Privy Council Appeal No. 41 of 1978

Rafia Khanum Malik – – – – – – *Appellant*

v.

The General Dental Council – – – – – – *Respondents*

FROM

THE DISCIPLINARY COMMITTEE OF THE GENERAL DENTAL COUNCIL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 7TH JUNE 1979, DELIVERED THE 24TH JULY 1979

Present at the Hearing:
LORD CHANCELLOR
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by* LORD KEITH OF KINKEL]

This is an appeal from a determination of the Disciplinary Committee of the respondent Council, dated 16th November 1978, directing that the name of the appellant be erased from the Register of dental practitioners.

The history of events leading to the determination is as follows. The appellant qualified as a dental practitioner in this country in 1970, and in 1971 she started to carry on a practice in south-west London under a National Health Service contract. On 10th November 1977 the Disciplinary Committee of the respondent Council held an inquiry into the following charge against the appellant:—

> "That being a registered dentist you showed a persistent and reckless disregard of a dentist's duty in regard to record keeping and submission of estimate forms in that between the 4th September 1973 and the 23rd March 1975 you submitted estimates in respect of dental treatment provided to 103 National Health Service patients in which you:—
>
> (*a*) failed to keep proper records;
> (*b*) submitted 'duplicate' estimates which were at variance with the original estimate submitted;
> (*c*) claimed fees for treatment not provided;
> (*d*) claimed fees for treatment which you had already claimed;
> (*e*) made claims for time barred items; and
> (*f*) failed fully and accurately to complete estimate forms.
>
> And that in relation to the facts alleged you have been guilty of infamous or disgraceful conduct in a professional respect".

At the conclusion of the hearing the Committee found that the facts alleged in the charge against the appellant had been proved and that in relation to those facts she had been guilty of infamous or disgraceful conduct in a professional respect. The appellant's solicitor addressed the Committee in mitigation, and thereafter the President made an announcement in these terms:—

> " the Committee has found that you have been guilty of infamous or disgraceful conduct in a professional respect and it is in very great doubt about whether your name should remain in the Dentists' Register. The Committee considers, however, that your appearance here today will have convinced you of the gravity with which conduct of this kind is regarded by your colleagues, and that you will now take active steps to ensure that there is no further occasion on which you are likely to damage the good name of your profession. The Committee has accordingly decided to keep your conduct under surveillance and to postpone determination of this case until its meeting in November 1978 ".

The power to postpone judgment which was thus exercised by the Committee is conferred upon them by Rule 10(3) and (4) of the General Dental Council Disciplinary Committee (Procedure) Rules 1957.

Prior to the hearing before the Disciplinary Committee, a Dental Services Committee had considered a complaint against the appellant concerned with the same subject matter as the charge, and had on 7th January 1976 determined, while finding that the appellant had not been criminally motivated, that the sum of £2,000 should be withheld from the appellant's remuneration. This sum was subsequently increased to £3,000 by the Minister of State. The Dental Services Committee had further recommended that the appellant be placed on prior approval notice. This recommendation was put into force on 1st May 1977, to the effect that for a period of twelve months after that date the appellant was required to submit to the Dental Estimates Board a form E.C. 17 after she had examined any patient but before treatment was carried out, in order that prior authorisation could be given to the course of treatment prescribed. On 17th October 1977 the appellant wrote a letter to the local Family Practitioner Committee expressing the desire to resign from her National Health Service contract, as she had been advised by her doctor to cut down work to the minimum. This resignation became effective on 17th January 1978. On 7th April 1978 the appellant applied to the Family Practitioner Committee for re-engagement with effect from 18th April 1978, and the application was accepted.

At this stage it is necessary to set out the relevant provisions of Rule 12 of the 1957 Rules, which deals with procedure upon postponement of judgment:

> " 12.(1) Where under any of the foregoing provisions of these Rules the judgment of the Committee in any case stands postponed, the following shall be the procedure:
>
> (*a*) The Solicitor shall, not later than six weeks before the day fixed for the resumption of the proceedings, send to the respondent a notice, which shall
>
> (i) Specify the day, time and place at which the proceedings are to be resumed and invite him to appear thereat,
>
> (ii) unless the President otherwise directs, invite the respondent to furnish the Registrar with the names and addresses of persons to whom reference may be made confidentially or otherwise concerning his character and conduct, and

(iii) invite the respondent to send to the Solicitor, not less than three weeks before the day fixed for the resumption of proceedings a copy of any statement or statutory declaration, whether made by the respondent or not, relating to his conduct since the hearing of his case or setting out any material facts which have arisen since that hearing.

(*b*) . . . . . .

(*c*) At the meeting at which the proceedings are resumed the Chairman of the Committee shall first invite the Solicitor to recall, for the information of the Committee, the position in which the case stands and the Committee may then receive further oral or documentary evidence in relation to the case, or to the conduct of the respondent since the hearing, and shall hear any other party to the proceedings who desires to be heard.

(*d*) The Committee shall then consider and determine whether they should further postpone their judgment on the charges on which their judgment was previously postponed; and if the Committee determine further to postpone judgment, the judgment of the Committee shall stand postponed until such future meeting of the Committee as they may determine; and the Chairman of the Committee shall announce their determination in such terms as the Committee may approve. The provisions of this rule shall apply to any case in which judgment is further postponed.

(*e*) If the Committee determine that judgment shall not be further postponed paragraph (5) of rule 10 of these Rules shall apply.

(2) At any resumed proceedings any new charge alleged against the respondent in accordance with these Rules shall first be dealt with in accordance with such of rules 7 to 9, and so much of rule 10 as may be applicable and if the Committee determine not to postpone judgment in respect of any such new charge, the Committee may apply paragraph (5) of rule 10 simultaneously to the new charge and the charge in respect of which they had postponed judgment.

(3) Nothing in the last foregoing paragraph shall prevent the Committee from receiving evidence at any resumed proceedings of any conviction recorded against the respondent which has not been made the subject of a charge under these Rules.

(4) . . . . . ."

It is to be observed that Rule 7 relates to the reading of the charge and the making of objections to it in point of law, Rule 8 to proof of conviction, Rule 9 to proof of the facts alleged in cases relating to conduct, and Rule 10 to procedure on proof of conviction or of the facts alleged in cases relating to conduct. Rule 10(5) requires the Committee, in cases of guilt where they have decided not to postpone judgment, to determine whether the name of the respondent before them should be erased from the Register, and to announce their determination.

On 4th October 1978 the respondents' solicitors sent to the appellant a notice in terms of Rule 12(1)(*a*) in relation to the resumed hearing to be held on 15th November 1978. On 3rd November 1978 they delivered by hand to the appellant's solicitors a letter confirming that, as had been notified by telephone, they intended at the resumed hearing to call, under Rule 12(1)(*c*), further evidence about the alleged conduct of the appellant since the original hearing. They enclosed statements from a number of witnesses whom they proposed to call, including a Mrs. De Silva, who

had been the appellant's associate in her practice from 24th October 1977 until 10th April 1978, under an arrangement whereby the appellant was to receive 50% of Mrs. De Silva's earnings. There were attached to Mrs. De Silva's statement two Schedules, A and B, said to have been compiled from original Dental Estimate Forms F.P. 17 in the possession of the solicitors. Schedule A set out particulars of 36 such forms submitted on Mrs. De Silva's contract number and signed by her on various dates between 8th February and 1st April 1978, in relation to which it was said that the treatment had been carried out wholly or in part by the appellant. Schedule B set out particulars of 21 such forms relating to late 1977 and early 1978 all bearing Mrs. De Silva's contract number, which were said to have been submitted by the appellant unsigned, it being further said that in some instances Mrs. De Silva had done none of the treatment specified, and in others, only part of it. On the same date, 3rd November, the appellant's solicitors wrote to the respondents' solicitors acknowledging receipt of their letter and enclosures, and stating that in view of the shortness of time they reserved their right to apply for an adjournment of the resumed hearing. The respondents' solicitors replied on 6th November, acknowledging that time was short and enclosing copies of the original forms F.P. 17 and record cards from which Schedules A and B had been compiled. On 14th November the appellant's solicitors wrote to the respondent's solicitors reserving her right to cross-examine the witnesses, but stating that the appellant admitted

(*a*) that in relation to the cases in Schedule A she gave the whole or part of the treatment as therein specified, and

(*b*) that in relation to the cases in Schedule B she gave certain specified treatment in a number of these cases, but none in the others.

At the resumed hearing on 16th November 1978 counsel for the respondents, in his opening address to the Committee, recalled the position in which the case stood, and stated his intention to call further evidence in relation to the case or the conduct of the appellant since the original hearing, after which the solicitor appearing for the appellant would have an opportunity of making submissions and calling evidence if so desired. The appellant's solicitor, in response to a question by the President, agreed that this would be an appropriate procedure. After counsel had summarised the evidence which he proposed to call, the legal assessor to the Committee raised the point whether fresh charges should have been formulated against the appellant in respect of the matters to which such evidence related. This point was taken up by the appellant's solicitor. While stating that he had not been embarrassed by inadequacy or shortness of the notice he had received of the evidence it was proposed to call, nor prevented thereby from taking proper instructions, he submitted that in view of the gravity of the new allegations they should in justice to the appellant be made the subject of fresh charges, rather than being dealt with under Rule 12(1)(*c*). The legal assessor advised the Committee that it was appropriate to proceed under Rule 12(1)(*c*), and this advice was accepted. Counsel for the respondents then led evidence as he had outlined from the witnesses whose statements had been furnished to the appellant's solicitors, and all but one of them were subjected to cross-examination. Thereafter the appellant gave evidence and was cross-examined. The Committee were finally addressed by the appellant's solicitor and afterwards made the determination appealed against.

Before this Board it was argued for the appellant that the procedure followed by the Committee at the resumed hearing involved a departure from the rules of natural justice, and that the determination appealed against should be set aside on that ground. The Committee's duty to make due inquiry, so it was maintained, required that in relation to the appellant's conduct since the original hearing clear and unambiguous

charges should be formulated and notified to her, that the substance of the evidence to be adduced in support of the charges should be disclosed to her, and that the Committee should arrive at a precise determination as to the facts proved against her, and as to whether in relation to the facts found proved the appellant had been guilty of infamous or disgraceful conduct in a professional respect. No complaint was made about the procedure followed at the original hearing, and it was accepted that under Rule 12(1)(*c*) the Committee had power at the resumed hearing to hear evidence not only about good conduct but also about bad conduct on the part of a respondent before them during the intervening period, without the necessity of such bad conduct being made the subject of fresh charges. But it was contended that if the allegations of bad conduct were very serious, such as if proved would amount to infamous or disgraceful conduct in a professional respect, natural justice required that new charges should be formulated and duly investigated in accordance with the whole of the applicable Rules. It was particularly important, so it was urged, that the appellant should have the means of knowing, from a finding of the Committee, whether or not they took the view that in regard to the conduct in question she had been guilty of infamous or disgraceful conduct in a professional respect, and, if so, upon what specific grounds.

Their Lordships have found themselves unable to accept this argument. The provisions about postponement of judgment contained in Rules 10(3) and (4) and 12 have clearly been devised in order to empower the Committee, in cases where the charges of which a respondent before them has been found guilty are such as to require serious consideration of penal erasure, to set something in the nature of a period of probation for the respondent. No doubt it is in contemplation that if, at the expiry of the period, it appears to the Committee that the respondent's sheet has been clean during it, then erasure will not be directed. But if the sheet is not clean, then erasure may, or certainly will if the stains are bad, be directed. It is for the respondent to take care to see that his conduct during the period is impeccable. Any respondent must know this, and the terms of the Committee's announcement on 10th November 1977 were apt to make it clear to the present appellant.

Rule 12(2) of the 1957 Rules envisages that at the resumed hearing new charges preferred against a respondent may be dealt with by the Committee. Such charges might no doubt arise out of the respondent's conduct since the original hearing. Rule 12(2) refers to

> " any new charge alleged against the respondent in accordance with these Rules ".

By virtue of Rule 2, proceedings for inquiry into a charge can only be set in motion through the Preliminary Proceedings Committee referring a case to the Disciplinary Committee in accordance with the provisions of what is now section 26 of the Dentists Act 1957. Whether or not this should be done must be exclusively within the discretion of the Preliminary Proceedings Committee. There is nothing in the framework of the Rules which gives a respondent the right to insist, in a case where his conduct since the original hearing has been particularly bad, that the Disciplinary Committee is precluded from hearing evidence about it at the resumed hearing unless the Preliminary Proceedings Committee has set in motion the machinery for preferring new charges. Nor, in their Lordships' opinion, does natural justice require that this should be so. If no new charges are preferred against a respondent in respect of his conduct since the original hearing, it cannot be found that such conduct was infamous or disgraceful in a professional respect. That is in his interest, since otherwise he might be left with a further serious blot on his record. It being conceded, in their Lordships' view rightly, that Rule 12(1)(*c*) allows

the Committee to hear evidence about bad conduct on the part of the respondent since the original hearing, it becomes impossible to draw a line and say that if the conduct is such that it could be the subject of new charges the Committee may not hear it in the absence of new charges. That would be an unreasonable and impractical conclusion. The Committee could not say whether they ought to hear the evidence until after they had heard it. What the Committee are concerned about at the resumed hearing is not whether the respondent has been guilty of further infamous or disgraceful conduct, but whether since the original hearing he has turned over a new leaf so that it would not be appropriate to direct penal erasure on account of the infamous or disgraceful conduct of which he was originally found guilty. From that point of view hearing of the evidence involves no injustice or prejudice to the respondent. The rules of natural justice do of course demand that the respondent be given fair notice of the substance of the evidence which it is proposed to lead, and a fair opportunity to prepare and present his case to meet it. That requirement was satisfied in the present case. The notice given was somewhat short, but the opportunity of seeking a postponement or adjournment of the hearing was available, and at the hearing itself the appellant's solicitor, as has been mentioned, stated that he had not been embarrassed by any insufficiency or inadequacy of notice, nor disabled from seeking proper instructions. In the result the appellant, as was quite properly accepted by her counsel before this Board, had a fair and sufficient opportunity of dealing with all the allegations of fact against her.

The foregoing reasons dispose of the primary argument for the appellant. It was further argued that certain interventions by the President in the course of the appellant's evidence at the resumed hearing were prejudicial to her and vitiated the proceedings. Their Lordships have examined the relevant passages in the transcript and are satisfied that there is no substance in this argument.

Finally, it was maintained for the appellant that erasure of her name from the Register was too severe a penalty in all the circumstances, considering in particular that £3,000 had been withheld from her remuneration. It was further suggested that evidence obtained since the resumed hearing, and contained in statements exhibited to an affidavit by her solicitor, might have caused the Committee to take a more lenient view. Their Lordships observe that these statements do not appear to have any relation to that aspect of the appellant's professional conduct which was in issue in the course of the proceedings, which was concerned principally with the quality of her record-keeping and the propriety of her claims for fees.

It is the practice of this Board, except in exceptional and clear cases, to refrain from interfering with the judgment of the Disciplinary Committee as to penalty, a matter peculiarly within the Committee's discretion. Their Lordships have not been satisfied that the Committee went wrong in any respect in the present case. It is unnecessary and inappropriate to embark upon a detailed review of the evidence given at the resumed hearing. Their Lordships are far from holding that the Committee must have taken the view that this evidence showed that the appellant had been guilty of infamous or disgraceful conduct in a professional respect since the date of the original hearing. It is sufficient to say that the Committee were entitled on that evidence to find that the appellant had not, since the first hearing, demonstrated a sufficiently improved sense of responsibility in relation to that aspect of her professional conduct, namely the keeping of proper records and the submitting of proper claims for fees, which had given rise to the charge of which she was found guilty on 10th November 1977. In the circumstances the Committee had sufficient grounds for arriving at the judgment which they pronounced.

Their Lordships have therefore humbly advised Her Majesty that the appeal should be dismissed, and that the appellant should be liable to the respondents in costs.

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In the Privy Council

RAFIA KHANUM MALIK

v.

THE GENERAL DENTAL COUNCIL

DELIVERED BY
LORD KEITH OF KINKEL

Printed by HER MAJESTY'S STATIONERY OFFICE
1979