MPTS Medical Practitioners Tribunal Service

Appeals Circular A09/21

28 July 2021

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

0161 923 6263
enquiries@mpts-uk.org
www.mpts-uk.org

To: MPTS Associates

CC: Tribunal Clerks
Medical Defence Organisations
Employer Liaison Advisers

The General Medical Council v Armstrong *[2021] EWHC 1658 (Admin)*

Learning Points

- Tribunals must have proper regard to the nature and extent of a practitioner's dishonesty and engage with the weight of the public interest factors tending to a finding of impairment in such cases. In cases of significant professional dishonesty, mitigation has a necessarily limited role.
- The impact on public confidence in cases involving dishonesty, in particular of a regulatory regime, is not diminished because the practitioner in question is unlikely to repeat their dishonesty.
- Tribunals should explain what bearing and weight they give to issues of remediation.
- The categorisation of a case as 'exceptional' signifies that the nature of the issues in play are such that it will be only in an unusual or rare case that one set of factors will outweigh others. The consequences of a finding of dishonesty in the professional regulatory context on the overarching objective, mean that to justify a finding of no impairment, the factors on the other side will need to be extremely strong.
- In determining whether a case is exceptional, each case must be considered on its facts. In previous cases in which a finding of dishonesty did not lead to a finding of impairment, the dishonest conduct in each of them was an isolated incident, there was no question of financial gain and they were in the nature of uncharacteristic lapses in what may be described as "front-line" challenging clinical situations involving direct interaction between professional and patient (or patient's relative).

Background

This was an appeal brought by the General Medical Council ('GMC') pursuant to section 40A of the Medical Act 1983 against a Medical Practitioners Tribunal's ('the Tribunal's) decision dated 21 January 2020 that Dr Armstrong's ('A's') fitness to practise was not impaired.

A completed her General Practitioner ('GP') training in 2004 and then worked as a GP at various practices in the North of England. In 2012 she emigrated to Australia, working as a GP specialising in minor surgery, dermoscopy and women's health. She returned to the UK at the end of 2015.

The allegations against A included that:

- in 2016, she worked as a locum GP at several practices when she was not registered on the required Medical Performers List ('MPL');
- she dishonestly made various false statements between September 2017 and June 2018 including:
  - on 29 September 2017 falsely stating that she was on the MPL
  - in October 2017 that she had no plans or intention to work as a GP in the UK
  - in application forms in December 2017 and April 2018 indicating that she was not subject to any misconduct or fitness to practise investigations/proceedings
  - in June and August 2018 about the fact her registration had been made subject to an interim order of suspension for twelve months on 14 May 2018 (of which she had been notified by an email letter on 15 May 2018) including when applying for the position of GP at a practice in Australia
- she worked and intended to work as a GP health screener when interim suspended.

At the Tribunal hearing, A admitted all of the allegations against her and the Tribunal found that all, except a failure to cooperate with investigations by NHS England, amounted to misconduct. However, as a result of the exceptional circumstances of the case, the Tribunal found her not currently impaired.

When considering the question of current impairment of fitness to practise, the Tribunal looked for evidence of insight and remediation, and the likelihood of repetition, and balanced their findings against the three limbs of the statutory overarching objective. The Tribunal:

- acknowledged A's full admissions that she had fully engaged with the regulatory proceedings and considered her to be genuinely remorseful
- accepted that A fully understood that her dishonesty had a significant impact on others, that her failure to be on the MPL could have an impact on patient safety and that she was aware of the impact that her actions could have had on public confidence in the medical profession, but was satisfied that A had developed full appreciation of the gravity and impact of her actions
- whilst accepting that it was difficult to demonstrate remediation following a finding of dishonesty it considered that "to the extent possible, A had endeavoured to demonstrate remediation of her conduct."
- accepted that A's dishonest conduct continued for a period of over two years, but that during that period she was subject to a combination of significant factors

in her personal life which affected her thinking and decision making, but that she had now put measures in place to ensure her conduct would not be repeated. Therefore "due to the unique circumstances, the likelihood of repetition in this case was exceptionally low"

- when balancing its thoughts on insight and remediation with all three limbs of the statutory overarching objective it said:
  - it was satisfied that, given the level of insight demonstrated, the attempts at remediation undertaken and the testimonials it had seen, the risk of repetition of A's behaviour was extremely low and that she did not pose an ongoing risk to patient safety
  - the confidence of members of the public fully informed of the circumstances of this case, would not be undermined were there to be a finding of no impairment given the circumstances of this case
  - its duty to promote and uphold proper professional standards for the profession was satisfied by this rigorous regulatory process which had resulted in a finding of serious professional misconduct.
- "was mindful of the submissions it had heard in regard to the case of Uppal. It noted the finding of no impairment in relation to an incident of dishonesty in what had been determined to be exceptional circumstances. The conduct in this case arose during a period in which [A] was subject to a combination of multiple, significant adverse life stressors. The Tribunal was satisfied that the particular circumstances of this case were also exceptional. For the reasons it has set out, it was satisfied that a finding of no impairment was appropriate in this case and met the requirements of the statutory overarching objective."

Grounds of appeal

The GMC appealed the decision on the following grounds:

- that the Tribunal's decision in the present case was wrong in that the Tribunal failed to have proper regard to the nature and extent of A's dishonesty
- that the Tribunal placed wholly excessive weight upon factors in favour of A.

The GMC asked the court to quash the MPT's decision on non-impairment; to substitute a finding of impairment; and to remit the matter of sanction to the MPT, to be determined in the light of the court's judgment.

Judgment

Preliminary issue – Mr Justice Lane decided to hear the appeal in A's absence (she was understood to be in Australia and had indicated she would not be attending or represented at the hearing).

Ground 1 – The Judge agreed that the Tribunal had failed to have proper regard to the nature and extent of A's dishonesty. He said that the Tribunal had "an impermissibly incomplete engagement with the issue of dishonesty" [47] and failed to engage with the weight of the public interest factors tending to a finding of impairment [50]. He said that:

- the only reasoned engagement with the important aspects that A's dishonest conduct was lengthy, persistent and multi-faceted was where the Tribunal

"merely recorded" A's acceptance "that failure to be on the list could have an impact on patient safety" and that she "was aware of the impact that her actions could have on public confidence in the medical profession" [46].

- the Tribunal's determination had no specific regard to the significance of A's dishonesty about being on the MPL [48] or to the consequences of someone practising (or being available to practise) when they are not on the MPL and, accordingly, cannot satisfy the Board (or, thereby, the public) of matters which would be evidenced in such an application [49]. This includes, for example, that appropriate indemnity arrangements are in place, suitability information relating to children and vulnerable adults and the provision of undertakings, including to maintain an appropriate indemnity arrangement and to participate in any appraisal systems [48] which the Judge said "are, clearly, highly important matters that go to the heart of the over-arching aim in section 1 of the 1983 Act" [49].

- the only inference the Tribunal drew from their acceptance that A's dishonest conduct continued "for a period of over two years" was that this "was subject to a combination of significant factors in her personal life which affected her thinking and decision-making, including financial pressures, adverse health events in her close family and being the victim of an abusive and controlling partner." Whilst A did not seek to use this as an excuse for her behaviour, the Tribunal then concluded that, because of the measures A had put in place, the likelihood of repetition was "exceptionally low" [46].

The Judge also said that the Tribunal had failed to consider the significance of the fact that A's dishonesty extended over a period of some two and a half years and the sheer number of times that she resorted to it. He said "the reference to the length of the dishonest conduct is followed immediately, and without further analysis, by a set of circumstances which the Tribunal concluded amounted to sufficient mitigation. But....an acknowledgment of wrongdoing and attempts at reparation have only a limited part to play in cases of serious dishonesty". He went on to say that these issues actually raised questions about A's lack of insight because, if financial and other pressures were affecting her "thinking and decision-making" over this period, when she was treating patients despite not being on the MPL, there was an obvious issue as to whether, in this position, she should have been engaging with patients at all [50].

There was, the Judge said, a serious disconnect between the Tribunal's findings that A's conduct would be considered as deplorable by fellow practitioners, was a breach of a fundamental tenet of the profession and that it brought the profession into disrepute, and its findings that A's fitness to practise was not currently impaired.

He said that he was in no doubt that a hypothetical member of the public would take entirely the opposite view to that of the Tribunal which was that "the confidence of members of the public fully informed of the circumstances of this case, would not be undermined were there to be a finding of no impairment in this case". He said that this statement was "unreasoned" [47].

Ground 2 – the Judge agreed with the GMC that the Tribunal placed wholly excessive weight upon factors in favour of A. He said:

- there was no acknowledgment by the Tribunal that "in cases of significant professional dishonesty, mitigation has a necessarily limited role" (quoting from *Bolton v Law Society [1994] 1 WLR 512 at 598*) [51]

- "The fact that the assessment of impairment is forward-looking means the Tribunal must appreciate that any loss of public confidence in the regulatory regime, resulting from erroneously lenient decisions, is likely to be of an ongoing nature. It does not necessarily fall to be discounted or downplayed, merely because the practitioner in question is unlikely to repeat their dishonesty. Undue leniency risks undermining general public confidence in the ability of the regulatory regime to protect the public from harm. In the present case, there is a legitimate concern that the integrity of the list required to be kept by the 2013 Regulations would be put at risk, in that others may lie about being on it and yet escape formal sanction." [52]

- in relation to the issue of exceptionality and the factors considered by the Tribunal in this regard:

  - "Exceptionality is rarely a substantive "threshold" test. Rather, the categorisation of a case as exceptional in the judicial context signifies that the nature of the issues in play are such that it will be only in an unusual or rare case that one set of factors will outweigh others…..in cases such as the present, the consequences of a finding of dishonesty in the professional regulatory context are likely to be so profound, in terms of the overarching regulatory objective, that the factors on the other side, viewed as a whole, will need to be extremely strong, in order for a finding of no impairment to be justified. Competing factors of the required overall strength are unlikely to be frequently encountered." [53]

  - that it was very difficult to regard the remediation undertaken by A (attending two one-day courses in 2019 concerned with medical ethics and medical professionalism and providing an "extensive reading list" which, the Tribunal said demonstrated "that she had reflected on her misconduct in detail") as having any material bearing and that the Tribunal failed to explain why it was considered to do so [54].

  - "no more than limited weight" could be placed upon the Tribunal's view that the "duty to promote and uphold proper professional standards for the profession was satisfied by this rigorous regulatory process which had resulted in a finding of serious professional misconduct". Whilst the Judge accepted that the mere fact of facing allegations before the Tribunal may have "some modest bearing on the public's view of the effectiveness of the regulatory regime", he said that in the light of the extremely serious allegations proved against A, "it cannot rationally be concluded that the mere existence of the Tribunal process, resulting in a finding of "serious professional misconduct", but which did not lead to a finding of impairment and, so, any consideration of sanction, adequately addresses the legitimate concerns of the public." [55]

- in determining whether a case is exceptional, whilst it is important not to make direct factual comparisons between one case and another, "the way in which the facts of other cases have been judicially addressed can shed light on what kinds of factors may or may not be regarded as possessing inherent weight or significance." He said that adopting this approach, what was striking about all three of the cases in which a finding of dishonesty did not lead to a finding of impairment[1], was that "the dishonest conduct in each of them was an isolated incident; and that there was no question of financial gain. They were in the nature of uncharacteristic lapses in what may be described as "front-line" challenging clinical situations involving direct interaction between professional and patient (or patient's relative)" [56].

  He said in A's case, the dishonesty could not be described as an isolated incident; she lied repeatedly and for financial gain and she did not do so in a stressful clinical situation. He said "[A]ccordingly, not only do these three cases not serve to support the Tribunal's conclusions in the present case; properly analysed, they serve only to underscore the deficiencies in the Tribunal's decision." [57]

The Judge concluded that both grounds had been made out and that the Tribunal's decision that A's fitness to practise was not currently impaired was not one which a reasonable Tribunal could reach. He said that a finding of impairment was the only rational conclusion that, in the circumstances, could have been made and therefore quashed the decision on impairment and substituted a decision that A's fitness to practise is currently impaired [58].

The appeal was allowed and the matter remitted for a Tribunal to make a decision on sanction.

Kind regards
Tribunal Development Section
0161 240 7292
tribunaldevelopmentsection@mpts-uk.org

[1] Professional Standards Authority for Health and Social Care v General Medical Council, Uppal [2015] EWHC 1304 (Admin).
Professional Standards Authority for Health and Social Care v a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council dated 22 March 2016 [2017] CSIH 29
Professional Standards Authority for Health and Social Care v the General Medical Council, Hilton [2019] EWHC 1638 (Admin).