Appeals Circular A12/12

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14 June 2012

To: Fitness to Practise Panel Panellists
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Re: Dr A - v – General Medical Council [2012] EWHC 1269 Admin

Background

Dr A, a consultant anaesthetist, appeared before the Fitness to Practise Panel ("Panel") in September 2011 in relation to allegations of misconduct. Although the Panel dismissed certain principal allegations they found one particular allegation of dishonesty established. As a result of that finding, on 12 January 2012 the Panel determined to suspend Dr A's name from the Medical Register for a period of 12 months with immediate effect.

Dr A appealed in relation to the specific finding and, if the finding was upheld, against the imposition of the sanction of suspension.

Appeal

The appeal was considered by Mr Justice Foskett on 30 April and 1 May 2012 with judgment being given on 4 May 2012.

The Judge sets out the case advanced against Dr A by the General Medical Council ("GMC") in paragraphs 8 to 21 of his judgment with details of the Panel's findings at paragraphs 22 to 25.

Mr Justice Foskett confirms the approach of the court to challenges to findings of fact (paragraphs 26 to 31) identifying that the issue for the court is whether the Panel's determination was wrong. He repeats certain quotations from earlier cases which he had made in the case of *Chyc v General Medical Council* [2008] EWHC 1025 Admin concerning the court's approach (paragraphs 22 to 31). Having set out the parameters for considering the issues raised in relation to the findings of fact the Judge confirms that it is plain that

where the conclusion of the Panel is largely based on the assessment of witnesses who have been *"seen and heard"*, the court will be very slow to interfere with that conclusion. Nonetheless, the court has a duty to consider all the material put before it on an appeal in order to discharge its own responsibility, appropriate deference being shown to conclusions of fact reached on the basis of the advantage of having seen and heard the witnesses. Where this court does not feel disadvantaged by not having heard the witnesses, and the issues can be addressed with little emphasis on the direct assessment of the evidence by the Panel, it is in a position to take a different view in an appropriate case (paragraph 32).

The Judge then goes on to consider the approach of the court in relation to the alleged wrong or misleading advice provided by the Legal Assessor. The Judge sets out the relevant paragraphs from the case of *Gopakumar v GMC* [2008] EWCA Civ 309 (paragraphs 33 and 34).

He concludes (paragraph 35) that in relation to the Legal Assessor's advice, the question is whether it was unfair such that it casts doubt on the Panel's decision. The Judge summarises the arguments advanced in support of the appeal (paragraph 38) but he confirms that in order to see the context of these submissions it was necessary to see the way this part of the case had been put against Dr A by the GMC (paragraph 39).

The Judge then goes on to deal with the way in which the case was put against Dr A in paragraphs 40 to 72 including relevant sections of evidence given by witnesses and the doctor himself.

The Judge comments (paragraph 63) that to him it was *"important to understand precisely the way in which the case was advanced in order to put into perspective, and thus to evaluate, the arguments advanced in support of the appeal."*

Before dealing with the analysis of the facts the Judge deals with the submission of Counsel for the doctor that the Legal Assessor's advice was less full than it should have been and that express reference to the kind of issues dealt with in *Re B* [2008] UKHL 35 and *Re Doherty* [2008] UKHL 43 should have been made. Counsel for the doctor submitted that the Judge should indicate that advice of this kind should be given more frequently.

The Judge confirms (paragraph 65):

> *"Persuasively though this submission was advanced, I am unable to accept it. It is plain from the analysis of the role of the Legal Assessor in Gopakumar (see paragraph 33 above) that the advice of a Legal Assessor is not to be equated with the directions given in a summing up by a judge in a jury trial. Even in that latter context, a formulaic approach is not encouraged: any summing up should be fashioned to the particular case. By way of a loose analogy, it must, as it seems to me, equally be the case that the advice given by a Legal*

Assessor must also be fashioned to the particular case being considered by the FTP. In my experience…the contents of that advice would often be a matter for discussion between the Legal Assessor and Counsel (in the absence of the Panel) and that practice, it seems to me, is one that ought to be encouraged: problems can be ironed out and minds concentrated on the real areas of concern. Ultimately, of course, the Legal Assessor must give the advice that he or she considers helpful to the Panel in the context of the circumstances of the case being considered by the Panel. It is a responsible and not always an easy task."

The Judge goes on that it is against this background (paragraph 66) whilst it cannot as a matter of principle be wrong to give advice along the lines of *Re B* and *Re Doherty* if it fits the situation, it cannot be advice that must be prescribed in every case where an allegation of dishonesty is made against a practitioner of previous good character: it must depend on the circumstances.

The Judge confirms that the GMC has decided that the appropriate standard for determining an issue of fact is whether it is, more probably than not, established. It is not for the court to raise or lower that threshold.

The Judge then goes on in paragraphs 67 to 70 to deal with allegations of dishonesty. Mr Justice Foskett confirms (paragraph 67):

"What, however, seems to be a proposition of common sense and common fairness is this: an allegation of dishonesty should not be found to be established against anyone, particularly someone who has not been shown to have acted dishonestly previously, except on solid grounds. Given the consequences of such a finding for an otherwise responsible and competent medical practitioner, any Panel will almost certainly (without express reminder) approach such an allegation in that way."

He confirms (paragraph 68) that an allegation of dishonesty against a professional person is one of the allegations that he or she fears most. It is often easily made, sometimes not easily defended and, if it sticks, can be career-threatening or even career-ending.

He goes on (paragraph 69):

"I do not think that I state anything novel or controversial by saying that it is an allegation (a) that should not be made without good reason, (b) when it is made it should be clearly particularised so that the person against whom it is made knows how the allegation is put and (c) that when a hearing takes place at which the allegation is tested, the person against whom it is made should have the allegation fairly and squarely put to him so that he can seek to answer it. It is often uncomfortable for an advocate to suggest that someone has been deliberately dishonest, but it is not fair to shy away from it if the

same advocate will be inviting the tribunal at the conclusion of the hearing to conclude that the person being cross-examined was dishonest."

Mr Justice Foskett concludes in this section of his judgment (paragraph 70):

"At the end of the day, no-one should be found to have been dishonest on a side wind or by some kind of default setting in the mechanism of the inquiry. It is an issue that must be articulated, addressed and adjudged head-on."

The Judge then goes on to deal with the analysis of the Panel's findings (paragraphs 73 to 84). In making the finding of fact the Panel did not in its reasons ascribe a motive to Dr A having deliberately excised the declaration from the time sheet (paragraph 73). However, when it came to its decision on sanction, some four months later, there was the first indication of what the Panel thought was the motive for, as it had found, the removal of the declaration (paragraph 76).

The Judge, in his analysis, sensed that the Panel arrived at its conclusion that Dr A had acted dishonestly having decided, as a matter of fact, that he had deleted the declarations. The Judge confirms that he could understand why that might have been so on the basis of the way in which the case was presented. He confirms however, that one advantage of being able to examine the circumstances at the remove is that the court is able to adopt, is that of looking at matters in a somewhat different way (paragraph 78).

The Judge notes that the GMC was pressing for a finding, in effect, of fraud of which the deletion of the declarations was an integral part; the doctor was saying that he did not over-claim for the hours in any fraudulent sense and did not delete the declarations. He did, in effect, invite the Panel to question why he would he have done it, but the Judge could well understand why the answer to the question was somewhat obscured in the context of the combative and, in some respects, less than helpful way in which the doctor addressed some of the issues before the Panel.

Mr Justice Foskett, however, confirms that he could see no reason at all to think that the Panel reached an adverse conclusion against the doctor because he conducted his case in this way, but he did think it may well have contributed to an atmosphere in which everyone lost sight of the true issue concerning the *"declaration allegation".*

The Judge concludes his analysis in paragraph 79. He did not think that the Panel was right to conclude that the doctor deliberately deleted the declaration from the time sheets. He reaches that conclusion without regard to the way the advice of the Legal Assessor was given to the Panel but on the basis that the deliberate deletion of the declaration on the part of someone out to commit fraud (by over-claiming hours worked) is so unlikely that it could not be proved even on the balance of probabilities.

He notes that it is an integral part of this reasoning that the case advanced by the GMC against Dr A was that the deletion of the declaration <u>was</u> part of the fraudulent design.

Given the Panel's conclusion that this was not established, the Judge found it difficult to see how another element of the fraudulent design could be established independently. Whilst the allegations were open to be considered as separate allegations, this was not the case advanced by the GMC. No submission was made to the effect that if the Panel did not find that the over-claiming was proved, it could go on to conclude that, as a free-standing allegation, the *"declaration allegation"* was proved.

Mr Justice Foskett in paragraph 83 confirms:

> *'The overall conclusion I have reached renders it unnecessary to consider whether it is open to an Appellant to rely upon the submission that the advice of the Legal Assessor was defective when an opportunity to correct or supplement it was not taken at the Panel hearing by his or her then legal team.'*

He passed no comment upon that other than to observe that:

> *'(1) if there is a proper dialogue between Counsel and the Legal Assessor about the advice to be proffered (as there is in a jury trial between the judge and Counsel about the directions to be given before the speeches to the jury are given), the issue would rarely, if ever, arise and*
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> *(2) this court is unlikely readily to permit reliance upon submissions to this effect made by an entirely new team of legal advisers who played no part in the proceedings below and who were not privy to the decisions, tactical or otherwise, made by the team below and who have little knowledge of the extent to which the doctor played a part in those decisions.'*

In all events the Judge concludes (paragraph 84) that the Panel was wrong to find that the doctor was responsible for deleting the declarations and should not have found him guilty of acting dishonestly in that fashion.

Mr Justice Foskett then goes on to deal with other matters specifically the Legal Assessor's advice (paragraph 85 to 88). He includes reference to the kind of direction given to a jury about lies told by a defendant in a criminal case along the lines set out in the case of *R v Lucas*. The Judge sets out the advice given by the Legal Assessor (paragraph 85).

He notes that Counsel for the doctor did not criticise this advice nor was any objection taken to it before the Panel (paragraph 86). The essential issue for the Panel was to determine whether the doctor was telling the truth about the declarations of truth and the Judge, therefore, had some reservations about how helpful the advice would have been in the circumstances. He, therefore, in paragraph 87 repeats his suggestion that the practice of a full discussion between Counsel and the Legal Assessor (in the absence of the Panel) before any advice based on *Lucas* is given and where such advice is to be tendered, on the issue of the precise terms of the advice.

He concludes (paragraph 88) that he did not allow the appeal on this basis as such but the phraseology of the advice did, however, reflect his concern about whether real thought was given to the way in which the GMC's case against the doctor was truly being advanced and how the Panel should have assessed it.

He allowed the appeal.

Salient Points

- Where an allegation of dishonesty is made it must be clearly particularised, addressed before the Panel fairly and adjudged head-on (paragraphs 70 and 71)
- Advice from the Legal Assessor should not be equated with the directions given by a judge in a jury trial (paragraph 65).
- The Legal Assessor's advice must not be formulaic but 'fashioned' to the circumstances of the particular case.
- Although the Legal Assessor must give advice that he or she considers helpful to the Panel it may be appropriate for him or her to discuss the contents of the proposed advice with the parties (in the absence of the Panel) before it is given.
- Advice along the lines of *Re B and Re Doherty* cannot in principle be wrong but it cannot be said to be prescribed in every case where an allegation of dishonesty is made against a practitioner of previous good character: it must depend on the circumstances (paragraph 66).