 of the appeal failed.

Ground 2 (paragraphs 32 – 38)

This centres on complaints on the role of Drs K and A in the first assessment carried out and the report that that it generated.

The Judge accepted that the 2007 assessment was a starting point for the eventual determination but did not accept the implicit suggestion that the 2007 assessment pre-determined either the second assessment in 2012 or the determination reached by the Panel in 2013 (paragraph 35).

Further, she did not find any evidence of bias on the part of either Drs K or A, even if that were the case, there was no evidence that such bias could have or did determine the Panel's findings (paragraph 37).

She confirmed the inclusion of their evidence and the overall history of the poor performance was not determinative and its inclusion was neither wrong nor procedurally unfair (paragraph 38).

In the circumstances Ground 2 failed.

Ground 3 (paragraphs 40 – 49)

Dr Adu complained of late notice of an error in the statistical analysis of one of the stage tests, which caused an amendment by deletion of one of the facets of the performance assessment and therefore the charge created prejudice to him and he was denied the opportunity to cross-examine one of the witnesses, Dr G, on the point.

Mrs Justice McGowan noted that the error did not relate to, or affect, Dr Adu's score on the relevant station. She noted that part of the assessment process involved a series of stage tests where the person whose performance is being assessed is required to complete a piece of interaction, diagnosis or treatment of a patient. That conduct is observed directly and given a score by the observer which is in itself an indicator of performance. This is then assessed against a reference group to provide an objective reference point rather than just the individual marking of the person under assessment (paragraph 42).

She noted that the problem with the statistical analysis would not have affected the relevant section of the assessment report then Mrs Justice McGowan went on to consider the suggestion that Dr G should have been recalled to be cross-examined by Dr Adu as to the reliability of the other test results. She concluded that such a step was not necessary nor would it have achieved any advantage for Dr Adu as Dr G could not have dealt with the statistical problem but that even if another witness from the Academic Centre for Medical Education (ACME) had been found and called it could not possibly have affected the outcome of the overall assessment (paragraph 47).

She concluded (paragraph 48):

> *'These tests, assessments and interviews that go up to make these reports are incredibly detailed and thorough. To exclude one piece of referential assessment could not in any way diminish the overall conclusion based on empirical assessment supported by historical account and analysis that the appellant's performance was deficient.'*

In the circumstances this ground also failed.

Sanction (paragraph 51)

Mrs Justice McGowan confirmed that she would turn briefly to the question of sanction. She noted that it was clear that the outcome to Dr Adu must be proportionate to the risk that his deficient professional standards created and goes on to say:

> *'But there is a balance to be struck between Dr Adu's practice as a doctor and the need for the public to be protected. It seems to me that there is good reason to find, even on an exacting analysis of the factual case that the*

objective in removing him from the register of those unable to practise is sufficiently important to justify limitation on his ability to do so. There is a clear rational connection between that and the objective, namely of ensuring in so far as it is reasonably possible that all those who practice within the medical profession do so to a high standard of competence and skill. There is no less intrusive measure in my view that could be used. The severity of the consequences which I accept entirely to Dr Adu are nonetheless the striking of a fair balance between his rights and the interests of the community as a whole.'

In the circumstances, the appeal failed.

Salient Points

- Reminder of the role of the legal assessor and the test to be applied when considering an allegation against them of apparent bias (paragraph 28).
- Reminder that when considering a performance assessment that if one piece of the assessment is excluded this does not necessarily diminish the overall analysis of the doctor's performance (paragraph 48).
- Reminder that a sanction should strike a fair balance between the doctor's rights and the protection of the public (paragraph 51).

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