Neutral Citation Number: [2019] EWHC 189 (Admin)

Case No: CO/2511/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 February 2019

Before :

MRS JUSTICE LANG DBE

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Between :

GENERAL MEDICAL COUNCIL	**Appellant**
- and -	
PRZEMYSLAW SLEDZIK	**Respondent**

- -
- -

Ivan Hare QC (instructed by the **GMC Legal**) for the **Appellant**
The **Respondent appeared in person**

Hearing date: 13 December 2018

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Approved Judgment

Mrs Justice Lang:

1. The General Medical Council ("GMC") appeals under section 40A of the Medical Act 1983 ("MA 1983") against the determination of the Medical Practitioners Tribunal ("the Tribunal") dated 31 May 2018, in which it imposed conditions on the Respondent's registration. The grounds of appeal were that, in the light of the findings on impairment, the Tribunal should have erased him from the register, instead of imposing conditions on his registration.

2. The Respondent is a medical practitioner, specialising in ophthalmology.

The legal framework

3. Section 40A MA 1983 provides, so far as is material:

> "(1) This section applies to any of the following decisions by a Medical Practitioners Tribunal—
>
> (a) a decision under section 35D giving—
>
> …
>
> (ii) a direction for conditional registration, including a direction extending a period of conditional registration;
>
> …
>
> (2) A decision to which this section applies is referred to below as a "relevant decision".
>
> (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—
>
> (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.
>
> . . .

(6) On an appeal under this section, the court may—

(a) dismiss the appeal;

(b) allow the appeal and quash the relevant decision;

(c) substitute for the relevant decision any other decision which could have been made by the Tribunal; or

(d) remit the case to the MPTS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court,

and may make such order as to costs . . . as it thinks fit."

4. In *General Medical Council v Jagjivan & Anor* [2017] EWHC 1247 (Admin) [2017] 1 WLR 4438, Sharpe LJ summarised the approach to be adopted to an appeal under section 40A MA 1983 at [39-40]:

> "As a preliminary matter, the GMC invites us to adopt the approach adopted to appeals under section 40 of the 1983 Act, to appeals under section 40A of the 1983 Act, and we consider it is right to do so. It follows that the well-settled principles developed in relation to section 40 appeals (in cases including: *Meadow v General Medical Council* [2006] EWCA Civ 1390; [2007] QB 462; *Fatnani and Raschid v General Medical Council* [2007] EWCA Civ 46; [2007] 1 WLR 1460; and *Southall v General Medical Council* [2010] EWCA Civ 407; [2010] 2 FLR 1550) as appropriately modified, can be applied to section 40A appeals.
>
> In summary:
>
> i) Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
>
> ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong': see *Fatnani* at paragraph 21 and *Meadow* at paragraphs 125 to 128.
>
> iii) The court will correct material errors of fact and of law: see *Fatnani* at paragraph 20. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing (see *Assicurazioni*

Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at paragraphs 15 to 17, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325 at paragraph 46, and *Southall* at paragraph 47).

iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Fatnani* at paragraph 16; and *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at paragraph 36.

vi) However there may be matters, such as dishonesty or sexual misconduct, where the court "is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal …": see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC 579 (Admin); [2005] Lloyd's Rep. Med 365 at paragraph 11, and *Khan* at paragraph 36(c). As Lord Millett observed in *Ghosh v GMC* [2001] UKPC 29; [2001] 1 WLR 1915 and 1923G, the appellate court "will afford an appropriate measure of respect of the judgment in the committee … but the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances".

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.

viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust (see *Southall* at paragraphs 55 to 56)."

The Tribunal's findings on the Allegation

5. The Allegation against the Respondent was based on an analysis of his treatment of 8 patients whilst working as a Locum Ophthalmic Medical Practitioner for Boots Opticians, and 60 patients whilst working as a Locum Optometrist for Specsavers, between January and October 2015.

6. The Tribunal made the following findings on the Allegation against the Respondent:

> "1. Whilst working as a Locum Ophthalmic Medical Practitioner for Boots Opticians between April and October 2015 you:
>
> a. consulted with Patient A and you failed to:
>
> i. dilate his eyes for an examination of the posterior segment including the retina and optic discs; **Found proved**
>
> ii. countersign the retinal photographs; **Found not proved**
>
> b. consulted with Patient B and you failed to:
>
> i. obtain an adequate medical history from Patient B's parents in that you did not ascertain:
>
> 1. whether it was Patient B's first eye test; **Found not proved**
> 2. how long the squint in Patient B had been present for; **Found proved**
> 3. which eye tended to turn; **Found proved**
> 4. whether there was a squint running in the family; **Found proved**
> 5. general health history; **Found proved**
> 6. whether there was any restriction to Patient B's eye movements; **Found proved**
> 7. whether there was any abnormality of the optic nerves; **Found proved**
>
> ii. make an adequate medical record of the medical history obtained from Patient B's parents; **Admitted and found proved**
>
> iii. undertake an adequate examination of Patient B in that you did not:
>
> 1. examine the back of Patient B's eyes; **Found proved**
> 2. perform binocular tests on Patient B; **Found proved**

3. identify fixation preference; **Found proved**
4. perform a relative afferent pupillary defect test on Patient B; **Found proved**

iv. make an adequate medical record of the examination; **Admitted and found proved**

v. record your advice to Patient B's parents; **Admitted and found proved**

c. used the incorrect term 'constant esophoria' during Patient B's consultation; **Admitted and found proved**

d. consulted with Patient C and you failed to:

i. record:

1. your advice to Patient C's parents; **Admitted and found proved**
2. the best corrected visual acuity with the strength of the lenses in either eye; **Admitted and found proved**

ii. countersign the retinal photographs; **Found not proved**

iii. undertake an adequate examination in that you did not perform ancillary tests looking for binocular function in line with Boots Policies; **Found not proved**

e. consulted with Patient D and you failed to:

i. obtain an adequate medical history from Patient D's parents in that you did not ascertain:

1. the strength of glasses that Patient D was wearing; **Found proved**
2. how long Patient D had worn the glasses; **Found proved**
3. family history; **Found proved**

ii. make an adequate record of the medical history obtained from Patient D's parents; **Admitted and found proved**

iii. undertake an adequate examination of Patient D in that you did not:

1. perform an external eye examination of the anterior segments; **Found proved**

2. perform tests to investigate stereopsis; **Found not proved**

iv. make an adequate record of the examination; **Admitted and found proved**

v. record your advice to Patient D's parents; **Admitted and found proved**

vi. arrange a three month review to check visual acuity; **Admitted and found proved**

vii. countersign the retinal photographs; **Found not proved**

f. consulted with Patient E and you failed to:

i. obtain an adequate medical history from Patient E in that you did not ascertain:

1. the period of time Patient E's eyes had been red; **Found not proved**
2. why Patient E had gritty red eyes; **Found proved**
3. whether Patient E's vision had been affected; **Found not proved**
4. whether Patient E was using drops; **Found proved**

ii. undertake an adequate examination of Patient E in that you did not:

1. carry out a pre-screen; **Found proved**
2. take the intraocular pressures; **Found proved**
3. use fluorescein dye to examine for presence or absence of staining of epithelial disruption; **Found proved**
4. examine for tear film and eyelid issues; **Found not proved**

iii. make an adequate record of the examination; **Admitted and found proved**

iv. provide advice to Patient E regarding his gritty red eyes such as the use of lid hygiene programmes and lubricant use; **Found proved**

v. countersign the retinal photographs; **Found not proved**

g. consulted with Patient F and you failed to:

i. obtain an adequate medical history from Patient F in that you did not take a relevant history in relation to the prescription of lubricant eye drops; **Found proved**

ii. undertake an adequate examination of Patient in that you did not:

1. perform an adequate ocular movement examination; **Found not proved**
2. arrange a visual field test; **Found proved**
3. identify a need for eye drops; **Found proved**

iii. record best corrected visual acuity; **Admitted and found proved**

iv. identify the reason why both vertical and horizontal prisms were incorporated into glasses; **Admitted and found proved**

v. formulate a diagnosis for Patient F; **Found proved**

vi. record any advice given to Patient F about cataracts; **Admitted and found proved**

vii. advise Patient F about the use of eye drops; **Found not proved**

viii. countersign the retinal photographs; **Found not proved**

h. consulted with Patient G and you:

i. failed to obtain an adequate medical history from Patient G in that you did not;

1. request any further information about Patient G's current medication; **Found proved**
2. enquire how long the subconjunctival haemorrhage ('the haemorrhage') had been present in Patient G's right eye; **Found proved**
3. enquire if the haemorrhage was causing Patient G any discomfort; **Found proved**
4. arrange an earlier follow up; **Found proved**

5. countersign the retinal photographs; **Found not proved**

ii. advised Patient G to have Botox to cure her frown lines and headaches, or words to that effect; **Found proved**

iii. did not introduce yourself to Patient G; **Admitted and found proved**

iv. were dismissive of Patient G; **Admitted and found proved**

i. consulted with Patient H and you failed to:

i. undertake an adequate examination of Patient H in that you did not:

1. arrange a visual field test; **Found proved**
2. use eye drops to examine the cornea and tear film; **Found proved**
3. perform an anterior external eye examination looking for quality of tears; **Found not proved**

ii. formulate a diagnosis for Patient H; **Found proved**

iii. adequately advise Patient H about the use of lubricant drops; **Found proved**

iv. countersign the retinal photographs. **Found not proved**

2. Whilst working as a Locum Optometrist for Specsavers you consulted with:

a. those patients as set out in Schedule 2 and you failed to carry out a visual field test; **Admitted and found proved**

b. those patients as set out in Schedule 3 and you failed to review the visual field test; **Admitted and found proved**

c. those patients as set out in Schedule 4 and you failed to refer them to the eye hospital service; **Admitted and found proved**

d. Patient K on 5 February 2015 and you failed to:

i. test the intraocular pressure more than once;

Admitted and found proved

ii. advise Patient K that a referral to the hospital eye service was indicated; **Found proved**

e. Patient L on 16 February 2015 and you failed to:

i. test the intraocular pressure more than once; **Admitted and found proved**

ii. advise Patient L that a referral to the hospital eye service was indicated; **Found proved**

f. Patient M on 10 April 2015 and you failed to undertake an adequate examination of Patient M in that you did not:

i. complete an examination at the back of either eye including optic nerve analysis; **Found proved**

ii. make an adequate record of the examination; **Admitted and found proved**

g. Patient N on 10 January 2015 and you failed to undertake an adequate examination of Patient N in that you did not:

i. examine the posterior pole including the discs; **Found proved**

ii. make an adequate record of the examination; **Admitted and found proved**

h. Patient O on 8 October 2015 and you failed to inform the hospital eye service about the increased pressure in Patient O's left eye.
Found proved

3. You knowingly made a decision not to refer the patients to the hospital eye service, as listed in Schedule 4, in accordance with the national guidelines.
Admitted and found proved."

The Tribunal's findings on impairment

7. The Tribunal concluded that the facts proved amounted to misconduct and/or deficient professional performance, and that his fitness to practise was currently impaired. Both his conduct and performance marked a clear departure from the principles set out in paragraphs 7, 12, 19 and 21 of *Good Medical Practice*.

8. On the issue of performance, the facts showed "broad and repeated failures over a sustained period in fundamental areas of clinical practice such as history taking, examination, record keeping and providing advice". The Tribunal accepted the expert evidence of Mr Simmons, a consultant ophthalmic surgeon and paediatric ophthalmologist, who concluded that:

> "His management of the Boots patients illustrates a lack of attention to detail and poor record keeping consistent with a practitioner who is doing the minimum (or below minimum) required. His management of the 2 year old in the Boots group (Patient B) is the most concerning in that serious pathology could have been missed with such a brief 'assessment'. Overall, PS comes over to me as an OMP who rushes patients through and who is happy to ignore national guidelines even if this puts patients at risk. For this reason, in particular, I feel that the overall standard of care offered falls seriously below that to be expected of a reasonably competent OMP."

9. The Tribunal went on to conclude that the Respondent's fitness to practise was impaired by reason of deficient professional performance. The Tribunal considered that he lacked insight into his failings and that there was a significant risk of repetition, thus putting patients at risk. There was no evidence from him in respect of remediation, nor testimonial evidence of his competence from colleagues or patients.

10. On the issue of misconduct, the Respondent admitted that his record keeping failures amounted to misconduct. He also accepted that, in failing to refer patients to the Hospital Eye Service, he acted outside of guidance in place at the time. Based on his experience as a hospital doctor, he was aware that the guidelines were 'imperfect', and resulted in unnecessary referrals, which were not in the best interests of the patient or the NHS. The guidance has since changed to reflect his practise at the material time. He did not consider that his actions amounted to misconduct and had he known this, he would have followed the relevant guidance.

11. The Tribunal accepted the sincerity of the Respondent's evidence, but it was concerned by his belief that his knowledge and experience outweighed that of those who produced the relevant national guidance. Having regard to Mr Simmons' opinion that the Respondent's conduct fell seriously below the standard expected of a reasonably competent practitioner, the Tribunal concluded that the facts proved did amount to misconduct.

12. The Tribunal went on to find that his fitness to practise was thereby currently impaired because in failing to refer patients, in accordance with the guidelines, he had put them at risk, and was liable to do so in future. Although his conduct was capable of remediation, there was no evidence that it had been remedied, or that the Respondent had any more than limited insight into the need to follow guidelines.

The Tribunal's determination on sanction

13. The Tribunal determined that the Respondent's deficiencies in professional performance and his misconduct were capable of remediation. Taking this into account, it determined, at paragraph 19, that the Respondent:

> "... could, in the future, be a doctor who practised safely and to an appropriate standard…..remediation would be best achieved by [the Respondent] undergoing a period of supervision and focused retraining, where he could improve his clinical skill and knowledge."

14. By reference to the GMC's *Sanctions guidance*, the Tribunal formulated a set of "appropriate, proportionate, workable and measurable conditions which could adequately address [the Respondent's] deficient professional performance and protect the public … 18 months was an appropriate period for [the Respondent] to demonstrate an evolved level of insight and remediation" (paragraph 22). These included notification of relevant details to the GMC and any employer or agency; a workplace reporter; a personal development plan; an educational supervisor and a clinical supervisor.

15. It directed that a review of the Respondent's case should be convened shortly before the end of the conditional registration period, at which the Respondent would have to demonstrate how he had developed his insight and remediated his deficient professional performance before the conditions could be lifted.

Grounds of appeal

16. The GMC submitted that the Tribunal failed to apply its findings on impairment, and instead drew back from the implications of those findings when determining sanction, without any adequate evidential basis for doing so. Moreover, the clinical supervision imposed was at the lowest level envisaged by the *Glossary for undertakings and conditions*, and did not provide sufficient protection for the public. The appropriate sanction was erasure.

Conclusions

17. It was not disputed by the GMC that the Tribunal correctly directed itself on the general approach to be adopted, at paragraph 12:

> "Throughout its deliberations, the Tribunal bore in mind that the purpose of sanctions is not to be punitive, but to protect the public interest. The public interest includes protecting the health, safety and well-being of the public, maintaining public confidence in the profession, and declaring and upholding proper standards of conduct and behaviour. In making its decision, the Tribunal also had regard to the principle of proportionality, and it weighed Dr Sledzik's interests with those of the public. It also

> considered and balanced the mitigating and aggravating factors in this case."

18. The GMC rightly submitted that there appeared to be a contradiction between the Tribunal's strong findings of a lack of insight at impairment stage, and lack of evidence of remediation, and its subsequent findings at sanction stage that:

> "… it was reassured by his developing insight and willingness to work collaboratively with colleagues. It determined that [the Respondent], with the right support, structure and proper reflection, could develop his insight to a satisfactory level." (paragraph 20).

I agree with the GMC's submission that it was not clear why the Tribunal altered its view, as the evidence adduced at sanction stage was limited.

19. The GMC rightly criticised the Tribunal's assessment of the mitigating factors as inconsistent on the issue of insight (at paragraph 13). However, I concluded that the Tribunal was entitled to find that there was "evidence that he was regarded positively by employers" and had "received additional offers of employment", even though the evidence was not extensive. The GMC also criticised the Tribunal for referring to a "significant" number of admissions. However, in my view, the Tribunal was entitled to conclude that the admissions were significant in number, even though they related to the less serious allegations.

20. The GMC criticised the Tribunal for only identifying one aggravating factor, namely, the Respondent's lack of insight into the care of Patient B. The GMC submitted that the Tribunal should not have limited the aggravating factors to the care of Patient B. The aggravating factors should have included his lack of insight into his failings in respect of all his patients, as well as his failure to remediate. The Tribunal should also have had regard to patient safety.

21. The *Sanctions guidance* includes a list of potential aggravating factors (which I consider to be non-exhaustive). It includes lack of insight. The Tribunal did not explain why it decided that it should only include Patient B as an aggravating factor, and I am not able to ascertain the reason. To that extent, I accept the GMC's criticism. However, I do not consider that the Tribunal was wrong not to include failure to remediate or patient safety as aggravating factors. Neither of these is included in the list in the *Sanctions guidance*. In my view, although there may be cases where, on the particular facts, the failure to remediate or the risk to patients is so striking that it would be wrong for a tribunal not treat it as an aggravating factor, I do not consider that to be the position on the evidence in this case.

22. I have concluded that the flaws which I have identified in the Tribunal's determination may be a consequence of a defective approach to the case by the Tribunal, or they may merely be a result of poor drafting and inadequate reasons. Without clarification from the Tribunal, I am not able to discern the cause.

23. However, this is not a case where I am able to conclude that the Tribunal was wrong to impose a period of conditional registration, and to reject the sanctions of suspension or erasure. The *Sanctions guidance* requires tribunals to take a proportionate approach to

imposing sanctions, and consider each sanction in turn, starting with the least restrictive. The Tribunal concluded, on the evidence before it, that it could impose "appropriate, proportionate, workable and measurable conditions which could adequately address [the Respondent's] deficient professional performance and protect the public …" (paragraph 22). The Tribunal was well aware that the Respondent was working independently as a locum, which obviously made supervision more difficult. Yet it was satisfied that adequate supervision could be put in place and "the statutory overarching objective could be fulfilled by the formulation of a robust set of conditions" (paragraph 21). At the hearing before me, the GMC did not suggest any alternative or additional conditions which the Tribunal could and should have imposed.

24. The Tribunal then went on to consider the relevant paragraphs in the *Sanctions guidance* and concluded, at paragraph 27, that it would be "disproportionate, punitive, and otherwise not in the public interest to suspend [the Respondent's] registration or to erase his name from the medical register".

25. I note that there were no previous adverse disciplinary findings against this Respondent. He was an established practitioner, who was plainly well-qualified for the work he was doing, and it was not suggested that he did not have the ability or skills to perform his duties. Conditions are frequently used in cases of deficient performance and other shortcomings, as the *Sanctions guidance* recognises at paragraph 81. In my judgment, it was reasonable for this Tribunal to conclude that he should be given the opportunity to improve the standard of his work, under supervision, on the basis of its findings. I do not consider that the allegations of misconduct were so grave that erasure was the only proper course to adopt.

26. However, insight and remediation on the part of the practitioner are essential if the conditions are to be workable and effective: see paragraph 82 of the *Sanctions guidance*. Because the Respondent works independently, his full co-operation will be required. In the light of the findings on impairment, these factors need to be carefully considered when determining sanction.

27. In the circumstances, I consider that the appropriate course is to allow the appeal on the basis of the flaws in the determination, and remit the case to the same Tribunal for them to re-determine sanction, in the light of my judgment. The findings on impairment cannot be re-opened as they were not the subject of an appeal. The Tribunal should provide full reasons for their findings and conclusions on sanction.

28. The GMC has asked for an order that the Respondent should pay the costs of the appeal since it was successful. However, the GMC was only successful in establishing that there were flaws in the determination. The GMC failed to persuade the Court that the sanction of conditional registration was not sufficient to protect the public and that the Court should substitute an order that the Respondent should be erased from the register. In those circumstances, I consider that the just outcome is that the parties should bear their own costs.