MPTS Medical Practitioners Tribunal Service

Appeals Circular A11/21

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## Ramaswamy v The General Medical Council *[2021] EWHC 1619 (Admin)*

### Learning points

- When considering applications to adjourn or postpone in disciplinary proceedings:
  - the over-riding objective to deal with cases fairly and justly takes precedence over the over-arching objective to protect the public. Fairness to the registrant is the prime consideration.
  - the relative prejudice to the parties of the decision whether to adjourn or not should be adequately taken into account. This should include considering the factual complexity of the case and the consequences of the order being sought and potentially the impact on the ability of the registrant to be represented by counsel of their choice, who has been acting for them throughout.
- Where a registrant is referred to a tribunal for non-compliance with a GMC direction, the tribunal must first consider whether the registrant failed to comply with the GMC's direction and then must consider whether there is "good reason" for the failure to comply.
- The Non-compliance guidance for Medical Practitioners Tribunals sets out examples of such good reasons, including that a good reason is provided where the registrant can demonstrate that the failure to comply does not create a risk to public protection because the GMC can still investigate the concern. For these purposes:
  - the relevant "concern" is a concern about impairment of fitness to practise
  - the relevant "investigation" is an investigation into fitness to practise (not for example investigations into health conditions on their own)
  - if the GMC is able to investigate the concern "by other means", the failure to comply with the direction will not have created a risk to public protection

- a doctor will demonstrate good reason if they can establish that the direction was not "necessary" in order to enable the GMC to investigate the concern, even if the direction was reasonable or appropriate. The necessity of an assessment directed by the GMC cannot only be taken into account at the stage of sanction.

## Background

This was an appeal made by Dr Sheela Ramaswamy ('R'), pursuant to paragraph 5A(5) of Schedule 4 to the Medical Act 1983, as amended ('the Act') against two (non-compliance) determinations ('the Determinations') of a Medical Practitioners Tribunal ('the Tribunal') dated 12 January 2021 which found that R had failed to comply with a direction made by the General Medical Council ('the GMC') that she undergo a health assessment for the purposes of a fitness to practise investigation ('the Non-Compliance Determination') and which directed that her registration be suspended for a period of nine months ('the Sanction Determination').

R also challenged the decisions of a Case Manager at the MPTS made before 11 January 2021 and the decision of the Tribunal made on 11 January 2021, to refuse to postpone/adjourn the hearing and the decision of the Tribunal on 11 January 2021, to proceed in her absence.

R practised as a speciality doctor in elderly medicine. In August 2018 the GMC opened an investigation into her fitness to practise arising from concerns about her mental health as a result of "the tone and content" of correspondence between her and the GMC. The background to that correspondence arose from a previous relationship between R and another doctor, her suspected delusional belief about the existence of that relationship, and R's subsequent use of that doctor's name; whilst R was not legally married to the doctor, she insisted that in accordance with Hindu custom, she was married to the doctor at her home on 21 February 2014.

The GMC made a formal direction pursuant to Rule 7(3) of the General Medical Council (Fitness to Practise) Rules 2004, as amended ('the Rules') that R should undergo a medical assessment arising out of a concern as to her fitness to practise. On 29 July 2020 the GMC made a further direction that R should undergo a health assessment. R did not comply with that direction and in October 2020 the GMC referred that non-compliance to the Tribunal (pursuant to paragraph 5A of Schedule 4 to the Act).

Before the hearing (which commenced on 11 January 2021), a MPTS Case Manager refused R's applications to postpone the hearing and at the hearing itself the Tribunal refused R's application to adjourn[1]. R did not attend on 11 January 2021, but she attended in person on 12 January 2021. On 12 January 2021, the Tribunal held that R had failed to comply with the direction and that there was no good reason for that failure and then went on to consider and determine sanction. The

[1] Pursuant to Rule 29 of the GMC (Fitness to Practise) Rules 2004, as amended, before the opening of a hearing, a Case Manager may **postpone** the hearing (r29(1)(b)). Once the hearing has commenced, the Tribunal may **adjourn** the hearing (r29(2)). In the judgment, and therefore for the purposes of this circular, all the decisions made by the Case Manager or Tribunal under rule 29 will be referred to as decisions not/to adjourn or adjournment decisions.

Tribunal suspended R's registration for a period of nine months, with immediate effect.

## Grounds

R appealed on the following grounds:

- the three decisions refusing to adjourn the non-compliance hearing were procedurally unfair. (R said this was compounded by the unreasonable refusal to accept additional information from R which she wished to place before the Tribunal).
- the Tribunal's determination of non-compliance was wrong and seriously flawed
- the Tribunal's determination on sanction was unnecessary, excessive and disproportionate.

## Judgment

The appeal was heard by Mr Justice Morris.

### Review or rehearing?

Mr Justice Morris considered whether, in the light of CPR 52.21(1), an appeal of a non-compliance decision (governed by paragraph 5A(5) of Schedule 4 to the Act), is by way of review or rehearing and the Court's approach on appeal. He concluded that it was an issue of some complexity upon which he did not make a definitive ruling, principally because its determination did not affect his conclusions on the issues in this case (and most particularly on Ground 2) and because he did not have the benefit of full argument on all relevant case authorities [20]. However, he observed that on any appeal (including this one), the question for the Court is whether the decision of the court below or in this case, the Tribunal, was "wrong" or "unjust because of a serious procedural or other irregularity in the proceedings in the lower court" (see CPR 52.21(3)(a) and (b)).

### Ground 1- procedural unfairness

When considering the question of applications to adjourn generally, Mr Justice Morris referred to General Medical Council v Adeogba[2] and Sanusi v General Medical Council[3], and set out the general propositions arising [22] including that:

- fairness to the medical practitioner is of prime importance and a prime consideration but fairness to the GMC and the interests of the public must also be taken into account.
- there is a difference between a criminal trial and disciplinary proceedings - in the latter the decision must also be *guided* by the over-arching objective in section 1(1A)[4]. The fair, economical, expeditious and efficient disposal of allegations is of very real importance. In this regard he also said that given the terms of paragraph

[2] [2016] EWCA Civ 162 at paras 13 to 23
[3] [2019] EWCA Civ 1172; [2019] at paras 63 to 66, and 70 to 71
[4] Section 1(1A): "The over-arching objective of the General Council in exercising their functions is the protection of the public"

1(1B) of Schedule 4 to the Act[5], he approached the matter on the basis that "the over-riding objective of fairness takes precedence over the over-arching objective" [22].

In terms of considering the effect of any serious procedural irregularity, the Judge confirmed that the question which arises is "whether the irregularity made any difference to the outcome. The position is that the respondent to the appeal must show that, absent the irregularity, the decision of the court below "would inevitably have been the same"; and that probability of the same outcome is not enough" [23]. He said that on the facts of this case that involved two questions:

- Was the refusal (in the three adjournment decisions) to adjourn the hearing on 11 and 12 January a serious procedural irregularity?
- If so, were the substantive determinations "unjust" as a result of that irregularity? This question was to be determined by reference to the question of whether, had the hearing been adjourned, the substantive outcome would inevitably have been the same [112].

The Judge said in relation to the various decisions not to adjourn:

- 10 December 2020 an MPTS case manager's decision refusing to adjourn the hearing ('the First Adjournment Decision') - R had informed the MPTS on 1 December 2020 that the proposed dates for the hearing were not suitable, but despite a request on 4 December, neither R nor her barrister responded to put forward alternative dates of availability. The Judge said that the First Adjournment Decision was not a definitive refusal of an adjournment. It was made clear that it remained open to R to make a further application, and pointed to matters which she should address, if she did so. The Judge said that these considerations outweighed R's concerns (that the date of the hearing had not been formally fixed and as R had replied, as requested and within the time allotted, to say that the hearing dates were not suitable, her correspondence was treated as a formal application to adjourn the hearing leading to a formal decision without any attempt to resolve the matter more informally) and concluded that the First Adjournment Decision (and the events leading up to it) did not amount a serious procedural irregularity [115].

- on 7 January 2021, an MPTS case manager made a decision refusing a second application to adjourn made on 6/7 January ('the Second Adjournment Decision') – by this time R's barrister had put forward detailed reasons why fairness required R to be represented by him at the hearing and had sent to the MPTS the dates of his availability in each of the months of February to May 2021. The Judge said that Second Adjournment Decision was open to criticism including that:

[5] Schedule 4 para:
1(1A) "The overriding objective of the General Council in making rules under this Schedule with respect to the procedure to be followed in proceedings before a Medical Practitioners Tribunal.....is to secure that the Tribunal .... deals with cases fairly and justly."
1(1B) "Where the General Council consider that there is a conflict between meeting the objective under sub-paragraph (1A) and the over-arching objective, they must give priority to meeting the objective under sub-paragraph (1A)."

- the statement that the public interest in proceeding as scheduled "must be the prevailing consideration" was "a misdirection in law. The over-riding consideration is fairness to both parties, with fairness to [R] being the prime consideration"
- the Case Manager underestimated the complexity of the issues arising and he did not accept that it was fair to suggest that R might instruct alternative legal representation
- the Case Manager took no account of the relative prejudice to the parties of the decision whether to adjourn or not; "the factual complexity of the case and the consequences of the order sought being made were such that the ability of [R] to be represented by her counsel of choice who had been acting for her throughout was a consideration of great weight, and was not adequately taken into account" [117]

However, the Judge said that the key issue was the question of alternative dates of availability and if the Case Manager was actually aware of the dates provided by R's barrister when taking the decision then, on that basis alone, the Second Adjournment Decision amounted to a serious procedural irregularity [18]. However, whilst the other concerns were serious, on the assumption that the dates had not been passed to the Case Manager (as there was no evidence to suggest they had been), the Second Adjournment Decision did not amount to a *serious* procedural irregularity [119].

- On 11 January 2021, the Tribunal made a further decision refusing an adjournment ('the Third Adjournment Decision') following receipt of a further application to adjourn the hearing by way of two emails sent by R on the morning of the hearing – the Judge said that that decision was open to the same legitimate criticisms as those against the Second Adjournment Decision in that:

  - "emphasis is placed on the "over-arching objective", yet no reference is made to the "over-riding objective" of fairness to both parties, with fairness to [R] being the prime consideration"
  - in so far as the Tribunal relied upon the two previous decisions and in particular the Second Adjournment Decision, that latter decision was itself open to substantial criticism
  - the Tribunal did not expressly consider "the relative prejudice to the parties of the decision whether to adjourn or not. As the GMC had stated in earlier correspondence, it was positively seeking an order of suspension, which if granted would mean that [R] would lose her livelihood. The consequences for the R were very serious, and in my judgment warranted counsel of her own choice" [120]

  In terms of the key issue of dates of availability, the Judge said that by the time of the Third Adjournment Decision R's barrister's dates of availability were known to the Tribunal and there was no reason why those dates were not, or could not have been, taken into account by the Tribunal itself on the morning of 11 January. There was no reference in the Third Adjournment Decision to the dates of availability and if the Case Manager was not aware of the dates when taking the Second Adjournment Decision (as he had assumed earlier in his judgment), then the Tribunal's statement in the Third Adjournment Decision that R "had not

provided them with new information" was incorrect and in refusing the adjournment in this way, “the Tribunal failed to take into account a highly material consideration” [121]. He said that from the transcript, it was clear the Tribunal was aware that R’s barrister had provided the relevant information as to his dates of availability, but the Tribunal had misinterpreted that information, and understood that he was unavailable at any time until after May when in fact he was available on multiple dates between February and May [122].

In addition, the Judge said that the Tribunal’s statement that R’s challenge against the interim order imposed on her registration on 1 October 2018 was separate to the issue of non-compliance, “was an over-simplification” as there was overlap between the underlying factual issues, both arose out of one and the same investigation into the same fitness to practise concern and the outcome of the challenge might have had some bearing upon the outcome before the Tribunal; the interim order of suspension had been lifted by an Interim Orders Tribunal, but the GMC was seeking to have a suspension re-imposed by the non-compliance proceedings. Whilst that order may “serve a different purpose, the *effect* of any order for suspension imposed in the non-compliance proceedings would be to re-impose an order to the same effect as the one which the Interim Orders Tribunal had removed, and in respect of one and the same investigation and concern” and the GMC had advanced no reason why the non-compliance issue needed to be heard as a matter of urgency [124].

Overall, he said that "the failure to take account of dates of availability coupled with the plain error of fact as to that availability, amount to a serious error. When taken together with the further criticisms set out in paragraphs 117 and 120 above, I conclude that [R] had put forward "good reason" for the adjournment (see Adeogba at §19) and that the Third Adjournment Decision amounted to a serious procedural irregularity. The unfairness arising from that irregularity was compounded by the subsequent refusal to admit the documents and information specifically in relation to the issue of non-compliance" [125].

In relation to the question of whether the substantive Determinations were, as a result of that irregularity, unjust, he said “the GMC has not shown that, absent the serious procedural irregularity, the Non-Compliance Determination (and thus the Sanction Determination) would inevitably have been the same” (see below) and therefore he concluded that the Non-Compliance Determination and the Sanction Determination were both unjust because of a serious procedural irregularity and that Ground 1 was established [127].

Ground 2 – Non-Compliance Determination

R submitted that first, the Non-Compliance Direction was not properly reasoned, in view of its central reliance upon Professor Gilvarry’s evidence (a specialist handler from whom the GMC had obtained external medical advice) and secondly R had, and has, a defence of good reason under paragraph A24e of the Non-compliance guidance for Medical Practitioners Tribunals (‘the Guidance’); the failure to comply does not create a risk to public protection because the GMC can still investigate the relevant concern.

Mr Justice Morris said that the Tribunal's conclusions on whether there was a "good reason" for the failure to comply with the direction repeated, largely verbatim, Professor Gilvarry's views but as regards the penultimate paragraph the Tribunal repeated the first two sentences, but, significantly, it omitted the third sentence (underlined below) [90]:

> *Prof Gilvarry explained the correspondence suggests there could possibly be a delusional disorder present. It could be personality traits or possible personality disorder, with the doctor able to work without significant issues being noted by employers and then send inappropriate correspondence to the GMC. However, it is unlikely that she would be able to maintain this persona and not be noticed by people outside the GMC."*

The Judge said that the following questions arose [137]:

- Was the Tribunal's Non-Compliance Determination wrong?
  - Was the Tribunal's decision in its own terms seriously flawed?
  - If it was flawed, does this Court, on the basis of the argument it has now heard, consider that the Tribunal's Non-Compliance Determination was wrong?
- Even if the Non-Compliance Determination was not "wrong", is it inevitable that, if the Appellant had had the opportunity to make her case before the Tribunal, it would have reached the same conclusion as it did?

- Was the Tribunal's Non-Compliance Determination wrong?

First, Mr Justice Morris noted HH Judge Keyser QC's observations in Teewary v General Medical Council[6] that any challenge to a direction itself is to be made by judicial review and the Tribunal did not have jurisdiction to question the lawfulness of the direction [138].

Secondly, however, he said that on a reference for non-compliance, the Tribunal has to consider whether the doctor failed to comply with the GMC's direction and then "must consider, as its second question, whether there is "good reason" for failure to comply". He said that paragraph A24 of the Guidance sets out five examples of such good reason and that in particular, "by paragraph A24e, good reason is provided where the doctor can demonstrate that the failure to comply does not create a risk to public protection because the GMC "can still investigate the concern". As a matter of construction of these provisions alone, the relevant "concern" is a concern about "fitness to practise" and "impairment" to fitness to practise (see A46); and the relevant "investigation" is an investigation into fitness to practise (A47). Further, if the GMC is able to investigate the concern "by other means", the failure to comply with the direction will not have created a risk to public protection (A48). In my judgment, this means that the doctor will demonstrate good reason if he can establish that the direction was not "necessary" in order to enable the GMC to investigate the concern, even if the direction was reasonable or appropriate" [139].

[6] [2021] EWHC 376 (Admin)

The Judge acknowledged that whilst there is a tension between the two points above, his view was that, “whatever the correct position is as regards the route to challenge the direction or the reference, it is open to a doctor, on a reference to the Tribunal, to contend that the Tribunal cannot find non-compliance, because he has established good reason under paragraph A24e i.e. because the direction was not necessary to enable the GMC to investigate the concern" [140].

Mr Justice Morris disagreed with the submission that “Teewary was authority for the proposition that the need for the health assessment which has been directed by the GMC, is not relevant to findings of, nor to justification for, non-compliance, and can only be taken into account at the stage of sanction" or that that took authority over the Guidance. He said that in the case of Teewary, he was not putting forward the same "good reason" and that paragraphs A24e and A46 to A48 of the Guidance make it clear that a doctor is entitled to raise, as a reason for non-compliance - that the assessment was not necessary to investigate the fitness to practise concern. He said that “the Tribunal should apply that Guidance, which was introduced to meet serious objections recorded in the DoH Report" [141 and 13].

R’s case on “good reasons” under paragraph A24e was that concerns about her fitness to practise could be investigated by other means (by consideration of previous medical assessments in 2015 and 2016 and the employer feedback already obtained, and by obtaining further employer feedback from the other hospitals where R had worked) and that Professor Gilvarry’s evidence did not support the proposition that a mental health assessment was necessary to investigate the concerns. The Judge confirmed that "given the terms of section 35C, rule 2 of the Rules and the terms of the Guidance, the concern that is being investigated is [R]’s fitness to practise (and not her health condition on its own)" [143].

In relation to the medical evidence from Prof Gilvarry, Mr Justice Morris made the following observations:

- "The precise wording of the final sentence of the relevant paragraph of Professor Gilvarry’s advice is essential to a proper understanding of that advice... In my judgment the word "However" qualifies the previous sentence and the final words "outside the GMC" include not only the wider public, but the [R]’s employers and the NHS more generally. On that basis, the true sense of that paragraph is (very arguably) that it is likely that, if [R] had a personality disorder, it would be noticed by, amongst others, her employers. That conclusion provides strong support for the proposition that the GMC’s concern could reasonably and proportionately be investigated by inquiries of her employers – both those which the GMC had already received and by making further inquiries of those employers which had not been asked" [144(1)]
- “The only evidence that was placed before Professor Gilvarry were the email exchanges with the GMC (and [R’s] general record). The evidence gathered from employers and feedback forms was not provided to her. The fact that employers had raised no concerns about the [R’s] performance might well have been relevant to her overall conclusion and earlier health reports which found no concerns were arguable relevant” [144(2)]
- “her conclusion was that a health assessment was reasonable and appropriate. She was not asked, and did not say, that such an assessment

was necessary or the only means to investigate the relevant concern about [R]" [144(3)].

- Was the Tribunal's decision in its own terms seriously flawed?

  The Judge found it was seriously flawed because of its reliance on Professor Gilvarry's evidence [146] and that by omitting the final sentence of that evidence it appeared "likely that the Tribunal failed to proceed on the basis of the true sense of her opinion" and the evidence itself was "not based on the complete picture and did not support the conclusion that the GMC was "unable to proceed" with an assessment" [147] and the failure of R to put forward a good reason or her evidence, but that given his conclusion on the refusal to adjourn, that could not support the Tribunal's conclusion [146].

- If it was flawed, does this Court, on the basis of the argument it has now heard, consider that the Tribunal's Non-Compliance Determination was wrong?

  "On the basis of the material which this Court has considered....in my judgment the paragraph A24e defence has some considerable merit. The strongest points in [R's] favour are the true meaning of Professor Gilvarry's opinion and the fact that it is not known what her opinion might have been, had she seen the employer and patient feedback and been asked whether an assessment was necessary to investigate a fitness to practice concern" [150] and R contends "that there was a clear reason why she was using the Doctor's name and that this is not a case of someone using a name for no rational reason. This Court has not had the opportunity to consider the material relevant to such a contention; that would be something for the Tribunal to consider" [151]. The Judge concluded that he was not therefore satisfied, taking account of the material now placed before this Court, that the Non-Compliance Determination was wrong and that it fell to be quashed "*on that ground*" [153].

- Even if the Non-Compliance Determination was not "wrong", is it inevitable that the Tribunal would have reached the same conclusion as it did ie would the "good reasons" defence inevitably have failed, if the hearing had been adjourned?

  The Judge said that the answer was "no" as the paragraph A24e defence, on the basis as advanced before the Court, would have had some prospect of success before the Tribunal, but for the serious procedural irregularity found in relation to the Third Adjournment Decision (as set out above) [154].

<u>Ground 3 – sanction</u>

As Ground 1 was successful, Mr Justice Morris did not consider Ground 3 as a separate ground; both the Sanction Determination, as well as the Non-Compliance Determination were quashed.

Therefore, the Judge found that Ground 1 of the appeal succeeded and the Non-Compliance Determination and the Sanction Determination were quashed, pursuant to paragraph 5A(5)(a) of Schedule 4 to the Act.

Kind regards
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