SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 71
XA131/19

Lord Justice Clerk
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Appeal

by

X

Appellant

against

THE GENERAL DENTAL COUNCIL

Respondent

Appellant: Duncan QC, P Reid; The Medical and Dental Defence Union of Scotland
Respondent: Dean of Faculty; Balfour + Manson LLP

17 November 2020

[1] This is an appeal under section 29 of the Dentists Act 1984 against a decision of the Professional Conduct Committee of the General Dental Council. It directed that the appellant's name be erased from the register of dentists. The background circumstances are as follows.

Background

[2] The appellant was diagnosed with a health condition (the 'first health condition').

He was permitted to practise as a dentist subject to annual testing as to viral load. An administrative error resulted in him not being called for monitoring by his employers' occupational health department between April 2008 and December 2011. He took no steps to comply with the requirement and continued his dental practice as normal.

[3] In July 2010 the appellant was diagnosed as also carrying another virus ('the second health condition'). Under the then current Department of Health guidance, it prevented him from practising dentistry. He told the medical staff treating him that he was a receptionist. He did not inform his employers, a Health Board, of his condition. He continued to treat patients, including by way of exposure prone procedures (EPPs), albeit that for a period he reduced the number of such procedures. As a result of therapy, by December 2010 his viral load in respect of the second health condition was undetectable, and he returned to a normal number of EPPs.

[4] In October 2011, following his appointment to a particular hospital position, he completed a health declaration form to the effect that he had no medical conditions and was not receiving treatment. In September 2013 he applied for and obtained some private dental work.

[5] As a result of guidance changes, from January 2014 dentists carrying the second health condition could practise dentistry, including undertaking EPPs, if they were registered as such, their viral load was and remained at undetectable levels, and they were under the supervision of an occupational health physician. However the appellant continued to conceal his condition.

[6] In December 2016 the appellant's second health condition was uncovered when, by chance, a colleague saw computer records which indicated that he was attending a particular clinic. He was suspended by the Health Board and he undertook not to carry out

private work. In due course the matter was referred to the GDC. A number of charges were made to the general effect of misleading and dishonest behaviour amounting to misconduct which impaired the appellant's fitness to practise. Dishonesty was admitted in respect of the failure to disclose the second health condition.

The Committee's decision

[7] The Committee heard evidence over several days. The witnesses included the appellant, a senior HR professional, a clinical services manager and an occupational health services manager, both from the Health Board. There was expert evidence from Martin Fulford BDS MPhil DGDP FIBMS. Various witness statements were agreed. The Committee made certain findings in fact which have been summarised above. Thereafter it reconvened to consider whether the appellant's fitness to practise was impaired because of misconduct, and, if so, what sanction should be imposed. The appellant did not resist a finding of misconduct. The Committee records that no submissions were made on his behalf regarding impairment. As to sanction the Committee was invited to take the view that a suspension would strike the right balance, and that erasure from the register would be punitive.

[8] In considering misconduct, the Committee held that the failure to comply with the monitoring requirement for the first health condition was serious. The appellant knew that it was necessary to meet government guidance and to ensure that there was no risk to his patients, who would have been trusting him to comply. It was recognised that there had been an administrative error by the monitoring department and that to the appellant testing might have seemed less of a priority because of the pressure he was under at the time. Nonetheless the failure to meet the responsibilities that came with carrying the virus was

deplorable. It met the threshold of misconduct as it posed a risk to patients, undermined public confidence in the profession, and breached professional standards.

[9] In respect of the second health condition, the Committee judged the failure to disclose and the non-compliance with government guidelines as being exceptionally serious. There had been repeated acts of dishonesty. The appellant put his own interests ahead of those of his patients. This was deplorable. It amounted to misconduct in that it posed a risk to patients, undermined public confidence in the profession, and breached professional standards.

[10] The Committee decided that the appellant's fitness to practise as a dentist was currently impaired by reason of his misconduct on wider public interest grounds. Any fair minded and well informed member of the public would be shocked if no such finding was made and would lose confidence in the dental profession and its regulatory process. It was not for the appellant to decide whether there was a risk of transmission to a patient. As a clinician he required to adhere to government guidance applicable to all healthcare professionals specifying submission to independent specialist monitoring and testing. Even after his viral load in respect of the second health condition fell below detectable limits, the continuing treatment of patients in breach of the requirements remained an extremely serious matter.

[11] The Committee then addressed sanction. It acknowledged that the aim is to protect the public and the wider public interest, not punishment of the appellant. It set out a number of mitigatory and aggravating factors, and sought to balance them. The mitigatory factors included that the appellant's judgement would have been impaired in the weeks following the diagnosis of the second health condition, which would have been a cataclysmic event. He was under the pressure of extraordinary circumstances. Since his

conduct was discovered he has acted honestly, undertaken targeted remediation, shown insight and remorse, and fully complied with investigations. A number of testimonials attested to his dental skills and vouched him to be honest, trustworthy and of good character.

[12] The aggravating factors included that there was a risk of harm to patients while the first health condition was unmonitored and while the viral load of the second health condition was high. The appellant knew of the risk but still undertook EPPs. It was not for him to decide whether he could continue to practise and under what conditions. His dishonesty was serious and prolonged, and productive of financial gain. There was a significant breach of the trust of his patients, employers and colleagues.

[13] The Committee considered the available sanctions in ascending order of severity. Notwithstanding the traumatic circumstances of the initial dishonesty, the remediation, and the public interest in retaining the services of an otherwise competent dentist, it concluded that a 12 month period of suspension would not be sufficient to mark the misconduct and maintain public confidence in the profession. Great weight was put on the appellant putting patients at risk when not being monitored for the first health condition and for the three months after the second health condition when he had good reason to regard his viral load as high. His actions in this respect were fundamentally incompatible with remaining on the register.

[14] The Committee also gave consideration to his dishonesty at the time when the shock of the second diagnosis would have settled and a more reflective judgement could have been made. In particular in October 2011 he lied to his employer when completing the OH form, and in 2013, while concealing his status, he decided to secure specialist part-time work to increase his income. The dishonesty was self-serving and in all likelihood would have

continued had it not been discovered. His behaviour was fundamentally incompatible with remaining on the register.

The grounds of appeal

[15] The grounds of appeal can be summarised as follows.

[16] Grounds 1 and 2 - There was no evidence that the appellant's condition posed a real risk to patients and no finding to that effect. The evidence indicated that his status was such that there was no actual risk and he should have been allowed to undertake invasive procedures. The expert evidence was that transmission was an extremely unusual event. There was no basis for the Committee's decision based on risk.

[17] Ground 2A - No proper effect was given to the conclusion that the appellant's judgement was impaired at the time of the diagnosis of the second health condition. The Committee wrongly sought to differentiate between what the appellant said and what he did.

[18] Ground 3 - There was no basis for the "more professional and reflective judgement" passage in the decision. The diagnosis had a "snowball" effect on the appellant, who was trapped by a lie made when he was in shock.

[19] Ground 4 - No proper consideration was given to the option of suspending the appellant, and no adequate reasons for its rejection. A fair minded and well informed member of the public aware of all the relevant circumstances would not be shocked and outraged by such an outcome.

[20] Ground 5 – The reasoning was so deficient as to render the decision unfair. There was powerful mitigation. It was not explained why it was concluded that patients were put at risk. No adequate reasons were given for there being a pattern of behaviour which was

fundamentally incompatible with the appellant remaining on the register, nor why maintenance of public confidence required erasure.

[21] Ground 6 – No proper reasons were given for rejecting the "snowball" argument, nor for the "shock and outrage" finding had it been accepted.

Submissions and the court's decision

[22] Counsel for the appellant accepted that the scope for the court interfering with a decision of this kind by a specialist body is severely circumscribed. However he submitted that a serious error made by the Committee removed any scope for deference and vitiated its decision on sanction. In particular the Committee founded its decision on an established risk to the health of patients, in the sense of a palpable non-negligible risk of such significance that erasure was justified. The contention was that the Committee's concern was not as to the appellant's behaviour; the focus was on its consequences, but none were proved. It was not a case of a potential for harm; the Committee was saying that patients were indeed at risk when treated by the appellant. However the evidence and the other findings did not support or lead to such a conclusion. Reference was made to the expert's evidence that the appellant's risk to patients from the second virus could not be assessed because his viral load was unknown, and that on any view any risk was very low.

[23] Counsel acknowledged that the Committee recognised that at all times the risk of transmission was very low. Nonetheless, without any solid foundation, it seemed to differentiate between the first three months after the second diagnosis and thereafter. It would be reasonable to infer from all the evidence that there was never any actual or palpable risk of transmission of a virus to a patient. In any event there was no proper basis for a conclusion that patients were put at risk of harm as a result of the appellant's conduct.

This undermined a main plank of the erasure decision. If a reasonable member of the public was told of the absence of any real risk to patients, or that at most it was extremely low, there would be no shock and outrage if the appellant's name remained on the register.

[24] The court is not persuaded by these submissions. Counsel accepted that his analysis depended on a particular construction of the Committee's decision as expressed in its reasoning. In our view his interpretation proceeds on a misreading or misunderstanding of the Committee's approach. The decision requires to be read as a whole. If this is done it is clear that the Committee was concerned about the appellant's actions and failings, not just whether any patient was exposed to a risk above a particular level. The guidance in respect of the second health condition, both before and after 2014, and the requirement for monitoring the first health condition, were aimed at patient protection. In ordinary parlance his conduct exposed his patients to a risk of harm. It is the absence of monitoring and other safeguards which creates the risk. Counsel's insistence that the Committee was talking of an actual risk of harm as opposed to the potential for harm is artificial and wrong.

[25] In respect of the first health condition the Committee said that the appellant's conduct "had the potential to put patients at risk." It is clear that this was the overall context of the findings as to risk, and that the focus was firmly on the conduct (or rather misconduct) of the appellant. It was not a necessary step in the Committee's reasoning that a patient was exposed to a "palpable", "clamant", or "actual" risk of harm. If there was a possibility of harm as a result of the appellant's actions, he created a risk of such; and this remains true whether it did or did not come about. And for present purposes it matters little if throughout the risks were low. The safeguards were designed to eliminate them or reduce them to the minimum. No doubt the appellant considered it safe for him to treat his

patients, but as he accepted, it was not for him to decide on appropriate conduct for a dentist carrying the viruses.

[26] As to the Committee singling out the three months after the diagnosis of the second health condition, this was based on the appellant's viral load being higher at that time, and remaining so until therapy took effect. The appellant himself recognised this by reducing his EPPs, albeit he should have stopped practising altogether.

[27] In so far as counsel's submission ultimately came to be that, in the absence of proof of unacceptable viral loads, erasure cannot be justified, we see no reason to agree. The Committee was assessing matters by reference to the wider public interest and as to what was required in order to maintain confidence in the profession and the regulatory process. When regard is had to the factors prayed in aid by the Committee, it is plain that they entitled the Committee to reach the decision that erasure was the only appropriate course.

[28] Counsel turned to the other grounds of appeal, dealing first with an alleged error in respect of the Committee failing to conclude that the impact of the initial shock upon the appellant's judgement and sensibilities extended to his conduct in subsequent years. It was said that this blunts the significance of the admitted dishonesty, his ability to make proper decisions and exercise sound judgement having been weakened throughout. The finding of current impairment should not have been made. Under reference to a report from a counsellor it was submitted that the Committee should have held that the continuing dishonesty was caused by shame and concerns about stigma. Furthermore he was caught by the initial lie and matters "snowballed" thereafter.

[29] In response the Dean of Faculty observed that the guidance until 2014 was clear and simple; the appellant should not have continued in dentistry. The Committee recognised that there was a limited period of impaired judgement after the initial shock of what it

described as a cataclysmic event. The counsellor's report was aimed at remediation, which was accepted. In any event there was no evidence of prolonged continuing shock or weakened thought processes as would bear the weight of the premise behind this ground of challenge.

[30] The court agrees with the Dean's submissions. We would add that this was quintessentially a matter for the Committee to weigh up and reach a decision. Given the continuing dishonesty of a serious nature over a period of years while the appellant continued as a dentist, and indeed gained additional specialist private work, it would have taken strong and clear evidence to overcome the entirely understandable view that for the bulk of that time he was responsible for his statements and conduct.

[31] Counsel labelled the remaining grounds of appeal as a reasons challenge. Suffice to say that we find no merit in them. The Committee's decision is commendably clear and straightforward. The appellant would have no difficulty in understanding all of it, and in particular why erasure was directed. Much of what is said amounts to no more than a disagreement with findings, reasons, and conclusions which were matters for the specialist judgement of the Committee. It had regard to all relevant considerations, weighed them, and reached a balanced decision which cannot be categorised as plainly wrong or manifestly inappropriate. Indeed we see no reason to express disagreement.

Disposal

[32] The court has identified no valid ground for interfering with the decision under challenge. It follows that the appeal is refused.