SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 69
XA30/18

Lord Justice Clerk
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Appeal

by

THE GENERAL MEDICAL COUNCIL

Appellant

against

A Decision of the Medical Practitioners Tribunal in the case of Dr Milind Mehta

Respondent

Appellant: Dunlop QC; Anderson Strathern LLP
Respondent: Party; Mr Freudmann, Lay Representative

15 November 2018

Introduction

[1] This is an appeal at the instance of the General Medical Council against a decision of the Medical Practitioners Tribunal dated 2 March 2018 to impose no disciplinary sanction upon the respondent in respect of a finding that his fitness to practice was impaired by reason of inappropriate and sexually motivated conduct towards a junior doctor. The

decision in question is a "relevant decision" for the purposes of the Medical Act 1983 ("the Act"), section 40A of which provides:

> "(3) The General Council may appeal against a relevant decision to the relevant court if they consider that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.
>
> (4) Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient—
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> (a) to protect the health, safety and well-being of the public;
>
> (b) to maintain public confidence in the medical profession; and
>
> (c) to maintain proper professional standards and conduct for members of that profession."

Parties were agreed as to the principles governing an appeal of this kind. In the context of nursing, these were explained by Lord Malcolm, delivering the opinion of the court, in the appeal of *The Professional Standards Authority For Health And Social Care against a decision of the Conduct and Competence Committee of the Nursing and Midwifery Council* 2017 SC 542, para 25 and *MSM* v *Nursing And Midwifery Council* 2016 CSIH 95, para 16.

[2] In respect of medical practitioners, the same core principles apply, as can be determined from *GMC* v *Jagjivan* [2017] 1 WLR 4438, para 40, which noted in addition that the level of deference to be given to the expertise of the Tribunal may vary according to whether the issue is one involving the Tribunal's personal expertise.

The Tribunal's findings

[3] The Tribunal made the following findings: that the respondent had invited Dr X to attend his office to view teaching presentations, but did not show her any presentation slides; that he told her that if she "found someone to confide in" who was not her boyfriend , "this would not be cheating", or words to that effect; that he added that she had to "look

after" her boyfriend, so she "needed to have fun" whilst she was in Elgin or words to that effect; that he moved his chair so that he was closer to Dr X so that their knees were touching; made prolonged eye contact with her; hugged her on more than one occasion; hugged her, pressing their chests together; kissed her shoulder on more than one occasion; and that when asked by Dr X if he tricked her into coming into his office, he laughed and replied "I hope you did not got (sic) the wrong idea" or words to that effect.

[4] The Tribunal found that this conduct was inappropriate and was sexually motivated. On the question whether the respondent's fitness to practise was impaired by reason of the misconduct, the tribunal recognised that the purpose of fitness to practise proceedings was not punishment but to maintain proper standards in the profession and for the protection of the public. It considered that the conduct, towards a junior colleague, was such as brought the medical profession into disrepute and breached a fundamental tenet of the profession. The Tribunal considered that the respondent's fitness to practise was impaired by reason of the misconduct in question.

[5] In respect of sanctions, the Tribunal found that there were both aggravating and mitigating factors, as follows:

> "Aggravating Factors
>
> 9. The Tribunal identified that you had broken a fundamental tenet of the profession due to a breach of sexual boundaries and had breached professional boundaries. Further it noted you had breached your position of trust in terms of your actions towards a junior colleague. The Tribunal had found a lack of candour in your evidence regarding aspects of your misconduct.
>
> Mitigating Factors
>
> 10. The Tribunal identified significant mitigating factors in your case. These included your previous good character – the Tribunal acknowledged that there have been no previous findings of impairment made against you. It noted that you admitted to much of the allegations at the outset of this hearing, and have accepted the Tribunal's findings. You have shown a significant degree of remorse for your

> actions and shown a high level of insight, as evidenced through your efforts to remediate.
>
> 11. There has been a significant lapse of time (over three years) since the events which led to your misconduct with no repetition of similar acts, and the Tribunal has found that the risk of repetition is very low. It has seen evidence from your colleagues that you have been adhering to and advocating the principles of good practice."

The Tribunal determined that no action should be taken in the circumstances of the case, finding exceptional circumstances in the nature and extent of the respondent's efforts at remediation, the promotion of appropriate standards in the profession and the education of others. In doing so it stated that it took into account the Sanctions Guidance issued by the General Medical Council in terms of section 35 of the Act, and in particular paras 68-70 thereof which set out guidance on the exceptional circumstances which may lead to a finding that no action was required following a finding of impaired fitness to practise.

[6] Dealing with the possibility of taking no action, despite a finding of impairment, that Guidance states:

> "68 Where a doctor's fitness to practice is impaired, it will usually be necessary to take action to protect the public (see paragraphs 14-16). But there may be exceptional circumstances to justify a Tribunal taking no action.
>
> 69 To find that a doctor's fitness to practice is impaired, the Tribunal will have taken account of the doctor's level of insight and any remediation, and therefore these mitigating factors are unlikely on their own to justify a tribunal taking no action.
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> 70 Exceptional circumstances are unusual, special or uncommon, so such cases are likely to be very rare. The Tribunal's determination must fully and clearly explain:
>
> a what the exceptional circumstances are
>
> b why the circumstances are exceptional
>
> c how the exceptional circumstances justify taking no further action."

[7] The Tribunal noted that the respondent had, over a lengthy period of time since the incident, publicly involved himself in presentations and discussions which were specifically based upon his own inappropriate behaviour, and at least one of which was attended by more than 75 colleagues. He had held himself out as an example from which other doctors might learn.

[8] In its determination on the primary issue, the Tribunal expressed reservations about the respondent's degree of insight, stating that it had reservations as to the timing and nature of any insight. It considered that he was fully aware that his actions were inappropriate and wrong, but was concerned by what it saw as a lack of candour. The respondent had only accepted all the findings of the Tribunal after it issued its findings of fact, which the respondent stated allowed further reflection and had led him to accept Dr X's evidence. There had been a gradual change in his position, from denying any impropriety to a final recognition that Dr X's account was correct. This reflected no credit on the respondent, but the tribunal was satisfied that he knew that what happened was wrong and that the behaviour would not be repeated.

[9] In the course of the sanctions determination the Tribunal concluded that to open himself up to public scrutiny as he had done demonstrated a degree of insight, remorse and willingness to improve himself and concern for his profession which was exceptional. He had not only remediated his own behaviour but engaged in restorative work to reduce the risk of other doctors acting inappropriately. Notwithstanding a lack of candour with regard to some of the respondent's actions, already identified by the Tribunal, it noted that in his efforts at remediation he had shown exceptional candour and openness. It was not uncommon for doctors to show personal reflection and remediation but it was "very

unusual for a doctor to use their reflection to the extent which you have in order to assist colleagues".

[10] In concluding that no action was necessary, the Tribunal stated:

> "19. In these exceptional circumstances, including the presence of numerous mitigating factors, alongside evidence of your efforts to be open regarding your failings, your actions have shown a willingness to personally serve to restore public confidence in the profession and uphold the standards of the profession. As a result the Tribunal is satisfied that no action is necessary in your case. It is satisfied that, in the context of your efforts to remediate, its finding of misconduct and impaired fitness to practise are sufficient to uphold the requirements of the overarching objective. The evidence before the Tribunal suggests that you will continue to now be an advocate of the highest standards in terms of this area of conduct."

Submissions for the appellant

[11] The appellant submitted that the Tribunal's decision was not sufficient for the protection of the public, being insufficient to meet the purposes stipulated in section 40A(4) (b)-(c) (no issue arose in respect of paragraph (a)). The nub of the argument was that in reaching its decision the Tribunal had referred to the Sanctions Guidance, but failed to give proper effect thereto.

[12] It was incumbent upon the Tribunal to have "proper regard to the guidance and apply…it as its own terms suggest, unless the [Tribunal] had sound reasons for departing from it – in which case they had to state those reasons clearly in their decision."(*Professional Standards Authority* v *Health and Care Professions Council* [2017] Med L R 301, para [29]) It failed to do so, and did not refer to further factors contained in the Sanctions Guidance which were relevant to the question of whether action should be taken.

[13] The Tribunal should have had regard to other relevant sections of the Guidance, including that sexual misconduct was a factor likely to lead to more serious action (para 149) which is conduct which "seriously undermined public trust in the profession". Misconduct

is particularly serious where there was "an abuse of the special position of trust a doctor occupies … More serious action, such as erasure, is likely to be appropriate in such cases"(para 150). Abuse of a position of trust was specifically identified as a factor which may indicate erasure as the appropriate sanction (para 109). Although erasure had not been sought in the present case, the terms of para 150 should have indicated to the tribunal that in a case of sexual misconduct involving breach of trust a significant sanction, such as suspension, would nonetheless be appropriate. Para 150 was a clear steer that imposing no sanction would not be appropriate.

[14] The conduct was such that no reasonable Tribunal properly directing itself under reference to the Sanctions Guidance could have concluded that it was appropriate to take no further action. Reference was made to *GMC* v *Stone* [2017] EWHC 2534 (Admin) and *GMC* v *Khetyar* [2018] EWHC 813 (Admin). In the former, the Tribunal had omitted reference to "obviously apposite" aspects of the Sanctions Guidance and failed to demonstrate that it had grappled with the seriousness of the case when set against those aspects, making the eventual decision flawed. In *Khetyar* the Tribunal again made general reference to the Sanctions Guidance without explaining why the clear pointers towards erasure as the appropriate sanction were not to be followed. Similar criticisms could be advanced in the present case.

[15] Moreover, the Tribunal failed to recognise that the reasons given for not imposing a sanction related mainly to insight and remediation, which would already have been taken into account in deciding the question of impairment, and as indicated in para 69 of the Guidance, were unlikely on their own to justify taking no action. The Tribunal failed to identify any further exceptional factor such as would be necessary to justify a decision to impose no sanction.

[16] In any event, the Tribunal adopted an inconsistent approach to the question of insight. In finding the level of insight to be exceptional the Tribunal ignored its earlier findings which indicated that insight was shown only very late in the process, and only after the tribunal had issued its findings in fact.

[17] The court should allow the appeal and remit the case to a differently constituted Tribunal with such directions as the court thinks fit.

Submissions for the respondent

[18] The Tribunal did not err in reaching the conclusion that no action should be taken. It clearly took cognisance of the overarching objective of protecting the public. The Sanctions Guidance recognises that there may be exceptional circumstances in which it may be justified in taking no action despite a finding of impairment. The Tribunal sets out what those circumstances were and why they justify not imposing a sanction. It could not be said that the Tribunal's decision was plainly wrong or manifestly inappropriate.

[19] In finding that the respondent's fitness to practise was impaired, the focus of the Tribunal had been on the past conduct in relation to Dr X, as constituting the current impairment to practice. That was conduct which brought the medical profession into disrepute and breached a fundamental tenet of the medical profession. However, the Tribunal made very clear findings that it accepted that there had been significant remorse and that there was very little likelihood of repetition, and that there had been extensive personal remediation. There had been no hint of any repetition of inappropriate behaviour, and the tribunal was satisfied that he "would not repeat such inappropriate behaviour in the future." (para 31)

[20] This was the background against which the Tribunal's findings in relation to sanctions had to be considered. In that regard, it was incorrect to label its reasons for concluding that the case was an exceptional one as being limited to remediation and insight such as would already have been taken into account in finding whether there existed an impairment. What made the difference in this case was not simply that there had been remediation of the respondent's own attitudes and behaviour ensuring that he understands that he has been at fault and that he will never repeat his misconduct, but that what the respondent had done had gone well beyond this. It had extended to actions designed to prevent others from doing the same thing by participating in public presentations, educating the profession in which he works with a view to preventing others from crossing boundaries, and encouraging and educating junior staff to speak up when they have been the subject of inappropriate behaviour. All this went beyond mere remediation and made the case exceptional.

[21] At the sanctions hearing it was not submitted that he lacked insight, rather that he had not developed insight in a timely manner. The then counsel for the appellant submitted that the case was not an exceptional one which would merit no sanction but nevertheless drew attention to the significant mitigating factors that the Tribunal may wish to consider, including that there had been no previous findings of impairment; that the respondent had demonstrated remorse; that there had been a considerable lapse of time since the incident occurred; and that the Tribunal had found both that there has been extensive remediation on his part and that it was highly unlikely that he would repeat his behaviour.

[22] The Tribunal took into account both the Sanctions Guidance and the aggravating factors. In stating their reasons for the conclusion that this was an exceptional case in which no sanction should be imposed they specifically referred to the respondent's efforts to

educate others and thus improve standards and strengthen public confidence. They accepted that by sharing his story in such an open and honest way, he was helping to support the development of an open, transparent, learning culture where colleagues were supported to learn and improve. He demonstrated a degree of insight, remorse, willingness to improve himself and concern for his profession that was rightly considered to be exceptional, and went beyond remediation. The lack of candour aspect of the findings should not be over-emphasised. He had always recognised that his behaviour was inappropriate and that Dr X was entitled to be upset by it. It is not so important when insight was reached, more important that it was reached. The Tribunal also took into account the public interest in allowing a widely respected and skilled practitioner who fulfils a valuable role in his local area to continue to practise. This was something about which there was ample evidence before the Tribunal.

[23] The Tribunal was fully aware the decision it was taking was unusual, and exceptional. To justify its decision, the Tribunal required to state what the circumstances were, why they were exceptional and why no action was merited. The reasons it gave included not only full insight, full personal remediation, no likelihood of repetition, no danger to public health, but also included corrective steps which had gone beyond remediation in ways designed to restore public confidence and maintain standards. In addition there was the significant matter of the public benefit in not losing the services of a skilled clinician.

[24] On behalf of the respondent, Mr Freudmann submitted that as a direct result of the respondent's actions staff had a better understanding of boundaries, and juniors were educated to speak up. These actions served the public interest and confidence and the

maintenance of standards within the profession. To impose a suspension would serve no purpose.

Analysis and decision

[25] As already observed, parties were in agreement as to the principles governing an appeal such as this. They are summarised in *The Professional Standards Authority for Health and Social Care* v *The Nursing and Midwifery Counci*l 2017 SC 542 (para 25) as follows:

> "The court was favoured with the citation of a large number of previous decisions in cases of this kind. There is a well-established body of jurisprudence relating to the proper approach to appeals from regulatory and disciplinary bodies. The general principles can be summarised as follows. In respect of a decision of the present kind, the determination of a specialist tribunal is entitled to respect. The court can interfere if it is clear that there is a serious flaw in the process or the reasoning, for example where a material factor has not been considered. Failing such a flaw, a decision should stand unless the court can say that it is plainly wrong, or, as it is sometimes put, 'manifestly inappropriate'. This is because the tribunal is experienced in the particular area, and has had the benefit of seeing and hearing the witnesses. It is in a better position than the court to determine whether, for example, a nurse's fitness to practise is impaired by reason of past misconduct, including whether the public interest requires such a finding. The same would apply in the context of a review of a penalty."

[26] In the present case, the argument was that the Tribunal ignored relevant factors contained in the guidance, thus vitiating its decision; and that in any event, given the nature of the conduct, the decision is one which was plainly wrong or manifestly inappropriate. It was submitted that the decision of the Tribunal was not sufficient for the protection of the public. However, it is worth reminding ourselves that the Tribunal:

(i) Recognised the overarching objective of public protection.

(ii) Specifically identified the issues with which section 40A (4) (b) and (c) are concerned.

The overarching objective was recognised at para 7, pp25-26, where the individual components of promoting and maintaining public confidence in the profession and promoting and maintaining proper professional standards and conduct of its members were

specifically mentioned. Both the overarching aim and the importance of these individual components were repeatedly referred to in the course of the Tribunal's consideration of sanction and the reasons given for its decision (see paras 13-18). The Tribunal fully recognised the need to address the primary consideration of the protection of the public, and specifically the maintenance of professional standards and the maintenance of public confidence in the profession.

(iii) Addressed whether these would be met if they did not impose a sanction.

(iv) Concluded that they would be met, and gave their reasons for doing so.

They did so in paras 19, 21 and 22 in particular. The Tribunal considered that the imposition of a sanction would be punitive when the maintenance of public confidence in the medical profession and the upholding of proper standards had been marked by the respondent's remediation, by his steps to promote proper professional standards, and by his education of others. Its findings of misconduct and impaired fitness to practise were sufficient to uphold the aforementioned requirements (paragraph 19, page 28). The Tribunal also took into account, relevantly, that the respondent was a skilled practitioner who fulfilled a valuable role in his local area, a matter about which the Tribunal heard considerable evidence and submissions. In these circumstances it considered that it would not be in the public interest to impose a sanction, and specifically addressed the question of whether public confidence in the profession or the maintenance of professional standards would be compromised by that decision.

[27] The argument that the Tribunal did not give sufficient weight to the guidance was based on three primary arguments. First, that it did not refer, in terms or otherwise by reference, to certain specific paragraphs, in particular paragraphs 55, 109,149 and 150 of the Sanctions Guidance. Second, that proper consideration of paragraphs 149 and 150 would

have led the Tribunal to appreciate that sexual misconduct involving a breach of trust, even where erasure was not put in issue as a possibility, was conduct of a severity that required a significant sanction. Third, that the Tribunal had not taken account of paragraph 69 in that their reasons for taking no action related to remediation and insight which should already have been taken into account in making its decision on impairment.

[28] In relation to the first of these arguments, it is true that the Tribunal did not refer in terms or by reference to these specific paragraphs of the guidance, but that does not mean the Tribunal did not take these into account. There are several parts of the decision where it is clear that the Tribunal took account of provisions within the Sanctions Guidance without referring to the relevant paragraph, either in terms or by reference. One example occurs at para 8, p26 , where the Tribunal states:

> "Throughout its deliberations, the Tribunal has applied the principle of proportionality, balancing your interests with the public interest. It reminded itself that it should only impose the minimum sanction necessary to achieve the overarching objective. In deciding what sanction, if any, to impose the Tribunal considered each of the sanctions available, starting with the least restrictive. It also considered and balanced the mitigating and aggravating factors in this case."

This would appear to be a clear reference to the terms of paragraphs 20 and 24 of the Sanctions Guidance which address these matters. Thus, while it is correct to say that the Tribunal made no specific reference to these paragraphs in its decision, it is quite clear that the Tribunal was alive to the principles set out in them, where pertinent, and the Sanctions Guidance generally. We are not convinced by the appellant's argument that there was an express requirement upon the Tribunal to make reference to them, even if merely to confirm that a certain paragraph or paragraphs had been discounted. To do so could result in the process becoming more of a "box ticking" exercise rather than an evaluation of the complaint within its own factual matrix.

[29] It is instructive to consider the guidance in question and ask what elements of the specific paragraphs remained relevant to the issue before the Tribunal. Para 55 relates to aggravating factors which might lead to more serious sanctions being applied. Of nine factors identified only one is relevant to the present case, namely that the case was one of sexual misconduct, in respect of which the reader is referred to paras 149-150. Para 149 merely explains what sort of behaviour might be classified as sexual misconduct. The relevant guidance is contained in para 150 which states:

> "Sexual misconduct seriously undermines public trust in the profession. The misconduct is particularly serious where there is an abuse of the special position of trust a doctor occupies, or where a doctor has been required to register as a sex offender. More serious action, such as erasure, is likely to be appropriate in such cases."

[30] Para 109 highlights factors which may indicate that erasure is an appropriate sanction. Of these ten examples two are relevant, these again being that there was a breach of a position of trust and that the conduct involved sexual conduct. As noted above, both these elements were repeatedly highlighted by the Tribunal, along with the serious nature of the conduct, and we do not consider that there was any error in failing to refer in terms to para 109. These factors had also already been emphasised in the primary decision that the behaviour was a serious departure from the standards and behaviour to be expected from a member of the profession, aggravated by a breach of a position of trust (see, for example, para 32, p23). This was the whole basis of the finding of unfitness which in turn formed the basis for the imposition of a sanction. The aggravating factors identified by the Tribunal, consistent with the relevant paragraphs of the Sanctions Guidance, were:

- Breach of a fundamental tenet of the profession.
- Breach of sexual boundaries.
- Breach of professional boundaries.

- Breach of a position of trust.

We do not accept the submission that the Tribunal did not have due regard to the Sanctions Guidance.

[31] As to the appellant's second argument, the Tribunal did not state that misconduct of the type in question was not worthy of sanction. Rather it reached the decision that the respondent's case was exceptional, and that in similar cases suspension may well be required to mark the seriousness of the conduct (para 22, page 29). Notwithstanding the time that had elapsed since the events in questions, some 3 years, and the steps taken in remediation, the Tribunal nevertheless made a finding of impairment. The seriousness and impact of such a finding on a professional person cannot be ignored.

[32] The seriousness of the conduct, its sexual nature, and the fact that it involved a breach of a position of trust had been well identified by the Tribunal. We do not consider that there was an error in failing to refer to the final sentence of para 150 when (a) no question of erasure arose; (b) the very serious nature of the conduct was repeatedly referred to, as was the breach of a position of trust; and (c) the Tribunal also recognised that the serious nature of the conduct was such that the sought after remedy of suspension, which the Tribunal did consider, would otherwise be considered appropriate, and that not to impose such a sanction for conduct of this kind was an exceptional step.

[33] The appellant's third argument proceeds on the basis that remediation and insight cannot constitute "exceptional" reasons in terms of paragraph 69. Such an interpretation is incorrect. The paragraph's terms are clear. While remediation and insight are "unlikely on their own to justify a tribunal taking no action", there is nothing in principle preventing them from being the determining factors. The Tribunal had already decided that the personal remediation was not sufficient, even against a finding that there was no likelihood

of repetition, to prevent a finding of impairment. On the question of sanctions, insight and remediation were influencing factors, but they were by no means the only ones. The factors which the Tribunal considered in respect of exceptional circumstances went far beyond the sort of remediation which might be relevant to determining whether past conduct justified a finding of current impairment. The respondent had participated in public presentations on the subject, educating the profession in which he works to prevent others from crossing boundaries, and educating junior staff to speak up. Such activities, and the impact they might have on public confidence in the profession, were important and distinct considerations for the tribunal. In para 13, p27, it was noted that the respondent had:

> "over a lengthy period of time since the incident in question, publicly involved [himself] in presentations and discussions that were specifically based upon your own inappropriate behaviour and shortcomings, and at least one of which was attended by more than 75 colleagues. The Tribunal also bore in mind that these presentations sought to identify constructive learning for yourself and others."

[34] There was evidence before the Tribunal that:

> "he was a valued colleague, someone that had truly learnt from his experiences and putting into practice his learning. But more than that, by sharing his story in such an open and honest way, he was helping to support the development of an open, transparent, learning culture where colleagues are supported to learn and improve."

In para 15, p27, it added:

> "In giving the presentations and involving yourself in discussions you have not just remediated your own practice but proactively sought to engage in restorative work which helps to reduce the risk that other doctors may act inappropriately. The Tribunal was of the view that your desire to assist in upholding the standards of the profession and reduce the chances that others will act in such a way as to damage the public's confidence in the profession is genuine and exceptional."

It added (para 17, p28):

> "it is very unusual for a doctor to use their reflection to the extent which you have in order to assist colleagues."

[35] It is an error to state that the Tribunal, in considering exceptional circumstances, did no more than take account of the personal remediation which might be relevant to impairment, in terms of para 69 of the Sanctions Guidance. What the Tribunal did was take account of factors which it considered important steps towards the maintenance of public confidence and of proper standards within the profession, and that in the whole circumstances to impose a sanction would not serve either of these ends or the wider public interest. We can find no legitimate basis for concluding that the Tribunal was not entitled to reach the decision which it did, and the appeal will be refused.