5 March 2013

To: Fitness to Practise Panel Panellists
   Legal Assessors

Copy: Investigation Committee Panellists
     Interim Orders Panel Panellists
     Panel Secretaries
     Medical Defence Organisations
     Employer Liaison Advisers

Re: Dr Dinanbandu Sarkar v General Medical Council [2012] EWHC 4008 (Admin)

Background

Dr Sarkar appeared before a Fitness to Practise Panel ("Panel") in 2011 in relation to wide ranging concerns about his performance and conduct most of which were found proved and as a result the Panel found his fitness to practise was impaired.

On 6 July 2011 the Panel announced its decision that Dr Sarkar's name should be erased from the Medical Register, but that pending an appeal his name would be suspended with immediate effect.

Dr Sarkar appealed the Panel's determination under Section 40 of the Medical Act 1983 (as amended).

Appeal

Dr Sarkar's appeal was considered by Mr Justice Beatson on 3 July 2012.

He sets out the background to the appeal in paragraphs 1-16.

The Judge notes that the Panel found the majority but not all of the charges of Dr Sarkar proved. The Panel's key findings were usefully summarised in paragraph 9 of Counsel to the GMC's skeleton argument and are set out in Mr Justice Beatson's judgment (paragraph 7).
Details in respect of the finding of impairment in relation to deficient professional performance and misconduct are summarised in paragraphs 8-12 and the issue of sanction at paragraphs 13-16.

Although the Judge noted that the original grounds of appeal contained wide ranging arguments including allegations of several material errors of fact and law by the Panel two days prior to the hearing the grounds were substantially narrowed (paragraph 17) as follows:

1. The Panel erred when considering sanction in not inviting submissions as to whether a performance assessment or another report should be commissioned before reaching its conclusion on sanction.

2. That, in the light of the conditional order made by the Interim Orders Panel (“IOP”) confining Dr Sarkar’s practice as a Forensic Medical Examiner (“FME”) and the evidence of his colleagues, erasure was a disproportionate sanction.

In considering the first ground Mr Justice Beatson determined it necessary to return to the facts. After making its determination that Dr Sarkar’s fitness to practise was impaired and hearing submissions as to sanction the Panel deliberated in private and, at some point during their deliberations, one of the options considered by the Panel was giving a direction for a performance assessment.

The legal assessor referred the Panel, during that private discussion, to rule 17 of the General Medical Council (Fitness to Practise) rules 2004 (“the rules”) in particular rules 17(4) and rule 17(9).

Before turning to his decision in relation to the first ground Mr Justice Beatson sets out the details of the legal framework and the relevant case law (paragraphs 22-25).

He then returns to the first ground (paragraph 26) as follows:

“It is possible that there should have been an express reference to rule 17(9) of the 2004 Rules in the decision of the Panel. There was however an express reference to this paragraph in the legal adviser’s advice. The failure to make an express reference to it in the decision does not disclose an error of law. I have concluded that for the following reasons this ground must be rejected”

Mr Justice Beatson then sets out five reasons in support of his rejection of the first ground of appeal as follows:

1. The Panel did not state that it had no power to adjourn for a performance assessment at that stage (paragraph 26).
2. The Panel was aware of the general power under rule 17(9) because it had been discussed only just before its ruling (paragraph 26).

3. The Panel was well placed to reach a decision about this (paragraph 27).

4. The fact that this issue was floated by a member of the Panel during the deliberations and that the parties were then informed of what the legal adviser had said and invited to make submissions does not change the position (paragraph 28).

5. In any event, neither Dr Sarkar nor his legal team had put any evidence as to the extent of his work as an FME for the Humberside Police before the Panel (paragraph 29).

Mr Justice Beatson then turns to ground 2. Counsel for the Doctor relied on the order of conditions which had been imposed by the IOP pending the fitness to practise hearing enabling the doctor to continue to work as an FME and the Panel's finding that the doctor's deficient professional performance and misconduct could in principle be remedied.

Counsel for the GMC directed the Judge to the case of Yeong v GMC [2010] 1 WLR 548 in which the Judge, in that case, had drawn a distinction between the role of an IOP and that of the fitness to practise panel. Sales J stated that the roles are “very different” and that it will typically not be appropriate for an IOP, before a full hearing on the merits, to impose a sanction on grounds based simply on the importance of the public interest of maintaining clear standards of behaviour as distinct from dealing with an immediate risk posed by a practitioner.

Mr Justice Beatson confirms (paragraph 32):

“It is clear from the decision that what the Panel had in mind was the importance in the public interest of maintaining clear standards of behaviour. It is also important to bear in mind the particular importance of according respect to the expert body’s views on sanctions”.

He goes on (paragraph 33):

“The Panel said, when considering impairment, that the extent of the clinical errors and failure of management and leadership meant that a considerable weight of evidence was needed to persuade it that the doctor's fitness to Practise should not be considered impaired. It also stated that the doctor had not furnished the Panel with any evidence, either oral or documentary that he had attempted to remedy the ... deficiencies in his clinical management and leadership of his practice. It is unarguable, in those circumstances, that it can be said that the Panel's conclusions were ones to which it was not entitled to reach”.
In the circumstances Mr Justice Beatson dismissed Dr Sarkar’s appeal.

**Salient Point**

- The order made by an IOP is not relevant to the sanction imposed by a fitness to practise panel. A fitness to practise panel is entitled to impose an order of suspension or direct a doctor’s name is erased from the Medical Register even where the doctor has been able to continue to practise during the investigation.

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