Appeals Circular A09/19

Seventh floor
St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Email: enquiries@mpts-uk.org
Website: www.mpts-uk.org
Telephone: 0161 923 6263
Fax: 0161 240 7199

11 July 2019

To: MPTS Associates

Cc: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

The General Medical Council v Dr Hayat [*2018*] *EWCA Civ 2796*

Learning Points

When considering a doctor's application to adjourn on the basis of ill health:

- the decision is a matter for the discretion of the Tribunal, but also taking into account the public interest in the fair, economical, expeditious and efficient disposal of allegations made against medical practitioners;

- the Tribunal should consider the medical evidence submitted; that evidence must be evidence that the individual is unfit to participate in the hearing, must identify with proper particularity the individual's condition and explain why that condition prevents their participation in the hearing, and that evidence should be unchallenged;

- the Tribunal has a discretion to conduct further enquiries if the medical evidence does not meet the requirements above, but that is a discretion, not a duty. The onus remains on the individual to engage with the Tribunal and the process;

- a pro-forma sick note which only refers to an unfitness to attend work may well be insufficient to justify non-attendance at a hearing. In addition, the relevance of such a sick note depends on its contents, not its date (e.g. even if it is the most recent evidence);

- the Tribunal is entitled to weigh up a sick note against all of the other material available to them, including existing medical evidence but also the case overall, including, for example, previous unsuccessful applications to adjourn on entirely

different grounds and, as part of these wider considerations, the question of the public interest as any adjournment causes extensive disruption and inconvenience and wastes huge amounts of costs.

Background

This was an appeal brought by the General Medical Council ('the GMC') against the decision of the High Court dated 28 July 2017 allowing an appeal brought by Dr Hayat against the decision dated 15 February 2017 of a Medical Practitioners Tribunal ('the Tribunal') to erase his name from the Medical Register.

Tribunal hearing

The allegations against Dr Hayat related to him acting dishonestly when taking out a critical illness insurance policy and, in October 2012, when submitting a claim under the policy, stating he had suffered a heart attack, and subsequently providing medical reports from the institution where he claimed to have been treated, in support of his claim.

Dr Hayat twice unsuccessfully applied to postpone the hearing (on the basis that he had had insufficient time to prepare and insufficient funds to pay his lawyers, respectively) and twice applied to adjourn it, after it had started. On 31 October 2016, after his first application to adjourn had already been refused, Dr Hayat was found unresponsive in the hearing centre and subsequently admitted to hospital. He was discharged from hospital on 4 November, following which, two doctors from the treating hospital opined that Dr Hayat was fit to proceed with the hearing. On 7 November 2016, the Tribunal determined to proceed in Dr Hayat's absence despite a "fit note" from Dr Hayat's GP which stated that he was not fit for work.

The Tribunal went on to find Dr Hayat's fitness to practice was impaired and erased him from the medical register.

High Court appeal

Dr Hayat appealed the Tribunal's decisions on a number of grounds including that:

1. it was procedurally unfair to proceed with the hearing in his absence, after refusing his applications for an adjournment;
2. the Tribunal conducted the proceedings in an unfair manner;
3. the Tribunal's findings of fact (including dishonesty), misconduct and impairment were wrong; and
4. the sanction imposed was disproportionate.

Mrs Justice Lang allowed the appeal[1] on the basis that the Tribunal should not have allowed the hearing to proceed in Dr Hayat's absence on 7 November 2016 and therefore he did not receive a fair hearing. She said that:

1. information in the GP's fit note was sufficient to require the Tribunal to conduct further investigations into Dr Hayat's condition, if it was not prepared to adjourn the hearing on the basis of the fit note alone;
2. GP's evidence raised a new issue which had not been fully addressed in the earlier evidence provided by the treating hospital doctors;
3. the Tribunal "ought to have given careful consideration to the question whether and to what extent [Dr Hayat's] condition would affect his ability to take part in the proceedings" and "to consider whether that could also mean that he was not well enough to conduct a lengthy disciplinary hearing" including considering other factors such as conducting the case himself and being subject to cross examination on allegations of dishonesty.

As the Judge ordered a re-hearing before a fresh Tribunal, she did not go on to express her views on the other grounds of appeal raised by Dr Hayat.

Grounds of Appeal to the Court of Appeal

The GMC appealed against the High Court decision on the grounds that Mrs Justice Lang:

1. misdirected herself that medical evidence suggesting that the registrant was unfit to work 'ought generally' to result in the adjournment of their disciplinary hearing even when that evidence was unparticularised, unreasoned and disputed;
2. failed to afford appropriate respect to the judgment of the Tribunal on an issue which the Tribunal was better placed to judge – i.e. whether the medical conditions identified in the sick note suggested that Dr Hayat would be unfit to participate in the hearing;
3. failed to recognise that the question of whether to adjourn for further investigations into Dr Hayat's health was a case management decision which should only have been interfered with by an appellate court if it were 'plainly wrong'; and
4. failed to ask whether the alleged procedural irregularity (in failing to conduct further investigations) caused any injustice. There was no evidence that if the Tribunal had conducted further enquiries of the author of the sick note it would have discovered anything which would have prevented the hearing from continuing in Dr Hayat's absence.

[1] Hayat v The General Medical Council *[2017] EWCA Civ 1899 (Admin)*

Judgment of the Court of Appeal

Judgment was given by Lord Justice Coulson with whom Lord Justice McCombe and Lord Justice Moylan agreed. The Court considered the grounds of appeal together under two general points of principle and practice (which had been identified by the Judge granting permission to appeal) which were:

1. the manner in which the Tribunal should act where there is conflicting medical evidence and an application to adjourn on grounds of ill health (covering Grounds 1 and 4); and
2. the standard of review in an appeal under CPR 52.21(3)(b) in respect of a decision to refuse an adjournment (covering Grounds 2 and 3) [paras 30-31].

The Court of Appeal said:

1. in relation to point 1 above: **The correct approach to medical evidence relied on in support of an application to adjourn**:
    a. in relation to general principles: that previous authorities[2] in relation to the general approach to be adopted when a court or tribunal is considering whether to adjourn a hearing or to continue with a hearing in the absence of the defendant "need to be treated with considerable care following the decision of this court in General Medical Council v Adeogba[3]" [paras 32-36]. That decision includes the following principles:
        i. "there is a difference between continuing a criminal trial in the absence of the defendant and the decision under Rule 31 to continue a disciplinary hearing. This latter decision must also be guided by the context provided by the statutory overarching objective of the GMC….in that regard, the fair, economical, expeditious and efficient disposal of allegations made against medical practitioners is of very real importance";
        ii. "fairness fully encompasses fairness to the affected medical practitioner (a feature of prime importance) but it also involves fairness to the GMC… In that regard, it is important that the analogy between criminal prosecution and regulatory proceedings is not taken too far. Steps can be taken to enforce attendance by a defendant; he can be arrested and brought to court. No such remedy is available to a regulator."

[2] R v Jones [2003] 1 AC 1, Brabazon-Drenning v UKCC [2001] HRLR 6, Tait v Royal College of Veterinary Surgeons [2003] UKPC 34 and Norton v Bar Standards Board [2014] EWHC 2681 (Admin).

[3] [2016] EWCA Civ 162; [2016] 1WLR 3867

iii. "the GMC represent the public interest in relation to standards of healthcare. It would run entirely counter to the protection, promotion and maintenance of the health and safety of the public if a practitioner could effectively frustrate the process and challenge a refusal to adjourn when that practitioner had deliberately failed to engage in the process. The consequential cost and delay to other cases is real. Where there is good reason not to proceed, the case should be adjourned; where there is not, however, it is only right that it should proceed."

iv. "there is a burden on medical practitioners, as there is with all professionals subject to a regulatory regime, to engage with the regulator, both in relation to the investigation and ultimate resolution of allegations made against them. That is part of the responsibility to which they sign up when being admitted to the profession."

v. the GMC's "responsibility is very simple. It is to communicate with the practitioner at the address he has provided; neither more nor less. It is the practitioner's obligation to ensure that the address is up to date."

vi. "To suggest 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. In addition, an adjournment was highly disruptive…. Organising another hearing would have been both disruptive and inconvenient. 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 (rather than having disengaged from the process or even adopted an 'ostrich like attitude'): any culture of adjournment is to be deprecated."

b. in relation to <u>the required standard of medical evidence</u> necessary upon which to make an application for an adjournment on the grounds of ill health:

i. that evidence must "be evidence that the individual is unfit to participate in the hearing[4]…..must identify with proper particularity the individual's condition and explain why that condition prevents

[4] Governor and Company of the Bank of Ireland v Jaffery [2012] EWHC 724 (Ch) at [19]

their participation in the hearing[5] [and]... that evidence should be unchallenged[6]" [para 37];

ii. "This court has said repeatedly that a pro-forma sick note (of the kind provided here) may well be insufficient to justify non-attendance at a hearing, particularly if it refers only to an unfitness to attend work" [para 41];

c. in relation to making <u>further enquiries</u>;

i. the Tribunal has a discretion to conduct further enquiries if the medical evidence does not meet the requirements above, but that "is a discretion, not a duty...[T]he onus remains on the individual to engage with the Tribunal and the process, and "a culture of adjournment is to be deprecated": see *Adeogba* at [61]" [para 42];

ii. "if a Tribunal is being criticised for not undertaking further enquiries into the medical evidence, the complainant must be able to demonstrate that those further enquiries would have been material and would have been likely to have led to a different decision. In other words, the alleged failure must be material" [para 43];

The Court found that Mrs Justice Lang failed to apply the principles set out above and as a result came to "demonstrably the wrong conclusion" [para 44] for the following seven reasons:

1) she "appeared to conclude that, because the sick note post-dated the evidence of [the hospital doctors], it somehow trumped all that had gone before it. That was wrong in principle; the relevance of the sick note depended on its contents, not its date.....[she] compounded this error by saying at [53] that, applying the authorities, evidence of the kind set out in the sick note "ought generally to result in an adjournment". That is incorrect: as I have explained in paragraphs 34 – 36 above, that is manifestly not the approach set out in *Adeogba*" [para 45];

2) the sick note:

- "did not say that Dr Hayat was unfit to participate in the hearing. Lang J wrongly equated the statement in the sick note that he could not work with a statement that he could not participate in the hearing, contrary to the principles noted [above].... There was no medical basis for that conclusion and no consideration in the sick note of how the Tribunal might have

[5] Levy v Ellis Carr [2012] EWHC 63 (Ch) at [36]

[6] Brabazon-Drenning at [18] – see footnote 2

accommodated Dr Hayat and any symptoms he might have had, or how and why such accommodation was impossible." [para 46];

- was "wholly insufficient to warrant an adjournment. It failed to meet the *Levy v Carr Ellis* test….in any respect. It did not identify who prepared it, although there was a signature. It did not explain what Dr Hayat's medical condition was or how and why any particular features of that condition meant that he was unable to take part in the hearing. There was no prognosis. There was nothing about the pro-forma sick note which could have allowed the Tribunal 'to conclude with any confidence that what was being expressed was an independent opinion after a proper examination'." [para 48];

3) she appeared to have assumed that the sick note was diametrically opposite to the evidence of the hospital doctors, when it was not. The Court said that the only matter in the sick note that was even arguably 'new' was the reference to "right arm bruising +/- infection" and this "could not possibly have justified an adjournment". The Court said the reference to infection was unexplained and no prescription of antibiotics has ever been identified [para 49];

4) she "was wholly wrong to say at [51] that the GMC's scepticism about Dr Hayat "could not…justify the Tribunal in *disregarding* the evidence of a medical professional", and at [54], that "the Tribunal is not entitled to *disregard* the GP's certificate that the appellant was unfit for work" (emphasis supplied)" [para 50]. The Court said that the Tribunal carefully considered the sick note, but concluded that it "essentially reiterates" the medical information from the hospital admission and the hospital doctors and "[T]hat was a view to which the Tribunal was plainly entitled to come" [para 51];

5) "the judge was wrong at [50] and again at [54] to suggest that, in some way, because the sick note had given rise to an arguable case that there should be an adjournment on the grounds of ill-health, it was then up to the Tribunal to carry out further investigations. That was incorrect in principle. The onus was always on Dr Hayat, not the Tribunal" [para 52]. In any event, "there was no evidence before Lang J, or before us, that any further investigations by the Tribunal into Dr Hayat's medical condition would have made any difference at all. So even if there was a failure it was not material" [para 53];

6) "the Tribunal cannot be criticised in this case for considering the sick note but concluding that, in the round, the case for an adjournment had not been made out" [para 55];

7) that:

- "the Tribunal was entitled to weigh up the (inadequate) sick note against all of the other material available to them. This included not only the existing medical evidence (and the fact that the sick note was broadly consistent with that other evidence, and not contrary to it) but also the fact that Dr Hayat had already made three unsuccessful applications to adjourn this hearing on entirely different grounds, each without success." [para 56]; and

- "as part of these wider considerations, there was also the question of the public interest…..Any adjournment causes extensive disruption and inconvenience and wastes huge amounts of costs. That would have been particularly acute here, given the number of witnesses and the length of the hearing. Those again were relevant factors which the Tribunal was entitled to consider when arriving at its conclusion" [para 57]. Although it was accepted that those considerations also included "the potential consequences to Dr Hayat, if the matter went ahead in his absence. But, since there was no medical evidence to persuade the Tribunal that his absence was involuntary, that was of little weight. Moreover, I consider that the consequences of non-attendance were self-evident: they did not need setting out in the determination of a specialist tribunal." [para 58].

The Court concluded that "[T]he Tribunal was entitled to take into account all it knew, and put the sick note in the context of the other medical evidence, and the case overall. In my view, that is precisely what they did. Their decision to proceed in Dr Hayat's absence was unimpeachable and in consequence, if my Lords agree, this appeal must be allowed" [para 59].

2. in relation to point 2 above: **The status of the Tribunal's decision and the threshold for any appeal**, the Court said that "the judge failed to adopt the correct approach" and fell into error [para 70] for the following four reasons:

    a. she did not apply CPR 52.21(3)[7] but appeared to decide the adjournment application de novo, which was "impermissible" [paras 64-69]. "The only relevant question was whether there had been an unlawful (or unfair) exercise of discretion by the Tribunal……. there was no basis on which she could interfere with the Tribunal's exercise of its discretion." [para 71];

    b. she paid no heed to the specialist nature of the Tribunal [paras 61-63] and appeared to have reached her own conclusion as to what some of the

[7] that an appeal will be allowed where the earlier decision was wrong or unjust because of a serious procedural or other irregularity

medical evidence meant, regardless of the views of the medical members of the Tribunal [para 72];

c. there was no procedural irregularity as the Tribunal had not disregarded the sick note [para 73];

d. “when considering the issue of fairness, the judge failed to have any regard to the background material to which I have previously referred. In particular, she had no regard to the previous unsuccessful attempts to obtain an adjournment of this hearing or the public interest. These were matters which the Tribunal was entitled to take into account when exercising its discretion. In my view, Lang J, having approached the central issue on a narrow and incorrect basis (namely the alleged ‘disregard’ of the sick note), failed to grapple with the latitude to which the Tribunal was entitled as a consequence of the discretionary nature of the decision.” [para 74].

In summary, the Court said that the “decision to refuse to adjourn the hearing was a discretionary matter, properly made by a specialist tribunal on the basis of all the evidence. It was a decision to which the Tribunal was entitled to come” [para 75].

The Court of Appeal therefore allowed the GMC’s appeal and the matter was remitted back to the High Court to consider the remaining grounds of Dr Hayat’s section 40 appeal [para 76].

Kind regards

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