MPTS Medical Practitioners Tribunal Service

Appeals Circular A07/21

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Towuaghantse v The General Medical Council *[2021] EWHC 681 (Admin)* and Al Nageim v The General Medical Council *[2021] EWHC 877 (Admin)*

Learning points

- Narrative conclusions from another Court are admissible in all three stages of tribunal proceedings (facts, impairment and sanction). However, a tribunal is not bound by the previous findings[1]; it must weigh those findings, including the basis upon which they were made, with all the other evidence in determining the facts and must not make unfair use of them.
- If a registrant defends an allegation of primary fact by giving dishonest evidence and by deliberately seeking to mislead a tribunal then that conduct is relevant to consideration of impairment and fitness to practise in the future. However, if the registrant does no more than put the regulator to proof, then that stance should not be held against them during the impairment and sanctions stages.
- Where there is no significant gap between the findings of fact and the commencement of the impairment and sanctions stages, it is unrealistic to expect a registrant who has unsuccessfully defended the fact-finding stages to demonstrate full remediation almost immediately in the impairment stage, by fully accepting in a genuinely sincere manner everything found against them.
- It is not procedurally fair for a registrant to face the risk of enhanced sanctions by virtue of having robustly defended allegations made against them before the tribunal, or before another court.
- The strength of an expert's feeling does not automatically betray the existence of a direct personal interest in the outcome (ie actual bias) and there will be no

[1] Please note that Rule 34(3) and 34(4) of the GMC (Fitness to Practise) Rules 2004, as amended, continue to apply to conviction cases and cases in respect of a determination about fitness to practise by another regulatory body, respectively.

apparent bias if it is inevitable that the registrant and expert witness would know each other (given the pool of people with that speciality) or simply on the basis that an expert knows/knew some of a registrant's colleagues or did some of their training at the same place as where other witnesses work.

Towuaghantse v The General Medical Council

Background

This was an appeal made by Dr Towuaghantse ('T'), pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('the Tribunal's') decision dated 20 November 2020 erasing his name from the Medical Register.

The Tribunal hearing took place between October and November 2020. The allegations against T related to his treatment of Patient A whilst working as a locum consultant paediatric surgeon at the Royal Victoria Infirmary in Newcastle ('RVI'). Patient A was born on 21 October 2013 (at 37 weeks) in hospital, in Carlisle. From antenatal scans it was known that he had developed an exomphalos major - which is an extremely rare and serious condition where the intestine (and sometimes other organs such as the liver) develop outside the abdomen within a membrane. It requires prompt treatment and repair after birth, with an operation/operations either:

- to replace the contents back inside the abdomen and close up the base of the umbilical cord ('a primary closure procedure'), or
- to place a silo or pouch over the intestines, which is closed over a period of days to weeks, to allow the child to grow so that there is room inside the abdomen.

A potential side effect of a primary closure procedure is Abdominal Compartment Syndrome ('ACS') which is when tissue fluid within the abdomen accumulates in such large volumes that it cannot be accommodated within the abdominal wall. This can lead to organs collapsing and when the abdomen can no longer be distended then, without very prompt surgery, the patient will likely die.

Patient A's exomphalos was observed to be quite large and contained most of the bowel and a large part of the liver. He was immediately transferred to the RVI and T made the decision to undertake a primary closure procedure the following day.

On 16 November 2020, the Tribunal made its findings on fact which included severe criticism of T for: his inappropriate decision to attempt a primary closure procedure, his inaction in the six hour window following the first operation (during which there was insistent concern expressed to him by nursing and medical staff that the baby was suffering perilously from ACS and needed to be re-operated on immediately) and that his actions and omissions contributed to the death of Patient A, who had a treatable condition.

On 18 November 2020, the Tribunal concluded that its factual findings amounted to misconduct and that T's fitness to practise was currently impaired as T's insight was "*limited at best*" and there was little evidence to suggest that T had "*come to a full understanding and acceptance of what caused the tragic outcome insofar as Patient*

A was concerned. In particular, [T] failed to accept any of the Coroner's findings. He sought to blame others for what had occurred."

On 20 November 2020, the Tribunal concluded that T's insight and remediation remained incomplete and accorded the main aggravating factor (that T had fundamentally failed to provide an adequate level of care) considerable weight, notwithstanding the passage of time since the events. The Tribunal specifically held that in the absence of evidence of full remediation there remained a risk of repetition; there was a risk to patient safety because of the lack of timely insight and the lack of full remediation and that the gravity of the misconduct was such that erasure would remain the appropriate sanction, even if there was no ongoing risk to patient safety.

T had continued to work after the incident – subject to interim conditions between March 2014 and January 2016 and thereafter without restrictions. Since 2016, he had been working as an abdominal surgeon (on adults) without any concerns being raised about his practice.

A Coroner's inquest into the death of Patient A had also taken place on 5-8 March 2018.

Grounds

T appealed on the following grounds:

- the GMC relied on irrelevant, prejudicial and inadmissible material during the factual stage of the case; it produced the written (narrative) conclusions of the Coroner who had presided at an inquest into the death of Patient A, and who had heard evidence from a number of witnesses (Ground 1)
- the GMC relied upon an expert witness, (Dr A) who was not independent; he had worked at RVI, where Patient A was treated, and he knew and had worked with key witnesses appearing for the GMC. Therefore, his evidence should not have been given any weight (Ground 2)
- the GMC failed to produce antenatal medical records concerning discussions between Patient A's parents and medical staff prior to the hearing, notwithstanding that T was being criticised for not personally discussing the case with the parents prior to operating on the child. When antenatal records were produced within the hearing, they were incomplete, and T was thereby prejudiced in his defence (Ground 4)
- the finding of impairment and the imposition of the sanction of erasure were unfair in all the circumstances, and in particular the Tribunal failed to give proper consideration to the facts that:
  - the relevant events occurred in 2013, so more than 7 years before the hearing;
  - T had recognised at an early stage that he had made errors in the case and shown insight: he had apologised to Patient A's parents at the inquest, and which he repeated before and during the hearing;
  - T's practice over that 7 year period was unblemished, and he had not undertaken any paediatric work (Ground 6).

Judgment

The appeal was heard by Mr Justice Mostyn.

- Ground 1 - Mostyn, J said that the relevancy principle (that findings of fact of another decision maker are irrelevant) does not apply to inquisitorial regulatory proceedings [30, 31 and 34] and that this was put beyond doubt by Rule 34(1) of the GMC (Fitness to Practise) Rules 2004, as amended[2] [31]. He said that:

  - following R (on the application of Squier) v General Medical Council[3], the "Coroner's narrative conclusion in this case was plainly admissible, and was rightly admitted. It was weighed with all the other evidence in determining the facts. But the [Tribunal] must not have made unfair use of the Coroner's narrative conclusion. Were it to have done so, then its decision would be appealable" [34].

  - "the Coroner's narrative conclusion was plainly admissible in all three phases of the proceedings (facts, impairment and sanction). The [Tribunal] rightly held that it was not bound by the findings of the Coroner. However... in the impairment phase the [Tribunal] held that there was little evidence to suggest that [T] had come to a full understanding and acceptance of what caused the tragic outcome, in particular by failing to accept any of the Coroner's findings." Mostyn, J said that finding of a lack of insight and understanding was a key component in the finding of a limited capacity to remediate, which in turn critically informed the decision on impairment, which then influenced the decision on sanction. The Judge said that when it came to sanction, T was not treated fairly as his defence of his conduct both before the Coroner and before the Tribunal "was used against him as evidence of incapacity to remediate".

  Therefore, although Ground 1 failed (ie the material was admissible) it partially succeeded when the fairness of the decision-making process in relation to impairment and sanction was considered under Ground 6 (where he concluded that the Coroner's narrative conclusion was unfairly used against T when it came to impairment and sanction) [35].

- Ground 2 - Mostyn, J said that on the question of the independence of the expert witness (Dr A), the Tribunal's decision that there was nothing to support the proposition that he was affected by bias, whether real or apparent, was unimpeachable [40]. He said:

  - "Actual bias is confined to the position where it is shown that the expert has a direct personal interest in the outcome of the proceedings which is other than de minimis. Apparent bias will be found to exist where the reviewing court or tribunal, attributing to the reasonable man knowledge of the relevant circumstances and adopting a broad approach, assesses on behalf of that reasonable man that there is a real danger of bias." [para 41]

[2] Rule 34() - The Committee or a Tribunal may admit any evidence they consider fair and relevant to the case before them, whether or not such evidence would be admissible in a court of law
[3] [2015] EWHC 299 (Admin)

- "The strength of [Mr A's] feeling does not betray the existence of a direct personal interest in the outcome. There was thus no basis to find that there existed actual bias. As for apparent bias, it was inevitable that [T] and the witness would know each other; the pool of paediatric surgeons in this country is small and there is much common acquaintanceship. The fact that Mr [A] knew some of the consultants at the RVI is neither here nor there. Nor is the fact that he did some of his training there. The [Tribunal] was right to conclude that there was no real danger of actual bias."

Therefore, this ground was dismissed.

- Ground 4 – Mostyn, J found that the alleged missing letter from the previous paediatric surgeon to Patient A's mother's GP, would not have added anything to the content of the advice which that doctor gave about the exomphalos major on 4 June 2013, which was duly recorded in the antenatal notes, or thrown any further light on the contested allegation that T failed to discuss with the baby's parents the options for his management. In addition, although this was taken into account in the misconduct finding "this aspect of [T's] conduct did not specifically feature in the impairment decision" [para 49-50]. Therefore, this ground was dismissed.

- Ground 6 – Mostyn, J acknowledged that the findings about T's insight and his capacity to remediate, "were central to the finding of current impairment... and the decision on sanction" [58]. He drew attention to the Tribunal's findings that: T failed to accept any of the Coroner's findings [59], there was a change of stance by T in relation to insight, in that more evidence of insight was provided as the hearing progressed and when the Tribunal was considering the facts, T had tried to attribute to others at least some of the responsibility for what had happened to Patient A which the Tribunal considered was "*a particularly regrettable feature of the case*". [60]

  - He said that it was clear that a significant component in the decision-making process, both at the impairment and sanction stages "was the conclusion that [T] was to be seriously faulted for (a) having contested the allegations against him at the inquest, and not having accepted the Coroner's findings, and (b) having contested the allegations against him at the [Tribunal]. The pleas of not guilty (in effect) in both courts were clearly regarded by the [Tribunal] as evidence of an incapacity to remediate and therefore of a risk to the public, as well as an aggravating feature contributing to the award of the ultimate penalty" [61]. Mostyn, J said that in his judgment "it is not procedurally fair for a registrant to face the risk of enhanced sanctions by virtue of having robustly defended allegations made against him before the [Tribunal], or before another court" [63].

  - Mostyn, J considered that the reasoning in Misra v General Medical Council (GMC) [4] (in respect of it being oppressive and unnecessary to add charges based on a registrant's reaction to the initial complaint, which add nothing to

[4] [2003] UKPC 7

the degree of culpability in respect of the substantive allegations, which the registrant has declined to admit, if they were to be found proved) "surely applies equally to the situation, as here, where a registrant has doughtily defended allegations against him in the fact-finding phase. It surely leads to say that it is equally oppressive for that defence by the registrant to be used against him in the impairment and sanctions phases"[64].

- Mostyn, J reiterated that registrants are perfectly entitled to say that they do not accept the findings of the panel[5] [65] and his own previous findings[6] that:
  - to expect a registrant who has "doughtily defended an allegation on the ground that they did not do it suddenly to undergo a Damascene conversion in the impairment phase following a factual finding that he did do it…would be seriously to compromise his right of appeal against the factual finding, and add very little, if anything, to the principal allegations of culpability to be determined."[67]
  - "an accused professional has the right to advance any defence he or she wishes and is entitled to a fair trial of that defence without facing the jeopardy, if the defence is disbelieved, of further charges or enhanced sanctions" [68]
  - "in the absence of any significant hiatus between the factual finding and the impairment/sanctions phase in which full reflection can be undergone, it is not reasonable to expect an accused professional who has defended the case on the ground that he did not do what was alleged suddenly to admit everything in the impairment phase" [68] or to "demonstrate full remediation by fully accepting in a genuinely sincere manner everything found against him" [77].
- Mostyn, J said "[I]n my judgment a distinction should be drawn between a defence of an allegation of primary concrete fact and a defence of a proposed evaluation (or exercise of discretion) deriving from primary concrete facts. The former is a binary yes/no question. The latter requires a nuanced analysis by the decision-maker with a strong subjective component. If a registrant defends an allegation of primary concrete fact by giving dishonest evidence and by deliberately seeking to mislead the [Tribunal] then that forensic conduct would certainly say something about impairment and fitness to practise in the future. But if, at the other end of the scale, the registrant does no more than put the GMC to proof then I cannot see how that stance could be held against him in the impairment and sanctions phases. Equally, if the registrant admits the primary facts but defends a proposed evaluation of those facts in the impairment phase then it would be Kafkaesque (to use Walker J's language) if his defence were used to prove that very proposed evaluation. It would amount to saying that your fitness to practise is currently impaired because you have disputed that your fitness to practise is currently impaired" [72].

[5] Amao v Nursing and Midwifery Council [2014] EWHC 147
[6] In General Medical Council v Awan [2020] EWHC 1553 (Admin)

- Mostyn, J said that the rejection of T's defence on the facts by the Tribunal in this case did not entail a finding that he was guilty of blatant dishonesty or the deliberate misleading of the Tribunal [73]. In the absence of findings of blatant dishonesty, the Tribunal should not have used against T in the impairment and sanctions phases:
  - his decision to contest the allegations made against him in the Coroner's court or
  - his failure to accept those findings in circumstances where they were soon replicated by charges brought against him by the GMC before the Tribunal. "It is in this sense that the conclusions of the Coroner were unfairly deployed against him" [75]
  - his decision fully to contest the charge before the Tribunal. "His deployment of a robust defence, which was his right, should not have been construed as a refusal to remediate, let alone an incapacity to remediate" [76].

Therefore, he concluded that the decision-making processes that led to the finding of impairment, as well as the decision on sanction, were unjust because of a serious procedural irregularity and that "the capacity of the registrant to remediate sincerely should be judged by reference to evidence unconnected to his forensic stance in the fact-finding phase (unless the fact-finding decision included findings of blatant dishonesty by the registrant)" [77].

Mostyn, J said that given the irregularity, he could not say that the decision would inevitably have been the same (although he thought it quite likely) and that in relation to the Tribunal's conclusion that "*the gravity of the misconduct is such that erasure would remain the appropriate sanction even if there was no ongoing risk to patient safety*","[T]he misconduct of itself cannot justify the ultimate sanction. It informs, among other things, the criterion of current impairment of fitness to practise. That in turn informs in the sanctions phase the criterion of the protection of the public in all three of its aspects" [79].

Whilst the Judge said that all the findings of fact made by the MPT were unimpeachable [80], he allowed the appeal in part on Ground 6, and remitted the impairment and sanctions phases to be reconsidered by the MPT without reference to, or taking into account of:

- T's decision to contest the allegations made against him at the inquest;
- T's failure thereafter to admit the narrative conclusions of the Coroner;
- T's decision to contest the allegations made against him at the Tribunal, or the manner in which he contested them.

Al Nageim v The General Medical Council

The judgment in Towuaghantse v The General Medical Council was specifically considered in an appeal made by Dr Al Nageim ('AN'), pursuant to section 40 of the Medical Act 1983, against a Medical Practitioners Tribunal's ('AN's Tribunal') decision dated 4 December 2020 erasing his name from the Medical Register.

AN's Tribunal found misconduct proved against AN relating to:

- his dishonest use of on-call rooms and surgical day centre facilities at the Countess of Chester Hospital ('the Chester Hospital') after his employment with the Chester Hospital ended;
- his dishonest failure to notify the Royal Liverpool and Broadgreen University Hospital NHS Trust ('the Royal Liverpool Hospital') of salary payments made to him over 27 months totalling £41 266.16 (net) which he knew had been made in error.

AN's Tribunal concluded that AN had not given it a true account on five occasions in the course of his evidence at the first stage of the proceedings and was not satisfied that AN had developed any insight into his actions in not telling the truth, particularly to it.

When considering the grounds of appeal, Mr Justice Julian Knowles specifically considered the question of whether being found by a tribunal to have given untrue evidence at the fact-finding stage can properly be used at the impairment or sanction stages and in particular, Mostyn, J's comments in paragraphs 59-68 and 71-77 of his judgment in in Towuaghantse v The General Medical Council. Knowles, J concluded that in AN's case:

- Although the AN Tribunal did not use the phrase 'blatantly dishonest' to describe AN's evidence before it, it could aptly be so described; this was a case where AN was "advancing a positive defence about what he said he believed had been his entitlement to use Chester Hospital facilities (even though he no longer worked there and his use was not connected with his work as a doctor), and what he said had been his belief about why he was being paid his salary by the Royal Liverpool Hospital (even after his contract had come to an end and, later, he started to receive his Wrexham salary in addition). In other words, to borrow the language of [72] of Mostyn J's judgment, [AN's] defence involved the 'allegation of primary concrete facts' rather than being 'a defence of a proposed evaluation (or exercise of discretion) deriving from primary concrete facts'" [120].
- AN's Tribunal found as a fact that that AN did not have either of the states of belief that he claimed in his evidence he had had. These were findings that he knowingly advanced a false case before it [121].
- AN's case about the salary payments involved "especially egregious untruthfulness and dishonesty" as AN could "not have genuinely believed for one second that he was still entitled to be paid by the Royal Liverpool Hospital even after his contract there had come to an end. His claim that he genuinely thought the payments were some sort of ex gratia 'kindness', or a loan by the Hospital, and that after he started working in Wrexham in August 2013 it was perfectly in order for him to receive two NHS salaries, was completely absurd" [123].
- AN's Tribunal was not at fault in having regard to AN's dishonesty during the hearing when it came to assess his level of insight. "Its approach was in line with what Mostyn J said in Towuaghantse, supra, [72], that dishonesty in knowingly advancing a case of false primary fact certainly 'say[s] something about impairment and fitness to practise in the future'" and that this was a case where nine months had passed between the facts/impairment stage and the sanction stage, in which time AN had still not developed full insight into his dishonesty [124].

- This was not a case where AN was being punished for daring to contest the GMC's case against him; AN's Tribunal found that in March 2020 he had advanced a case as to his states of mind at the time of the alleged misconduct which he knew not to be true. By December 2020 the Tribunal was not satisfied that he had full insight into that dishonesty. This was a relevant factor for it to take into account in deciding whether his dishonest misconduct was fundamentally incompatible with his continued registration" [125].

The appeal was dismissed on this and all other grounds.

Kind regards
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