Appeals Circular A10/19

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Nabili v General Medical Council *[2018] EWHC 3331 (Admin)*

Learning Points

- When considering a doctor's application to adjourn to obtain legal representation:
    - the Tribunal should strike a proper balance between fairness to the doctor and the public interest in the fair, economical, expeditious and efficient disposal of such proceedings including having regard to the whole history of the proceedings, including any similar circumstances which had developed at previous hearings;
    - some relevant factors to consider include: how long the doctor had had to arrange representation, whether any explanation for the lateness in arranging representation is adequate, whether there is evidence that the lack of representation had arisen without fault on the part of the doctor, whether the Tribunal has confidence that any adjournment would result in the doctor being represented and/or attending and participating in the hearing.
- 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 whether the application can be substantiated upon the basis of verifiable independent medical evidence of ill-health;

- the Tribunal is entitled to have regard to previous unsuccessful applications to adjourn including similar applications during previous proceedings.

- When considering a doctor's application to participate in a hearing by remote means:

    - this is an exceptional course;

    - if such an application is made on health grounds the Tribunal would require contemporaneous, independent and verifiable medical evidence of ill-health to justify participation by remote means;

    - the Tribunal should also have regard to the practicality of the doctor participating in the hearing remotely for example, cross-examining witnesses by telephone and whether there could be logistical problems which might prevent the Tribunal from hearing evidence from a witness(es) at all.

Background

This was an appeal brought by Dr Nabili ('N'), pursuant to section 40 of the Medical Act 1983 (as amended) against a Medical Practitioners Tribunal's ('the Tribunal') decision dated 8 February 2018 to erase her name from the medical register.

2017 – First Tribunal hearing

In January 2017, a tribunal found N's fitness to practise impaired by reason of deficient professional performance. N's registration was suspended for a period of 12 months, which took effect on 20 February 2017. The tribunal directed that N's suspension should be reviewed and a review hearing was scheduled for 29 January 2018.

The 2017 hearing had originally been listed for April 2016, but had been adjourned upon N's application on the grounds she needed more time to instruct a legal representative. After the 2017 hearing commenced, N made further applications for an adjournment, first on the grounds she needed more time to instruct lawyers and subsequently, on the grounds of ill-health. The applications were refused.

2017 – 2018

During N's period of suspension, an allegation of misconduct against N came to light

which arose from her insecure storage of patients' medical records at her home address and thereby breaching patient confidentiality. In December 2017, the GMC informed N that this new misconduct allegation was to be heard alongside the review matter on 29 January 2018 in a 'new and review' hearing, pursuant to Rule 21A of the GMC (Fitness to Practise) Rules 2004.

Before the New and Review hearing on 29 January 2018

In the week prior to the hearing, N twice applied for a postponement of the hearing on the basis that she had been unable to secure legal representation. On both occasions, a MPTS Case Manager rejected N's application on the basis that no legitimate explanation had been provided as to why representation was being sought at such a late stage, and in respect of Counsel who was unavailable for the hearing, that a postponement would be contrary to the public interest in the fair, economic and efficient disposal of the proceedings and that witnesses would also be inconvenienced.

New and Review hearing:

- 29 January 2018 (Day 1) - the new and review hearing commenced. N did not attend but she renewed her application for an adjournment first on the basis that she had been unable to obtain legal representation and subsequently on the basis she was unfit to attend. The Tribunal invited N to submit any supporting documentation by the following day.

- 30 January 2018 (Day 2) - N submitted further documents and indicated that her GP wanted her to go to hospital. The Tribunal began consideration of N's applications to adjourn the hearing.

- 31 January 2018 (Day 3) - the Tribunal announced its decision that N's application for an adjournment was refused. It noted that:

    - N had been aware of the proceedings for some time;

    - there was no evidence about N's communication with another potential barrister;

    - no independent evidence had been provided about why the hearing should be adjourned on health grounds;

    - there was potential inconvenience and stress to witnesses if the hearing was adjourned;

    - the appropriate use of MPTS resources and the public interest would not be served by failing to proceed before the expiry of N's suspension; and

- it could not have any confidence that an adjournment would result in N being represented and/or attending a hearing.

The GMC then applied to proceed in N's absence. The Tribunal determined to do so and then adjourned in camera to consider which witnesses it wished to hear from.

In the meantime, N contacted MPTS asking to participate in the hearing by telephone and stating that she was in hospital. The Tribunal assessed N's communications as an application to participate by remote means. The Tribunal then considered this application and determined verbally that it had been refused.

- 1 February 2018 (Day 4) - the Tribunal provided a written determination of its reasons refusing to permit N to participate by remote means. It noted that, although N had stated she was in hospital, no further details or documentation had been provided to support this and it had regard to the practicality of N participating by telephone.

  The hearing then formally opened, the GMC presented its new case and the Tribunal heard from witnesses and then sat in camera to consider its decision on the facts in relation to the new misconduct allegation.

  During the afternoon, N again contacted MPTS asking for an adjournment of the hearing. N repeated that she was in hospital and was waiting for hospital documentation to forward on at a later date. N later provided a copy of a certificate of her hospital admission, but the certificate gave no details about her admission or treatment.

- 2 February 2018 (Day 5) - the Tribunal provided its determination on the facts and found the facts found proved in relation to the new misconduct allegation.

  The Tribunal then considered N's correspondence from the previous day and treated it as both a request for the Tribunal to recuse itself and as a further application to adjourn the hearing. Both requests were rejected by the Tribunal, which noted that N's documentation did not meet the threshold of independent verifiable medical evidence to support exceptional circumstances, that N had not specified the length of adjournment sought and that it had no confidence if the hearing adjourned, it would be able to continue at a future date with N attending and/or being represented. It also considered that there was nothing which led the Tribunal to believe that it had prejudiced itself.

  The Tribunal directed that N be informed that it would hear submissions on impairment the following day.

- 5 February 2018 (Day 6) - N attended the hearing and again applied for an adjournment of the hearing so that she could be legally represented. N submitted that a barrister could represent her if there was an adjournment, but presented no documents indicating their availability. The Tribunal concluded that public confidence in the profession would be undermined if the hearing was delayed further and elected to proceed to consider the issue of impairment.

  The GMC also presented the deficient professional performance element of the hearing, for review. During her submissions on impairment, N referred to documents she wished to present to the Tribunal. N was granted until the following day to produce these.

- 6 February 2018 (Day 7) - N emailed the Tribunal a number of documents in which she set out information regarding her admission to hospital during the previous week. The Legal Assessor also updated the Tribunal on discussions held the previous day in which N had said that there were two barristers available to represent her. The Tribunal considered this to be a further application to adjourn, which was refused the following day. The Tribunal also went in camera on the issue of impairment.

- 7 February 2018 (Day 8) - the Tribunal provided its determination finding N's fitness to practise was impaired by reason of both deficient professional performance and misconduct.

  During submissions on what sanction, if any, the Tribunal ought to impose, N submitted documentary evidence of her admission to hospital during the previous week and the treatment received. The Tribunal then went in camera on the issue of sanction.

- 8 February 2018 (Day 9) - N contacted the Tribunal by email requesting to be present by telephone when the Tribunal provided its determination. The Tribunal found no compelling reason to grant the application and handed down its determination that N's entry on the medical register should be erased.

Grounds of Appeal

N appealed on the following grounds:

1. the Tribunal should have granted her applications to adjourn the hearing, because she had been unable to obtain legal representation;

2. the Tribunal should have adjourned the proceedings because she was medically unfit to attend the hearing;

3. the Tribunal should not have carried on with the proceedings in her absence;

4. the Tribunal determined the misconduct allegation only on the evidence presented by the GMC; there were many flaws in the evidence of the witnesses whose evidence she fundamentally disputed.

Judgment

The appeal was heard by Mr Justice Spencer who carefully examined each of the various decisions at each stage to consider whether there was a serious procedural or other irregularity (focussing first on applications to adjourn and proceed in N's absence) which would render the sanction of erasure unjust. He indicated that it was important that the Tribunal's decisions were viewed in light of the information available to it at the time each decision was made [para 23].

General principles

The Judge indicated that the proper approach to adjournments and proceeding in absence in GMC disciplinary hearings, as well the requirements of the medical evidence required to demonstrate that a party is unfit to attend and participate in hearing, were considered by the Court of Appeal in General Medical Council v Adeogba [2016] EWCA Civ 162 [paras 18-22].

1. Refusing to postpone (MPTS Case Manager's decisions)

The Judge said that the decisions made by the MPTS Case Manager, cannot be faulted. N gave no adequate explanation for the lateness of arranging representation, despite being aware of the hearing date for many months. He said applying the principles set out in GMC v Adeogba, the MPTS Case Manager was "fully entitled to conclude that the public interest, considered in light of Dr [N's] obligations, had to take precedence over her request to gain representation from counsel who was unavailable" and that a "postponement was not proportionate" [para 147]. The Judge considered the MPTS Case Manager was fully entitled to refuse N's second application to adjourn on the same grounds, in which N also sought to blame the GMC for consolidating the new and review elements of the case into one hearing. He said this was a "disingenuous" claim by N, as she had known about the intention to join the matters for some time and raised no objection, but he also considered it important that Rule 21A required the new matter to be heard first in time but that the review had to take place before the suspension was due to expire on 19 February 2018 [para 148-149].

Refusing to adjourn the hearing (Tribunal's decisions)

In respect of the Tribunal's decision dated 31 January 2018 not to adjourn (for N to

obtain legal representation) Mr Justice Spencer found that this was fully reasoned, noting that there was still no good explanation for N's failure to obtain legal representation or evidence of another barrister who might be available if the hearing was adjourned. The Judge said the Tribunal took account of the inconvenience and potential stress to witnesses in the event of an adjournment and the appropriate use of resources and that the public interest would not be served by failing to proceed before N's suspension was due to expire [para 152].

He also said [para 153]:

> "Importantly, the Tribunal concluded that it could have no confidence that an adjournment would result in [N] being represented and/or attending and participating in the hearing. This was a conclusion they were fully entitled to reach having regard to the whole history of the proceedings, including the very similar circumstances which had developed at the January 2017 hearing. Public confidence in the profession would be undermined if the case were allowed to be delayed further without a far more compelling reason. The Tribunal properly balanced the public interest and the need to ensure fairness to [N]."

Mr Justice Spencer concluded that, in refusing N's multiple applications for an adjournment to obtain legal representation, the Tribunal had struck a proper balance between fairness to N and the public interest in the fair, economical, expeditious and efficient disposal of proceedings (in accordance with the principles in Adeogba). He said there was no procedural irregularity, each decision was both carefully considered and clearly reasoned and the Tribunal's discretion had been properly exercised [para 157].

2. Refusing to adjourn on the grounds of ill-health

Mr Justice Spencer noted that, although at first sight it may appear harsh for the Tribunal to have considered the case when N was in hospital on 31 January 2018, and unable to participate, that would be too superficial an analysis given the way the issue of ill-health developed and the limited information N was providing. He said that at that time, N had provided "no independent medical evidence whatsoever that she was, or had been, unfit to attend [the hearing] through ill-health". The certificate of admission to hospital which N subsequently provided only confirmed that she had attended hospital and "gave no medical details of her admission or treatment" [para 158].

The Judge concluded that, on each occasion where it was required to consider adjourning as a result of N's health, "the Tribunal was fully entitled to reject such application as unsubstantiated. The Tribunal was entitled to have regard to the similar history in January 2017 hearing. [N] was given every opportunity to provide verifiable independent medical evidence. She singularly failed to do so" [para 166].

Therefore, there was no procedural irregularity.

3. Proceeding in N's absence

After noting that the decision to proceed in N's absence was "separate and distinct from the decision to refuse her adjournment" and the principles in Adeogba had been properly applied [para 167], Mr Justice Spencer said that in this case, many of the same considerations applied and that "the Tribunal was entitled to take the view that it could have no confidence that an adjournment would result in [N] being represented and/or attending and taking part in a future hearing. The Tribunal was satisfied that [N] had chosen to absent herself" [para 168].

The Judge also noted the "great pains" which the Tribunal took to test the evidence in support of the misconduct allegation where N was not present to question the witnesses herself. He said that "[I]t was a proper safeguard in order to mitigate any prejudice from [N's] absence" [para 169] and the course taken by the Tribunal was "fully justified in the circumstances, balancing [N's] interests on the one hand and the public interest in ensuring that matters were dealt with expeditiously on the other" [para 170].

4. Refusing N's participation by telephone

The Judge said in relation to such applications that "It is an exceptional course. Normally an application would be made at the start of the hearing, supported by skeleton arguments and any necessary medical or other evidence" [para 171]. He said that there was a complete absence of medical evidence to justify N's participation by remote means. N had been told that the Tribunal would require contemporaneous independent and verifiable medical evidence in the case of ill-health, but no such evidence was provided [para 172].

He also noted that the Tribunal also had regard to the practicality of N participating in the hearing by telephone especially cross-examining witnesses by telephone and that logistical problems could well arise as a result which might prevent the Tribunal from hearing evidence from a witness at all [para 173].

Mr Justice Spencer said that the Tribunal had been entitled to take the view that there were no exceptional circumstances justifying N's participating by telephone and that in the particular circumstances it was fully justified in refusing this application. Therefore, there was no procedural irregularity. [paras 174-176].

5. N's erasure from the medical register

Finally, Mr Justice Spencer turned to the question of whether, in light of all the evidence, the Tribunal's decision to impose a sanction of erasure was wrong. In concluding that the Tribunal's decision to erase N's name from the Medical Register

"cannot conceivably be said to be wrong" [para 189], he said:

"The Tribunal was fully entitled to conclude that [N's] misconduct, coupled with her deficient professional performance, represented a particularly serious departure from the principles of Good Medical Practice and represented behaviour fundamentally incompatible with being a doctor. The Tribunal was also fully entitled to conclude that [N] had failed to remediate the deficiency in her professional performance, had refused to accept the findings of the 2017 Tribunal, and had failed to acknowledge and recognise the seriousness of the misconduct against her. She had shown total disregard for the basic duties of a doctor. The gravity of her misconduct and the seriousness of the persistent impairment arising from her deficient professional performance made erasure the appropriate and proportionate sanction in order to protect patients and maintain public confidence in the profession" [para 188].

Accordingly, N's appeal was dismissed [para 191].

Kind regards

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