MPTS Medical Practitioners Tribunal Service

Appeals Circular A06/23

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21 August 2023

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Sengupta v General Medical Council [2023] EWHC 1302 (Admin)

Learning points

- A tribunal is not obliged to consider each item of evidence in turn and explain what it finds and why.

- A restoration tribunal should not seek to go behind the findings on facts, impairment and sanction made or fully considered by tribunals at the previous hearing(s).

- If a new allegation is to be made at a restoration hearing, notice of this should be given to the practitioner in advance. In the unusual situation where a tribunal decides to consider/pursue a new allegation anyway, it should:

  - indicate in advance of its closing remarks to the parties that it is considering doing so and invite submissions as to whether such a finding is open to it, given the findings of the previous hearing(s)
  - give the parties an opportunity to put forward any evidence or argument which they wish to advance in relation to the new allegations.

It is unsatisfactory to introduce the issue of new allegations in questions to the practitioner and then after counsel make their submissions.

- When a tribunal is considering whether to direct that a right to apply for restoration be suspended indefinitely:
    - the tribunal should invite the practitioner to provide further representations, specifically on this issue.
    - the tribunal must consider the likely future position.
    - the fact that an order may be made after two unsuccessful attempts for restoration does not mean that no such order may be made after a third (or subsequent) unsuccessful attempt.

Background

This was an appeal made by Dr Sengupta ('Dr S'), pursuant to section 40 of the Medical Act 1983 ('the Act'), against a Medical Practitioners Tribunal's ('the Tribunal's) decision dated 24 January 2022 to indefinitely suspend her right to make further applications for restoration (pursuant to section 41(9) of the Act[1]), following her third unsuccessful application for her name to be restored to the medical register.

Dr S was erased from the medical register in March 2010 on the basis that that her fitness to practise was impaired by reason of misconduct and deficient professional performance. She made applications to the Tribunal for her name to be restored in 2015 and 2018, both of which were unsuccessful. The Tribunal hearing to consider her third restoration application took place on 21 January 2022. First, the Tribunal refused Dr Sengupta's application, made pursuant to section 41(1) of the Act, to be restored to the medical register ('the restoration decision'). Second, the Tribunal directed that, pursuant to section 41(9) of the Act, her ability to make further applications for restoration be suspended indefinitely ('the suspension decision').

During the course of the appeal hearing, the Judge also decided to consider the restoration decision in so far as it impacted on the question in the appeal and in the context of considering it as an application for permission to claim judicial review of the restoration decision.

<u>The 2010 fitness to practise proceedings</u>

The allegations considered at the hearing in 2010 related to Dr S' performance and misconduct:

- Performance - In 2008 a GMC performance assessment found that Dr S's:

[1] "(9) Where, during the same period of erasure, a second or subsequent application for the restoration of a name to the register, made by or on behalf of the person whose name has been erased, is unsuccessful, a Medical Practitioners Tribunal may direct that his right to make any further such applications shall be suspended indefinitely."

- performance was ‘unacceptable’ in the areas of ‘treatment’ and ‘practical skills’
- performance was a cause for concern in the area of ‘limits’
- ‘overall performance’ was unacceptable.

- Misconduct - The Tribunal found the following matters to be misleading and dishonest:

  - In 2006, Dr S undertook a training programme in obstetrics and gynaecology, where issues with her professional performance were identified and documented. The Deanery required her to include the performance documents in her personal development folder. However, in a 2007 application for a speciality training post, she omitted this documentation.

  - Subsequently, between March and July 2009, Dr S assisted another doctor with preliminary work on a case report, which was to be submitted to the Journal of Obstetrics and Gynaecologists. Dr S named herself as the primary author. The author contacted Dr S, asking her to correct this, but she did not do so.

  - In September 2009, Dr S told her educational supervisor that what happened in relation to the authorship of the report had been the result of a mistake or misunderstanding. Dr S also contacted the author on two occasions to ask them to confirm that it was a misunderstanding. The Tribunal found this to be inappropriate.

  - Finally, in September 2009, Dr S was interviewed by the Wales Deanery Assessment Panel. She gave the panel the impression that the report was in the process of being submitted, when in fact it had been submitted. Additionally, Dr S was not forthcoming about the authorship issue, which the Tribunal found to be inappropriate.

The Tribunal concluded that Dr S demonstrated a continued lack of insight into both the performance and misconduct elements of the case and directed that her name be erased from the medical register.

Previous unsuccessful applications for restoration

At the 2015 hearing, the Tribunal considered that S had made no attempt to improve her clinical deficiencies and they were not satisfied that she had any developing insight into her past misconduct. In 2018, the Tribunal stated that where S’s clinical competence was concerned, there was no material improvement in the eight years since the 2010 erasure decision. In relation to misconduct, the Tribunal was not

satisfied that S had demonstrated that she had remediated and gained genuine insight into it.

Events between the 2015 and 2018 applications for restoration

In November 2017, Dr S emailed the former head of the Postgraduate School in Obstetrics and Gynaecology; Dr Gee ('the 2017 emails'). Amongst other things, Dr S stated "*The GMC (collectively) decided that the training standard in your deanery at that time was POOR".* Dr S attached the interim order of conditions that had been imposed on her registration in 2009, which said nothing about the standard of training at the Deanery [30-32].

Dr Gee forwarded this email to the GMC, and it was considered at the 2018 restoration hearing. The 2018 Tribunal found that in respect of the 2017 emails, Dr S had acted intemperately and emotionally but did not find (nor did the GMC submit) that she had acted dishonestly [33 – 37].

The 2021/2022 restoration hearing

The hearing took place in 2021, but a decision was handed down in January 2022. The Tribunal examined the 2017 emails and noted that '*Dr S wrote these emails after her attendance at an MSc Medical Ethics Course. Although no formal finding of dishonesty was made in 2018 regarding these emails, Dr S accepted in her oral evidence to this tribunal, that she knew at the time that what she wrote was untrue'.*

As part of their decision not to restore, the Tribunal found that although Dr S "*now accepts that her episodes of dishonesty are her responsibility alone and she cannot blame others……it was insufficient to persuade it that [Dr S] is unlikely to be dishonest in future*" and that '*given that the dishonesty was persistent and repeated even after Dr S attended a professional ethics course, the current evidence fails to sufficiently demonstrate that she was fully understood her dishonesty, and put that dishonesty behind* her. *In light of these concerns and apparent contradictions, the Tribunal found that a significant risk of repetition remains*.

Grounds

Dr S appealed the suspension decision on the following grounds:

- there were various errors of law made by the Tribunal (Ground 1)
- there was a misapplication of the legal tests as to dishonesty (Ground 2)
- the Tribunal made several factual errors (Ground 3)
- there had been a miscarriage of justice (Ground 4)
- the decision of the Tribunal was disproportionate (Ground 5)

In Dr S's grounds of appeal and skeleton argument, she put forward a number of arguments that the restoration decision was flawed.

Judgment

The appeal was heard by Mr Justice Linden.

Mr Justice Linden asked Dr S to clarify whether she was challenging the restoration decision itself. Dr S confirmed that she was appealing against the suspension decision on the basis that the flaws in the restoration decision meant that the suspension decision was flawed, because the latter was based on the former.

The Judge highlighted that the Tribunal had stated that it had taken its findings on the restoration decision into account in considering the question of suspension and, "indeed, enjoined the reader to read the suspension decision in conjunction with the detailed findings made in the restoration decision." He said given this approach it was able to set out the reasoning which led to the suspension decision in three short sentences/paragraphs and in these circumstances, it seemed to be "wholly unrealistic to suggest that [Dr S] could not base her appeal against the suspension decision on criticisms of the findings and reasoning which led to the restoration decision….In effect, the suspension decision incorporated the reasons which the Tribunal had given for the restoration decision" [83].

Mr Justice Linden accepted the GMC's argument that Dr S could only ask the court to set aside or quash the restoration decision by way of a claim for judicial review, but allowing Dr S to criticise aspects of the restoration decision as part of her appeal against the suspension decision did not undermine this point, given that even if those arguments succeeded, absent a claim for judicial review, the restoration decision would stand [84]. He said there remained the question "whether any of [Dr S's criticisms of the [Tribunal] were valid and, if so, whether those criticisms meant that the suspension decision was wrong and/or unjust because of serious procedural or other irregularity" [85].

Ground 1 - various errors of law made by the Tribunal

Mr Justice Linden took each of Dr S's five arguments under Ground 1 [76] in turn, all of which were rejected:

- In relation to Dr S's argument that the Tribunal analysed her level of insight incorrectly, due to a lack of consideration of the cultural context and language barrier, Mr Justice Linden confirmed that this "type of argument required specific evidence about the cultural differences which were said to be relevant, which evidence would then need to be considered in the context of the evidence as a whole with a view to deciding whether it explained or mitigated the evidence against her". However, Dr S had never relied on cultural differences as having played a part in what happened in this case – at any hearing. Mr Justice Linden also noted that Dr S's oral English was impeccable, her evidence about cultural differences was vague and she did not identify any particular way in which cultural differences or differences in English language would have affected the Tribunal's assessment. Mr Justice Linden concluded that there was no valid criticism of the Tribunal in this regard [86 i)].

- Dr S argued that the Tribunal were wrong not to include in their determination the legal advice which it had received from its legally qualified chair ('LQC'). Mr Justice Linden noted that the LQC set out principles which were applied to the evidence by the Tribunal and was of the view that the LQC was under no obligation to do more than this. Further, Mr Justice Linden noted that in any event, this was not a point that affected the outcome of either decision [86 ii)].

- Dr S argued that the Tribunal gave insufficient evidence-based reasons for its decision. Mr Justice Linden opined that the reasons were more than adequate, and they were evidence based. Contrary to Dr S's argument, he said "the [Tribunal] was not obliged to consider each item of evidence in turn and explain what it found and why" [86 iii)].

- Dr S argued that it was unfair for the Tribunal to consider the conduct issues in relation to her cumulatively, and to describe them as involving persistent dishonesty. Mr Justice Linden opined that the Tribunal were fully entitled and indeed required to "look at the whole picture in terms of the deficiencies in [Dr S's] performance and skills and her conduct the steps which she had taken to address them and how effective those steps had been". Insofar at this amounted to looking at her conduct cumulatively, the Tribunal was clearly right to do so [86 iv)].

- Finally, Dr S argued that the improvement in her character in 2021 was not appropriately considered and the character references which were provided for her were not given appropriate weight. Mr Justice Linden stated that the Tribunal "clearly took into account the evidence which was supportive of [Dr S's] case and to a considerable extent that evidence was accepted". The problem was that fundamentally, that evidence did not address the critical issues in relation to Dr S's performance and her integrity [86 v).

Ground 2 - misapplication of the legal tests as to dishonesty

- Dr S argued that the Tribunal misapplied the test for dishonesty. In her skeleton argument, she appeared to be arguing that the original finding of dishonesty in 2010 was flawed, due to a misapplication of the test in R v Ghosh [1982] (the relevant test in place at the time of the hearing), and therefore that it was unfair for the 2021 Tribunal to rely on the findings of the 2010 tribunal. In oral arguments, however, Dr S stated that the 2021 Tribunal should simply have accepted the 2010 tribunal's findings and should not have questioned her about issues of honesty as it did at the 2021 hearing [77-78].

- Mr Justice Linden noted that the questions asked by the Tribunal in 2021 were about whether Dr S appreciated that what she was saying in the 2017 emails was untrue, and Dr S's argument also appeared to be that the Tribunal was applying the Ghosh test for dishonesty, which had since been superseded in Ivey v Genting Casinos UK Ltd [2017] [78].

- Mr Justice Linden opined that there was nothing in Ground 2. He confirmed that whichever test was applied (R v Ghosh or Ivey v Genting), Dr S's conduct which the 2010, 2015 and 2018 Tribunals found to be dishonest, was plainly dishonest. Moreover, Dr S herself ultimately argued that the 2021 Tribunal should simply have accepted the findings of the previous hearings [88].

Ground 3 – the Tribunal made several factual errors

- Dr S pointed out 11 factual errors which she said cumulatively, were fundamental and were therefore sufficient to vitiate the decision [79]. Mr Justice Linden observed that many of the alleged errors were actually accurate summaries or statements of what had been found at the earlier hearings and/or conclusions with which she disagreed. Mr Justice Linden concluded that they were also trivial and/or immaterial to the 2021 Tribunal's decisions, even if they were inaccurate.

- There were also alleged errors in relation to the Tribunal's findings on the issue of dishonesty including Dr S's complaint about the finding that Dr S had admitted in her oral evidence to the Tribunal that she knew at the time of the 2017 emails that what she wrote was untrue. GMC counsel accepted that Dr S had not made this admission. Mr Justice Linden returned to this point in his consideration of Ground 4 [89].

Ground 4 – that there has been a miscarriage of justice

Under Ground 4, Dr S argued three points.

Mr Justice Linden looked at the first and third points together, noting that they had a good deal more substance [91].

- Dr S's second point was that Section 41(9) of the Act required consideration of an indefinite suspension order after a second unsuccessful application for restoration but does not specify any actions after the third refusal. Dr S argued that if the order was not made after the second application, it could not be considered again, no matter how many further applications were refused [80 ii)]. Mr Justice Linden stated that this point was misconceived. The fact than an order under section 41(9) of the Act may be made after two unsuccessful attempts does not mean that no such order may be made after a third unsuccessful attempt [90].

- Dr S's first point was in relation to the 2017 emails, and that the Tribunal should have given notice of any new allegations, particularly allegations of dishonesty. Dr S accepted that she received notice of the GMC's intention to rely on the 2017 emails a month before the 2018 hearing (although she said that she was not told for what purpose). However, in relation to the 2021 hearing, she said that she did not have notice of the fact that it would be said that she had acted dishonestly in the 2017 emails [80 i)].

- Dr S's third point was that the LQC at the 2021 hearing overstepped his statutory role and was confrontational and dismissive, effectively cross examining her about her honestly. This meant that she did not give her best evidence and that she did not receive a fair hearing and the LQC appeared to be biased [80 iii)].

- Dealing with the first and third points together, Mr Justice Linden outlined the law in relation to notice. Specifically, he noted that Rule 23(2) of the Fitness to Practise Rules ('the Rules') "requires that the practitioner is given notice of certain

matters no less than 28 days before the hearing of the application for restoration to the register, and the Registrar is required to provide the applicant with '*a copy of any statement, report, or other documents the General Council has obtained which has not previously been sent to the applicant and which is relevant to the question or whether the applicant's name should be restored to the register*." Rule 23(2) provides that in this event: *'the applicant shall be given a reasonable opportunity of responding before the Medical Practitioners Tribunal makes a decision*'" [92].

- Mr Justice Linden quoted Paragraphs C2 and C5 of the MPTS Restoration Guidance, which state that '*the GMC will present any new evidence about allegations that have not previously been determined by a tribunal. The doctor will have been given notice of any new allegations in advance" (C5) and 'where there are previously untested allegations which call into question the doctor's fitness to practise, tribunals must weigh the evidence carefully to reach a judgment…..The tribunal should invite the parties to make submissions and present evidence*' (C2) [93 and 94].

- Dr S accepted that she had been given 28 days' notice of the GMC's intention to rely on the 2017 emails, but said the GMC had not alleged that she had acted dishonestly in this regard (which the GMC accepted), and the 2018 Tribunal had not found that she did [95].

Mr Justice Linden noted that at the 2021 hearing, the LQC questioned Dr S about whether she knew that her statement in the 2017 emails was untrue at the time she wrote it and suggested to her that it was a lie. Dr S did not accept that she knew that what she was writing was untrue, nor that it was a lie [96].He also noted that the 2021 LQC indicated that '*the primary view that we've took of the email is what we have to assess is whether it's dishonest or not…the real concern is whether it shows that even as recently as four years ago…[Dr S] couldn't be relied upon to tell the truth, couldn't be trusted'* [97].

- Mr Justice Linden did not accept Dr S's third point, ie that the LQC's approach showed apparent bias or unfairness; he did not accept that there was anything concerning about the LQC's tone, or (subject to one point covered below) that there was any unfairness in the questions; they were relevant to the questions of insight and remediation [99].

- However, Mr Justice Linden did accept Dr S's complaint about the finding of dishonesty against her in relation to the 2017 emails. He noted that:

    - the 2021 Tribunal directed itself that it should '*not seek to go behind the findings on facts, impairment and sanction made by the previous hearings*'. He indicated that "the basis on which the 2021 [Tribunal] could make a finding of dishonesty which was not made by the 2018 tribunal which fully considered the matter, was therefore unclear" [100 i)]

- the GMC did not allege dishonesty against Dr S (and had not given her notice of any such allegation) and that remained the case even after the LQC had raised the issue with the parties [100 ii)].

- that if the Tribunal was to take the point, "it should have indicated in advance of its closing remarks to the parties that it was considering doing so and invited submissions as to whether such a finding was open to it, given the findings of the 2018 [tribunal]. It should also have given the parties an opportunity to put forward any evidence and/or argument which they wished to advance on the issue of honesty. It was unsatisfactory to introduce the issue in questions to [Dr S], and then after Counsel had made their submissions, given the seriousness of the allegation" [100 iii)].

- Mr Justice Linden did consider the fact that Dr S's counsel did not respond to the LQC's closing remarks by objecting to the suggestion that her dishonesty could be put in issue in this regard. Indeed, Dr S's counsel conceded that Dr S knew at the time of the 2017 email that what she was writing was dishonest. However, Mr Justice Linden stated [101]:

  - "It is not clear that this is what he was conceding. If it was, the concession was incorrect. In her evidence, [Dr S] did not accept that she had acted dishonestly in this regard. She denied it."

  - It was a matter of concern that the Tribunal apparently misunderstood Dr S's answers, in particular in recording that *'[Dr S] accepted in her oral evidence to this Tribunal that she knew at the time that what she wrote was untrue*'. This was not the case, as the GMC conceded.

  - the finding of dishonesty was itself problematic. Dr S's statement in the 2017 emails that '*The GMC (collectively) decided that the training in your deanery at that time was POOR*' "was untrue, but she went on to 'attach their determination' from which it was apparent that no such decision had been reached or, at least, did not bear her out. It is highly arguable that this was not a communication in which she was attempting to deceive [the recipient] or which gave rise to any risk that he would be deceived.

  - "it is therefore unsurprising that it was characterised as intemperate by the GMC and the 2018 [tribunal], rather than dishonest". he said the 2021 Tribunal's statement that '*no formal finding is dishonesty was made in 2018*' was troubling, because it implied "that informally this was the view of that 2018 [tribunal]" but if so, Mr Justice Linden did not accept that it was.

  - the 2021 Tribunal's reasons "do not suggest that the finding of dishonesty in relation to the [2017 emails] was a minor or immaterial point. This finding was not the only matter on which it relied in relation to conduct and honesty,

but….it referred to [Dr S's] dishonesty as '*persistent and repeated, even after [Dr S] attended a professional ethics course*'". The GMC agreed that this referred back to the finding that Dr S "*accepted in her oral evidence to this Tribunal, that she knew at the time that what she wrote [in the 2017 emails] was untrue*". He said the Tribunal "therefore considered that this was powerful evidence that, despite the steps which she had taken, she had not addressed her dishonesty and there was a significant risk of further dishonesty."

- "realistically, this must have a bearing on the [Tribunal's] view as to the prospect of a future successful application for restoration. If the Tribunal's view was that she had continued to lie in a professional context after taking steps to address her past dishonest behaviour it was unlikely that further steps would be effective. That, in turn, was a powerful reason for making the suspension order."

Ground 5 – the decision of the Tribunal was disproportionate

Under Ground 5, Dr S argued five points [81]. Mr Justice Linden stated that, subject to one point, there was nothing in Ground 5. Dr S submitted that:

- the punishment (ie the suspension order) was disproportionate to the severity of her conduct and the GMC's guidelines on sanctions and restoration should have been analysed and applied. Mr Justice Linden did not accept that the suspension was disproportionate on the findings which the Tribunal made (although he did accept that aspects of those findings where flawed) [102].

- the 2018 Tribunal found her performance issues to be remediable and the decision of the 2021 Tribunal was inconsistent with this finding. The Tribunal failed to explore alternative options and to recognise the improvements. However, Mr Justice Linden stated that there was no inconsistency between the Tribunal concluding in 2018 that Dr S's shortcomings were still remediable and "it concluding, three years later, that in light of the lack of progress, her prospects of a successful application for restoration were such that the suspension order was appropriate. The 2021 [Tribunal] looked at the history thus far and concluded that although the shortcomings were remediable the prospects of them being successfully addressed were remote" [102 ii)].

- performance improvements and stress management strategies were not adequately considered. The Tribunal expressed concern that tiredness and frustration were a trigger to Dr S's dishonesty, but stress management and regular breaks were required by law and recommended in guidance to NHS managers, which suggested strategies for dealing with these issues. Mr Justice Linden stated that the argument that the Tribunal should have concluded that she be given breaks and rest periods so as to ensure that she was not dishonest in the future "was wholly unrealistic". He said that "[Q]uite apart from the fact that there was no power to order restoration with conditions, the expectation would be that a

practitioner would be honest at all times including when they were overworked, tired or frustrated."

- there was a failure to consider mitigating factors including her expressions of remorse, the improvements in her insight and her ongoing remediation. The passage of time was wrongly regarded as an aggravating factor and the Tribunal also failed to consider the contemporary concept of public confidence. Mr Justice Linden, however, said that it was plain that the Tribunal took into account all of the matters on which she relied, including the positive steps which she had taken to address her shortcomings [102 i)].

- that there had been a failure to comply with Rule 24(4) of the Rules in that she had not been given an opportunity to put forward evidence in relation to the question whether a section 41(9) direction should be made. Mr Justice Linden indicated that during discussions about whether Dr S wished the application under section 41(9) to be adjourned, the Tribunal told Dr S that it would not receive any further evidence in relation to the question of whether a section 41(9) order should be made. He concluded that "what the [Tribunal] told [Dr S] was contrary to Rule 24(i)(ii) of [the Rules],…which requires the [tribunal] to '*invite further representations and evidence from [her] specifically on this issue'* (Mr Justice Linden's emphasis added). Mr Justice Linden stated that the Tribunal did the opposite in relation to evidence [103].

Outcome

Mr Justice Linden allowed the appeal on the basis that the suspension decision was 'unjust because of a serious procedural or other irregularity in the proceedings' and remitted the GMC's Section 41 (9) application for reconsideration [107] (as he did not feel that he was in a position to substitute his own view as to the outcome of that application and as Dr S may have had further evidence to put forward in respect of that application [106]).

Mr Justice Linden confirmed (in the Order concluding the appeal) that at the remitted hearing, the findings of the restoration decision would stand, save for the findings of dishonesty in relation to the 2017 emails and the conclusions about Dr S' honesty which were based on those findings. Mr Justice Linden concluded that the remitted Tribunal shall proceed on the basis of the findings of the 2018 Tribunal in relation to the 2017 emails.

Application for permission to claim judicial review

Mr Justice Linden confirmed that out of an abundance of caution, he took the view that the appropriate course was to treat the notice of appeal as an appeal against the suspension decision and an application for permission to claim judicial review of the restoration decision (recognising the different levels of scrutiny required in respect of each decision) [109].

Mr Justice Linden concluded that he did not consider that permission to claim judicial review should be granted, as there was no arguable basis on which the Tribunal's decision on the application to restore was outwith its powers, unlawful or unfair

[110]. However he did conclude that the criticisms of the Tribunal's decision in relation to the 2017 emails were well founded, and noted that the risk of further dishonesty was a key aspect to the Tribunal's reasons in both refusing the application to restore and not to direct a new performance assessment. However, overall he considered that it was "highly likely that the [Tribunal] would have refused to restore [Dr S] to the register even without the finding of dishonesty in relation to the [2017 emails]" [113]. He said:

"The question for the [Tribunal] on the application to restore was whether [Dr S] was "now fit to practise?". The question on the application for a suspension order was different: should she be prevented from making future applications to be restored to the register and/or be limited to applying for a review after a period of 3 years. The two questions engaged different, albeit connected, considerations. The first concerned the current state of play; the second considered the likely future position" [114].

Insofar as it was applied for, Mr Justice Linden therefore refused permission to claim judicial review of the Tribunal's decision to refuse to restore Dr S's name to the register.

Kind regards

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