MPTS Medical Practitioners Tribunal Service

Appeals Circular A10/21

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The General Medical Council and The Professional Standards Authority for Health and Social Care v Bramhall *[2021] EWHC 2109 (Admin)*

Learning Points

- If departing from the Sanctions Guidance, a tribunal has a duty to state more clear, substantial and specific reasons for the departure, than if the Guidance was being followed. Generalised assertions that a registrant's actions are not fundamentally incompatible with continued registration, and that erasure is not proportionate or appropriate, are inadequate.
- Unusual facts or features of a case and public prominence make it especially important that a careful, structured, and transparently accessible approach to regulatory decision-making is demonstrably taken and potentially for the Sanctions Guidance to be applied sensitively, thoughtfully and flexibly to the facts.
- Tribunals must properly assess and/or articulate the gravity of conduct before them and in conviction cases, must grapple with the criminal quality of the misconduct as a public interest consideration in its own right.
- Motivation potentially goes to gravity and is relevant to candour, insight and remediability, and therefore sanction; as such it needs to be explored and resolved by a tribunal.

Background

This was an appeal brought by the General Medical Council ('GMC') pursuant to section 40A of the Medical Act 1983 ('the Act') against a Medical Practitioners Tribunal's ('the Tribunal's) decision dated 18 December 2020 that Mr Bramhall's ('B's') registration be suspended for five months (and a review hearing directed). The

The MPTS makes impartial decisions in doctors' fitness to practise hearings. The MPTS is part of the General Medical Council, but it is operationally separate and it is accountable to Parliament.
The GMC is a charity registered in England and Wales (1089278) and Scotland (SC037750)

Professional Standards Authority for Health and Social Care ('PSA') also joined the appeal as a party, further to section 40B of the Act.

B was a transplant surgeon. In 2017 he pleaded guilty in the Crown Court to two counts of assault by battery, committed six months apart in 2013, against two patients who had been anaesthetised during transplant surgery by marking his initials on their livers with a surgical instrument used for cauterisation. The sentencing Judge said B's conduct was "borne of professional arrogance of such magnitude that it strayed into criminal behaviour" and that he targeted patients in the knowledge that they were "unconscious and as such were vulnerable" but acknowledged that "opinions may differ", in relation to the impact B's actions would have on public confidence in the profession. However, he accepted B was remorseful and would never behave similarly in the future and in January 2018 the sentencing Judge imposed concurrent community service sentences and a fine.

The GMC brought regulatory proceedings against B following his conviction and sought his erasure from the medical register.

The Tribunal considered B's convictions as so serious that a finding of impairment was necessary to maintain public confidence in the medical profession and to uphold proper professional standards and conduct for members of the medical profession.

The Tribunal then considered the Sanctions Guidance and identified aggravating and mitigating factors. It was satisfied that B's behaviour was unlikely to be repeated and the level of insight and remorse he had demonstrated indicated a low risk of future breaches of Good Medical Practice. The Tribunal concluded that B's assault convictions were not fundamentally incompatible with continued registration, taking account of all the circumstances, the guidance and relevant principles and did not consider erasure to be an appropriate or proportionate response. It therefore determined to impose a five-month suspension order, with a review shortly before expiry.

Grounds of appeal

The GMC appealed on the basis that the sanction imposed was insufficient to maintain public confidence in the profession and/or to maintain proper professional standards and conduct for the profession and specifically on the grounds that:

- the Tribunal failed to consider relevant parts of the Sanctions Guidance and/or departed from the Sanctions Guidance by failing to direct erasure without giving any, or any adequate, reasons
- the Tribunal erred in its assessment of the inherent seriousness of the misconduct
- the Tribunal failed to address the attitudinal issues underlying the misconduct
- the Tribunal failed to take into account B's lack of candour and/or inconsistencies in respect of the February 2013 charge
- alternatively, the Tribunal erred in not imposing the maximum (or a longer) period of suspension and/or by failing to provide any, or any adequate, reasons for its decision that five months was sufficient

- in the further alternative, the Tribunal failed to give adequate reasons for its decision.

The PSA adopted and 'strongly supported' these grounds and advanced a further ground of appeal under section 40B(2)-(5) of the Act, that the GMC failed to present to the Tribunal all the statements made by B in its possession and then compare them to the statements he made in his police interview and his letter to the sentencing Judge. The PSA said that B's statements taken together revealed deep-seated attitudinal issues which could well have led the Tribunal to reach a different conclusion as to sanction.

Judgment

Mrs Justice Collins Rice gave judgment and said that this was a case with a public profile and highly unusual facts which had “attracted considerable public attention and reaction at the time.” She said that “[U]nique circumstances always pose a challenge for applying general principles and rules not drawn up with such facts in mind” [27]. However, the instant case was not a rehearing; it was to consider whether the Tribunal had done its job properly in relation to its task “to give a fair, informed, objective and definitive answer to the question of what was necessary to maintain *public* confidence in the medical profession.....It had to be fair to [B], and to hold in mind that the reputation of the profession as a whole was more important than the interests of any individual professional” [32]. She said “[U]nusual facts called for a particularly thoughtful and responsive application of the general rules” [33].

Sanctions Guidance

When considering the application of the Sanctions Guidance, Mrs Justice Collins Rice said that an appellate court “should avoid narrow textual analysis when considering a tribunal's reasoning....and must not expect a "slavish recitation" of the guidance[1]....[T]he determination must be read fairly, as a whole, to understand and assess its reasoning” [34]. However, she said a number of points arose on that basis:

- the Tribunal's decision on sanction was a departure from the guidance [35]. B “had been convicted of more than one offence of deliberate violence. He was sentenced on the basis that his offences had targeted patients who were particularly vulnerable because of their personal circumstances; that his acts were an abuse of power and of a position of trust; and that he had caused serious and lasting harm to one of his victims (albeit unintentionally)”. Paragraph 109 of the Sanctions Guidance provided that any one of those factors on its own might indicate that erasure was appropriate, and in the instant case, multiple factors were present. She said that the "‘authoritative steer’ of the guidance was plainly towards the proportionality of erasure” [35].

- while that did not necessarily constrain the Tribunal's final decision it engaged a duty to state clear reasons for departure from the Sanctions Guidance[2], “in the

[1] General Medical Council v Awan [2020] EWHC 1553 (Admin) para 26 and 44
[2] PSA v HCPC & Doree [2017] EWCA Civ 319

form of a careful and substantial case-specific justification[3]….This requires something more (a) clear, (b) substantial and (c) specific in the way of reasons than would be required if the steer of the Guidance were being followed” [36].

Mrs Justice Collins Rice said that the Tribunal's determination did not provide this and it failed to even acknowledge the erasure indicators in its decision, which was “remarkable in a case brought on the basis of convictions for crimes of violence, an express indicator in its own right that erasure may be required, not least where committed in a clinical setting”. She said "[F]ailure to deal with erasure indicators where they are engaged produces determinations which are simply incomplete...That is a fundamental flaw - an error of principle. The decision does not fully make sense and the reader cannot see how it is proportionate" [36].

Again applying GMC v Khetyar, she said “a *proper* conclusion that suspension is sufficient cannot be reached in a case like this without reference to, and careful consideration of, advice in the Guidance that erasure may be appropriate on the facts” and “without addressing what the Guidance says about when misconduct *is* 'fundamentally incompatible' [with continued registration] - is to make the error of principle….which leads to generalised assertion that erasure would be a disproportionate sanction and that a doctor's conduct is not incompatible with continued registration” which is insufficient [37].

The Judge said that the Tribunal's determination appeared to ‘stop at suspension’ and concluded with such a generalised assertion and “that it ‘thus’ did not consider erasure as proportionate or appropriate. An informed reader does not in these circumstances know *why* suspension (in principle, and for five months in particular) *rather than* erasure is sufficient to maintain public confidence in the medical profession and to maintain proper professional standards and conduct for members of that profession. It is asserted, not demonstrated” [38].

The Judge said that reading the “entirety of the proceedings does not supply the deficiency” and that although the Tribunal said it gave 'particular weight' to the impact on public confidence in the medical profession of such grave breaches of professional conduct and abuse of trust, it did not explain how it did that and it was not apparent. She said the Tribunal appeared to give determinative weight to matters of personal mitigation, which was in itself an error of principle [39].

Gravity

Mrs Justice Collins Rice said that the Tribunal failed “properly to assess and/or articulate the gravity of conduct before it, and hence correctly to apply itself to the question of sanction[4]” [40]. She said that whilst there were “competing narratives” about how serious B‘s behaviour truly was, this was an evaluative matter for the Tribunal [41] and the “discipline of fully addressing the application of the Sanctions Guidance to the facts, and clearly articulating reasons for any departure determined upon, is itself the surest route to a secure assessment of gravity of misconduct and hence of proportionality” [42].

[3] General Medical Council v Khetyar [2018] EWHC 813 (Admin)
[4] GMC v Stone [2017] EWHC 2534 (Admin) at [53]

She said that in a conviction case, particularly where the conviction is for repeated offences of violence against patients in a clinical context, it was also important for the Tribunal "not to lose sight of what the criminal law, criminal procedure and the principles of sentencing law and practice have already had to say about the public interest considerations which should properly be brought to bear in considering gravity." Whilst acknowledging that the differences between criminal and regulatory proceedings are crucial, she said that "the Sanctions Guidance expressly and properly indicates the relevance of the fact that misconduct has passed the threshold of criminality to the determination of sanction. To that might be added the relevance of the sentencing guideline's classification of the inherent seriousness of the offence and of the offending (in terms of culpability and harm, based on evidence established to the criminal standard of proof) before allowance is made for matters particular to the offender" [43].

She said that although this was not necessarily determinative, "the weight to be given to these matters will vary from case to case as they are assessed in context. But it is important for an MPT determination of sanction in a conviction case - especially where offences of violence and abuse of trust in a clinical context are involved - to grapple with the criminal quality of the misconduct as a public interest consideration in its own right. That steer is clearly given by paragraph 109g of the Guidance" [44].

Motivation

Mrs Justice Collins Rice said that B's perspective on his own conduct, and his engagement with the various procedures examining and responding to it, were matters of potential relevance to the determination of sanction and that "[M]otivation, in other words, potentially goes to gravity and also to insight and remediability" [45]. She that motivation was "underexplored and unresolved" in this case [46].

The Judge said that the following were said to be issues in the case:

- candour which is "a continuing professional obligation of openness and honesty, embracing full and proactive co-operation with regulatory and other investigative action, and putting self-interest behind that of the patient. It has potential relevance beyond particular incidents" [47] and
- insight which "goes to the subsequent development of fair, objective understanding of the nature and gravity of the misconduct. It typically requires demonstration of a degree of empathetic identification with the perspective of others: victims, professional colleagues, the public (including other patients and organ donors, actual and potential). It is a necessary precondition of remorse, or genuine regret for the impact on others. It is distinguishable from willingness to offer an apology, from the development of self-serving narrative, and from chagrin at the personal consequences of public exposure and regulatory and criminal justice action" [48].

She said that whilst these issues were considered to some degree, "the 'attitudinal' concerns were not demonstrably interrogated by the [Tribunal] to any degree and the [Tribunal] did not show itself sufficiently astute to the potential relevance of

these issues for the determination of sanction; to maintaining appropriate clarity about the distinctions between them; and to the need to assess and weigh them and explain its conclusions" [50].

She said that the additional material which the PSA was now concerned with and which formed the PSA's additional ground of appeal "ought to have been brought to the attention of the [Tribunal]"by the GMC, "which would then have produced a clearer focus on the nature and relevance of the attitudinal issues which the [Tribunal] needed to address, and which was capable of affecting its decision on sanction" [51]. She agreed that the material was/is potentially relevant to B's attitude in general, and candour, in particular, and therefore sanction [52].

Mrs Justice Rice Collins concluded that the Tribunal "made errors of principle in its sanctions evaluation, resulting in, and including, an insufficiency of reasons for departure from the Sanctions Guidance" which constitute serious irregularity and that by failing to "put its finger on precisely what was and was not wrong with [B's] conduct and sanction accordingly. It did not do full justice to this unique case" [53]. She said "[T]he unusual features of the case and public prominence made it especially important that a careful, structured, and transparently accessible approach to regulatory decision-making was demonstrably taken. The same unusual features potentially called for the sanctions guidance to be applied sensitively, thoughtfully and flexibly to the facts" [54].

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

Kind regards
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