Appeals Circular A06/16

Medical Practitioners Tribunal Service
Seventh floor, St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Tel: 0161 923 6263
Fax: 0161 240 7199
Email: enquiries@mpts-uk.org

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To: Medical Practitioner Tribunal members
Legal Assessors

Copy: Interim Orders Tribunal members
Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

Re: Dr Gopalakrishnan v The General Medical Council [2016] EWHC 1247 (Admin)

Abstract

An appeal was brought pursuant to section 40 of the Medical Act 1983, against a determination of the Fitness to Practise Panel (as it then was) to find the appellant guilty of misconduct, following which a sanction of four months' suspension was imposed.

Background

The appellant worked as an associate specialist in anaesthetics. Three female colleagues alleged that the appellant had sexually assaulted them, and these assaults were said to have occurred when the appellant was alone with each person. An internal disciplinary meeting took place, whereby the appellant was unrepresented, following which he was summarily dismissed immediately after the hearing. Unfair dismissal proceedings were successfully brought in the Employment Tribunal.

A police investigation was undertaken; all three complainants alleged that the appellant had sexually assaulted them. The appellant was tried at Canterbury Crown Court on eight charges of indecent assault, and was acquitted. The transcripts of the evidence given at the Crown Court were available for the regulatory investigation and fitness to practise hearing.

In relation to complainant A, the tribunal found that none of the matters had been found proved. In relation to complainants B and C, it was found that the appellant touched B's lower hips and backside area on more than one occasion without her consent, inappropriately and with sexual motivation; asked personal questions of B and made an inappropriate suggestion to B; moved his hand down C's back, patted her bottom and rubbed her bottom without her consent, inappropriately and with sexual motivation; held

his arms out to C and asked her to come back to him, inappropriately and with sexual motivation, asking why she kept running away from him.

The appellant was found to be impaired by reason of misconduct, and the appellant was suspended for four months.

Appeal

The appellant appealed against the findings of fact at stage 1 on the basis that they showed inadequate reasoning, perversity and apparent bias. It was accepted that should the challenge fail, that the stage 2 findings of misconduct and impairment of fitness to practise should stand and that the sanction is fair, appropriate and proportionate.

In dismissing the appeal on all grounds, Patterson J recited the case of *Southall v GMC [2010] EWCA Civ 407* as the authority that dealt with the approach to perversity and adequacy of reasons, with *Yaacoub v GMC [2012] EWHC 2779 (Admin)* providing guidance on the approach to the giving of reasons, re-emphasising the duty to make it clear to the losing party why he had lost, and acknowledging that the first instance body has the advantage of judging the credibility and reliability of evidence given by a witness. *Porter v Magill [2002] 2 AC 357* was cited setting out the test of apparent bias as being 'whether a fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased'. The fair minded observer was considered in *Helow v Home Secretary [2008] 1 WLR 2416* to be 'the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, nor complacent'.

As a general point, Patterson J observed that 'the mere fact that a witness may be believed in one part but disbelieved in another part of its evidence does not necessarily mean that there is a flaw in the approach of the FPP. It may simply be that either the clarity of the recall or other evidence, circumstantial or otherwise, assisted in the FPP in reaching its conclusions' [para 72]. Further, as a general point, it was said that '...the task for the FPP was essentially one of determining the credibility of witnesses' and that in doing so '...the FPP were aware that it had to be discharged to the civil standard...and they had to be alert to the risks of collusion and contaminations as between the complainants' [para 73]. It was further said that in respect of the submissions made by an advocate, that 'it is a matter of individual judgment on the part of the advocate as to how lengthy closing submissions should be. The FPP are entitled to take into account the arguments placed before it in closing submissions but the submissions are not evidence' [para 74].

In relation to the reasons provided by the panel, it was held that 'there is no obligation on the FPP to deal with matters in intricate detail provided that they deal with the main points

that were raised' [para 90]. In this case the FPP had preferred the evidence of C to that of the appellant in respect of the appellant asking C why she kept running away from him, and the panel found that '...it was more likely than not that the appellant had spoken to C as alleged'. Patterson J found 'that was sufficient reason for them to express given that this was a conflict of fact between C and the appellant' [para 91].

In providing its reasons, it was held that 'the FPP was under no obligation to deal with absolutely everything that was raised in cross-examination. It has to be remembered that it was not writing an examination paper but providing a determination after a fitness to practise hearing where the main parties were aware of the main arguments and details that flowed from them' [para 94].

The appellant argued that although the composition of the panel complied with the rules, the fact remained that all panel members were lawyers by qualification and that the reasonable observer would be 'horrified'; this panel questioned witnesses on evidence which it should have accepted, it attempted to amend charges and there was a lengthy period of deliberation which all gave the appearance of bias. Patterson J held that 'a lengthy period of deliberations has no bearing on the issue of bias at all but, rather, reflects the length of the case and the nature of the issues which the FPP had to determine' [para 110]. It was said: 'I can see no basis upon which a fair minded and informed observer who was not unduly sensitive or suspicious nor complacent could conclude on the circumstances here that there was any real possibility that the tribunal was biased' [para 111].

Salient points

- **When providing reasons, the Tribunal does not have to refer to absolutely everything that was raised. The Tribunal are not writing an examination paper. The function of the Tribunal, generally, is to determine the credibility of witnesses.**
- **An appearance of bias does not stem from the fact that a Tribunal comprises all members who are legally qualified**
- **Although a Tribunal is entitled to take into account arguments placed before in in closing submissions, the submissions are not 'evidence' in the case.**

Tribunal Development Section
0161 240 7292
Tribunaldevelopmentsection@mpts-uk.org