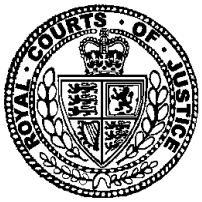

Neutral Citation Number: [2024] EWHC 3335 (Admin)

Case No: AC-2024-LON-002332

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2024

Before :

MRS JUSTICE LANG DBE

- -

Between :

PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE	**Appellant**
- and -	
(1) GENERAL PHARMACEUTICAL COUNCIL	**Respondents**
(2) AZHAR AHMED	

- -
- -

Andrew Deakin (instructed by **Hill Dickinson LLP**) for the **Appellant**
Hannah Smith (instructed by **Legal and Enforcement Department of the General Pharmaceutical Council**) for the **First Respondent**
The **Second Respondent** appeared in person.

Hearing date: 3 December 2024

- -

Approved Judgment

This judgment was handed down remotely at 2 pm on 20 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LANG DBE

Mrs Justice Lang :

1. The Appellant ("the Authority") has referred, under section 29(4) of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act"), the Decision of the Fitness to Practise Committee ("the Committee") of the First Respondent ("the Council"), dated 13 May 2024, that the fitness to practise of the Second Respondent ("the Registrant") was not impaired.

2. The Registrant relied upon the Council's submissions in response to the Authority's Grounds of Appeal. In his brief oral submissions, he also emphasised that the Committee had before them his references, his CPD record and his professional portfolio.

The Decision

3. The Registrant is a registered pharmacist. He faced an allegation of impairment of fitness to practise by reason of misconduct, namely, inappropriate sexual behaviour towards Colleague A, when he was employed by Northumbria Healthcare NHS Foundation Trust ("the Trust").

4. The allegations against the Registrant which were before the Committee were as follows:

> "You, a Registered Pharmacist,
> 1. Were employed as a pharmacist by Northumbria Healthcare NHS Foundation Trust from 26 July 2021 until 24 November 2021.
> 2. On 9 September 2021 whilst working at [M] Medical Centre you:
> 2.1 Touched your crotch against Colleague A's shoulder;
> 2.2 Grabbed Colleague A's crotch and:
> 2.2.1. Put your hand on his penis; and/or
> 2.2.2. Rubbed your hand; and/or
> 2.2.3. Grabbed and/or squeezed your own crotch;
> 2.3 Said to Colleague A words to the effect of "You're not going to tell anyone are you?".
> 3. Your actions as set out at 2.1 and/or 2.2 were sexually motivated.
>
> And by reason of the matters set out above, your fitness to practise is impaired by reason of your misconduct."

5. The Registrant admitted Particulars 1, 2 (the first line only), 2.2.1 and 2.3. He denied the other particulars.

6. Prior to the Committee hearing, the Council made repeated but unsuccessful efforts to engage with Colleague A, who was the only witness to the incident, other than the Registrant. Colleague A did not attend the hearing.

7. At the hearing, the Council did not apply for a witness summons to compel the attendance of Colleague A and the Committee agreed with this approach, finding that it would be "wholly inappropriate" to issue a witness summons in its Decision at paragraph 36 ("Decision/36").

8. The Council did not invite the Committee to admit Colleague A's evidence as hearsay and the Committee agreed with this approach, finding that it would be "unfair and prejudicial" to allow hearsay evidence of Colleague A to be admitted (Decision/36).

9. The Council decided not to offer any evidence to support the disputed allegations. The Committee agreed with the Council's submission that the admitted allegations were not sufficient for a finding of misconduct or a breach of the relevant professional standards, and would not support a finding that the Registrant's fitness to practise was impaired (Decision/38).

10. Accordingly, the Committee determined that there was no case for the Registrant to answer and that his fitness to practise was not impaired.

Facts and evidence

11. It was alleged by Colleague A that, on 9 September 2021 and while he was at work, the Registrant made an unwanted sexual advance.

12. In written evidence provided to the Committee, in particular in Colleague A's witness statement of 7 July 2022 provided to the Council, Colleague A alleged as follows:

    i) Colleague A and the Registrant were alone in the reception area of the medical centre in which they worked. Colleague A was seated behind the reception desk.

    ii) In the course of conversation with the Registrant the discussion turned to nightclubs and, in order to locate a shisha bar on Google maps, the Registrant moved around the reception desk to look at the computer screen.

    iii) When doing so, his crotch touched Colleague A's shoulder. Colleague A initially assumed this was an accident and moved his seat. He subsequently formed the view that this was an intentional act.

    iv) In the course of the conversation Colleague A explained that he attended a gay bar because this closed later than other clubs. He mentioned that he had been "grabbed" at that club on occasion but portrayed this in a negative light. The Registrant then put his hand on Colleague A's penis over the top of his trousers, rubbed up slightly and grabbed.

    v) The Registrant had his hand on his own penis at the same time, was looking into Colleague A's eyes and breathing heavily.

    vi) Colleague A told the Registrant to go back to his room, more than once, and the Registrant asked if Colleague A was going with him.

    vii) When the Registrant left he said to Colleague A "You're not going to tell anyone are you".

13. In written evidence provided to the Committee:

    i) The Registrant accepted that he did go around the reception desk.

    ii) He did not accept that he touched Colleague A's shoulder with his crotch.

    iii) The Registrant accepted that, at the point Colleague A discussed being touched in gay bars, his hand made contact with Colleague A's penis. The Registrant denied that this was intentional.

    iv) The Registrant accepted that Colleague A *"did mention to go back to my room"* but only once and in a respectful manner.

    v) The Registrant accepted that he did ask Colleague A not to tell anyone. The Registrant stated that this was due to embarrassment.

14. On the following day (10 September 2021) Colleague A contacted his manager to discuss the matter. A meeting was arranged for the following week.

15. On the same day (10 September 2021) the Registrant messaged Colleague A about an iPhone charger. These messages were as follows:

> Reg: "… soz about you having the extra tab yesterday lol" ["Tab" here is understood to be a reference to a cigarette]
>
> A: "think its funny?"
>
> Reg: "no mate – just wanted to say sorry. I'll[?] get you a drink to make up for it"
>
> A: "I don't fancy you pal"
>
> Reg: "I know mate. just professional from now on. I misread and misunderstood"
>
> A: "U think its fair on your wife and kids? Baffles me pal"
>
> Reg: "I'll speak to you in person."

16. In written evidence provided to the Committee the Registrant explained that when he wrote "**I** misread and misunderstood" this was a typographical error and he meant to write "**U** misread and misunderstood" (emphasis added). It is not clear that this account is consistent with the Registrant's explanation for these comments made in his 21 September 2021 Investigation Statement where he said "basically I got the wrong end of the stick".

17. Further evidence was provided to the Committee, as follows:

    i) Colleague A's witness statement dated 7 July 2022 annexed, *inter alia*, two investigation statements made by Colleague A on 30 September 2021 and signed 9 November 2021 and a record of interview from the Registrant's Panel. There were photographs of the scene.

ii) Christine Gray, the Trust's Administration Manager, made a statement for the Council on 30 August 2022, annexing a note of her conversation with Colleague A on 16 September 2021 and her investigation statement dated 4 November 2021 (in which she reported Colleague A having told her that the Registrant had "… come up to him and 'grabbed his cock'…").

iii) David Fisher, the Deputy Chief Pharmacist/Head of Operational Pharmacy at the Trust, provided a statement to the Council on 22 September 2022, to which he annexed *inter alia* his internal investigation report dated October 2021.

18. The Registrant was employed by the Trust from 26 July 2021 to 24 November 2021. The Trust instigated an investigation into an allegation of sexual misconduct/harassment by the Registrant on 9 September 2021. Both Colleague A and the Registrant were interviewed. Following disciplinary proceedings, the Registrant was dismissed on the grounds of his conduct, specifically sexual assault/harassment. The Registrant's dismissal was upheld on appeal.

19. On 28 January 2022, the Trust raised a concern with the Council. Colleague A provided a statement to the Council's investigating solicitors dated 7 July 2022. The Council tried to list the matter for a hearing from the end of 2023, and made repeated attempts to engage with Colleague A, as demonstrated by the correspondence chronology. However, Colleague A did not provide his available dates or confirm that he was willing to attend the hearing as a witness. He did not attend the fitness to practise hearing.

Legal framework

The role of the Authority

20. The Authority is a body corporate established pursuant to section 25(1) of the 2002 Act. By section 25 of the 2002 Act, the general functions of the Authority are *inter alia* to promote the interests of users of health care in relation to the performance by regulatory bodies of their functions, and to promote best practice in the performance of those functions. The over-arching object of the Authority in exercising its functions is the protection of the public: see *Council for the Regulation of Health Care Professionals v GMC & Ruscillo* and *Council for the Regulation of Health Care Professionals v NMC & Truscott* [2004] EWCA Civ 1356, per Lord Phillips MR, at [60].

21. The Decision was a "relevant decision" within the meaning of section 29(2)(a) of the 2002 Act.

22. The grounds for a referral are set out in section 29(4) and (4A) of the 2002 Act, which provide as follows:

> "(4) Where a relevant decision is made, the Authority may refer the case to the relevant court if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public.

> (4A) 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 profession concerned; and
>
> (c) to maintain proper professional standards and conduct for members of that profession."

23. By section 29(7) of the 2002 Act, where a case is referred to the High Court, it is to be treated as an appeal.

The approach of the High Court

24. Under section 29(8) of the 2002 Act, the Court may:

i) dismiss the appeal,

ii) allow the appeal and quash the relevant decision,

iii) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or

iv) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court,

v) may make such order as to costs as it thinks fit.

25. Applying CPR 52.21(3), an appeal under section 29 of the 2002 Act should be allowed if the relevant decision was "wrong" or "unjust because of a serious procedural or other irregularity in the lower court". A procedural irregularity which is not serious and does not render the decision unjust will not necessarily provide a sufficient basis for an appeal: see *Hussain v General Pharmaceutical Council* [2018] EWCA Civ 22, per Newey LJ at [35].

26. In *Ruscillo*, Lord Phillips gave guidance on the approach of the High Court to a reference, as follows:

> "73. What are the criteria to be applied by the Court when deciding whether a relevant decision was 'wrong'? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed that task so as to reach a correct decision as

> to the imposition of a penalty. Is that any different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached has due regard for the safety of the public and the reputation of the profession.
>
> …
>
> 76. This passage was cited with approval by Leveson J in *Solanke*. As he observed, not all of it is appropriate in a case where the primary object of imposing a penalty is the protection of the public. We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed.
>
> …
>
> 78. The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed."

27. In *General Medical Council v Jagjivan* [2017] EWHC 1247 (Admin), Sharp LJ, giving the judgment of the Court, gave guidance on the correct approach to appeals under section 40A Medical Act 1983, which confers a right of appeal on the General Medical Council if they consider that a decision is not sufficient for the protection of the public. She held:

> "*The correct approach to appeals under section 40A*
>
> 39. 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.

40. 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 Council's regulatory framework

28. Article 6 of the Pharmacy Order 2010 sets out the Council's general duties:

> "(1) The over-arching objective of the Council in exercising its functions is the protection of the public.
>
> (1A) The pursuit by the Council of its over-arching objective involves the pursuit of the following objectives—
>
> (a) to protect, promote and maintain the health, safety and wellbeing of the public;
>
> (b) to promote and maintain public confidence in the professions regulated under this Order;
>
> (c) to promote and maintain proper professional standards and conduct for members of those professions; and
>
> (d) to promote and maintain proper standards in relation to the carrying on of retail pharmacy businesses
>
> at registered pharmacies."

29. Article 61 of the Pharmacy Order 2010 provides for the making of procedural rules to be observed by a Fitness to Practise Committee.

30. Article 62 of the Pharmacy Order 2010 provides:

> "(1) For the purposes of proceedings under this Order in England and Wales—
>
> ….

> (b) the Fitness to Practise Committee, the Appeals Committee or any party to proceedings before either of those committees may apply for the issue of a witness summons directing a person to attend the proceedings in order to give evidence or to produce a document.
>
> (2) No person may be compelled under any such summons to give any evidence or to produce any document which that person could not be compelled to give or produce on the trial of an action.
>
> (3) Section 36 of the Senior Courts Act 1981 1 (subpoena issued by High Court to run throughout the United Kingdom), which provides a special procedure for the issue of such a summons so as to be in force throughout the United Kingdom, applies in relation to any proceedings under this Order in England and Wales as it applies in relation to causes and matters in the High Court."

31. The relevant procedural rules are the General Pharmaceutical Council (Fitness to Practise and Disqualification etc. Rules) Order of Council 2010 ("the Rules").

32. Rule 24 of the Rules provides:

> "**Evidence**
>
> 24.—(1) All questions of admissibility of evidence and law before the Committee are to be decided by the Committee (after having obtained the advice of the legal adviser, where appropriate).
>
> (2) Subject only to the requirements of relevance and fairness, the Committee may receive—
>
> (a) subject to paragraph (3), any documentary evidence; and
>
> (b) where a hearing is held, any oral evidence,
>
> whether or not such evidence would be admissible in any subsequent civil proceedings if the decision of the Committee were appealed to the relevant court."

33. The Council addressed the Committee on the authorities including *NMC v Ogbonna* [2010] EWCA Civ 1216; *R. (Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin) and *Thorneycroft v NMC* [2014] EWHC 1565 (Admin). In *Thorneycroft*, Andrew Thomas KC (sitting as a Deputy High Court Judge) reviewed the authorities on the admission of hearsay evidence and concluded, at [45]:

> "45. For the purposes of this appeal, the relevant principles which emerge from the authorities are these:

> 1.1. The admission of the statement of an absent witness should not be regarded as a routine matter. The FTP rules require the Panel to consider the issue of fairness before admitting the evidence.
>
> 1.2. The fact that the absence of the witness can be reflected in the weight to be attached to their evidence is a factor to weigh in the balance, but it will not always be a sufficient answer to the objection to admissibility.
>
> 1.3. The existence or otherwise of a good and cogent reason for the non-attendance of the witness is an important factor. However, the absence of a good reason does not automatically result in the exclusion of the evidence.
>
> 1.4. Where such evidence is the sole or decisive evidence in relation to the charges, the decision whether or not to admit it requires the Panel to make a careful assessment, weighing up the competing factors. To do so, the Panel must consider the issues in the case, the other evidence which is to be called and the potential consequences of admitting the evidence. The Panel must be satisfied either that the evidence is demonstrably reliable, or alternatively that there will be some means of testing its reliability.
>
> In my judgment, unless the Panel is given the necessary information to put the application in its proper context, it will be impossible to perform this balancing exercise."

34. Mr Thomas KC went on to set out the factors to be taken into account in the balancing exercise in that case:

> "56. However, in my judgment the Panel were led into error in their approach to the evidence of the two missing witnesses, Ms 1 and Ms 2. The decision to admit the witness statements despite their absence required the Panel to perform careful balancing exercise. In my judgment, it was essential in the context of the present case for the Panel to take the following matters into account:
>
> (i) whether the statements were the sole or decisive evidence in support of the charges;
>
> (ii) the nature and extent of the challenge to the contents of the statements;
>
> (iii) whether there was any suggestion that the witnesses had reasons to fabricate their allegations;
>
> (iv) the seriousness of the charge, taking into account the impact which adverse findings might have on the Appellant's career;

(v) whether there was a good reason for the non-attendance of the witnesses;

(vi) whether the Respondent had taken reasonable steps to secure their attendance; and

(vii) the fact that the Appellant did not have prior notice that the witness statements were to be read."

35. Rule 31 provides:

"**Procedure at principal hearings before the Committee in fitness to practise proceedings**

31.(1) Unless the Committee determines otherwise, the order of proceedings at a principal hearing in fitness to practise proceedings is to be in accordance with paragraphs (2) to (18).

(2) The Committee must hear and consider any preliminary legal arguments.

(3) ….

(4) The person acting as secretary must read out the allegation and the alleged facts upon which it is based.

(5) The chair must inquire whether the registrant wishes to make any admissions.

(6) Where facts are admitted, the chair must announce that such facts have been found proved.

(7) Where facts remain in dispute, the presenter is to open the case for the Council and may adduce evidence and, subject to paragraph (19), call witnesses in support of it.

(8) The registrant may make submissions regarding whether sufficient evidence has been adduced to find the facts proved or to support a finding of impairment, and the Committee must consider and announce its decision as to whether any such submissions should be upheld.

(9) The registrant may open their case and may adduce evidence and, subject to paragraph (19), call witnesses in support of it.

(10) The Committee must consider and announce its findings of fact.

(11) The Committee must receive further evidence and hear any further submissions from the parties as to whether, on the basis of any facts found proved, the registrant's fitness to practise is impaired.

(12) The Committee must consider and announce its finding on the question of whether the fitness to practise of the registrant is impaired, and give its reasons for that decision.

(13) The Committee may receive further evidence and hear any further submissions from the parties or from any other person who has a direct interest in the proceedings where the registrant's fitness to practise is found to be impaired, as to the appropriate sanction, if any, to be imposed, including evidence as to any mitigating circumstances and any relevant matters in the previous history of the registrant concerned.

(14) The Committee must consider and announce its decision as to the appropriate course of action to be taken in respect of the registrant of those specified in article 54(2) of the Order and give its reasons for that decision.

……"

36. Rule 42 provides:

"**Burden and standard of proof**

42.—(1) Where facts at a principal hearing are in dispute, the burden of proving the facts rests on the Council.

(2) …..

(3) Where facts are in dispute, the Committee must consider whether they have been established in accordance with the civil standard of proof."

37. Rule 44 provides:

"**Vulnerable witnesses at hearings**

44.—(1) In proceedings before the Committee, the following may, if the quality of their evidence is otherwise likely to be adversely affected, be treated as vulnerable witnesses—

(a) any witness under the age of 18;

(b) any witness with a mental disorder (within the meaning of the Mental Health Act 1983;

(c) any witness who is significantly impaired in relation to intelligence or social functioning;

(d) any witness with a physical disability who requires assistance to give evidence;

> (e) any witness, where an allegation against a person concerned is of a sexual nature and the witness was the alleged victim; or
>
> (f) any witness who complains of intimidation.
>
> (2) Upon—
>
> (a) hearing representations from the parties; and
>
> (b) in relation to a health allegation, after seeking the advice of a legal adviser,
>
> the Committee may adopt such measures as it considers necessary to enable it to receive evidence from a vulnerable witness.
>
> (3) Measures adopted by the Committee may include, but are not to be limited to—
>
> (a) use of video links;
>
> (b) subject to paragraph (4), use of pre-recorded evidence as the evidence-in-chief of a witness, provided always that the witness is present at the hearing for cross-examination and questioning; and
>
> (c) use of interpreters (including signers and translators).
>
> (4) Where—
>
> (a) there is an allegation against a person concerned of a sexual nature;
>
> (b) a witness is the alleged victim; and
>
> (c) the person concerned is not represented,
>
> the person concerned is not to be allowed to cross-examine the witness directly in person.
>
> (5) In the circumstances set out in paragraph (4), any questioning of the witness is to be undertaken by such person as the Committee considers appropriate."

The duty to give reasons

38. The Council relied upon my judgment in *PSA v GMC & Uppal* [2015] EWHC 1304 (Admin), where I stated at [42] – [44]:

> "42. Failure to provide adequate reasons for a decision was held to be a serious irregularity leading to a remittal in *Council for the Regulation of Health Care Professionals v. General Dental*

> *Council & Marshall* [2006] EWHC 1870 (Admin) because the Judge was unable to determine whether or not the sanction was appropriate.
>
> 43. In this case, I did not find the reasons to be inadequate, bearing in mind that they are the reasons of a regulatory panel (comprising of health practitioners and a lay member, with a legal assessor), which is not expected to give reasons to the same standard as a court. I found them intelligible and sufficient to enable the parties to know why they won or lost, and for the PSA to consider whether the decisions were too lenient.
>
> 44. At times the PSA embarked upon a forensic examination of the determination, seeking to identify ambiguities, omissions or infelicities of expression. The Panel is comprised of lay members, not lawyers, and the determination is drafted under pressure of time during the hearing, so allowance must be made for imperfect drafting. Its reasons will be adequate if they summarise the Panel's findings on the principal important issues. The Panel need not record every point made to it in evidence and submissions in order to show that it has taken it into account. This is particularly so in fitness to practise hearings where the parties and the appeal court has a full transcript of the hearing."

Grounds of appeal

Ground 1: witness summons

The Authority's submissions

39. The Authority submitted that the decision not to apply for a witness summons was infected by a serious procedural irregularity, with the consequence that the Committee did not substantively consider the allegations against the Registrant thus rendering it impossible to determine whether or not the Committee's decision was appropriate.

40. The Committee erred in law in assuming that Colleague A would be deemed to be a vulnerable witness under Rule 44, failed to take relevant considerations into account, and failed to give adequate reasons.

41. Even if Colleague A was deemed to be a vulnerable witness, the Committee failed to consider what the negative impact of a witness summons would be and whether special measures could mitigate any such effect. It was irrational to conclude that it would be "wholly inappropriate" for Colleague A to be compelled to participate in a hearing. The reasons put forward by the Council for not applying for a witness summons did not properly support that conclusion and the Committee's adoption of those reasons was irrational.

The Council's submissions

42. In response, the Council submitted that it was a matter for the Committee to scrutinise the evidence and take a view on the reluctance of a witness to attend. Here the Committee considered the matter carefully and provided cogent reasons why it was not appropriate to apply for a witness summons and postpone the hearing. The Authority's criticisms were too forensic.

43. Although entitlement to special measures is not automatic under Rule 44 of the Rules, it would be highly unlikely for a witness's request for special measures to be refused, especially where the Rules make specific provision for complainants of sexual misconduct.

44. Although the Authority cites evidence that Colleague A did not consider himself to be a victim, Colleague A also told his manager that he did not want to go through the story multiple times and he told the police that he did not want to attend court and asked them to close the case.

45. In assessing the adequacy of reasons, the Council submitted that the Court should take into account the material that was before the Committee, and not confine itself to the determination (see *PSA v GMC & Uppal* [2015] EWHC 1304 (Admin), [42] – [44]). There were factors placed before the Committee which supported the Council's conclusion that it would have been unfair or oppressive to apply for a witness summons, in particular Colleague A's obvious reluctance to give evidence even though he was offered support, and that giving evidence of sexual misconduct was likely to be more distressing than giving evidence of other matters.

Conclusions

46. The Council made extensive efforts to persuade Colleague A to attend as a witness and there is no criticism of the Council in that regard. Looking at the evidence, it is difficult to discern the reasons for Colleague A's failure to attend as his behaviour was contradictory. He made two statements in support of the Trust's investigation and also attended formal investigating interviews conducted by the Trust. He then provided a detailed witness statement to the Council's investigating solicitors on 7 July 2022. He provided contact details to the Council and suggested times for them to call, but then repeatedly failed to respond. In my view, the most likely explanation is that he was apprehensive about attending a hearing. He had previously told his manager that he did not want to go through the story multiple times, and he told the police that he did not want to attend court and asked them to close the case. There was no direct evidence that he was vulnerable and/or distressed at the prospect of giving evidence about an incident of sexual misconduct. On the contrary, he told the Trust investigation that "I don't see myself as a victim".

47. The Council submitted to the Committee that an application for a witness summons did not appear to be in the public interest for the following reasons:

    i) Colleague A seemed reluctant to attend and give his account;

ii) It may be distressing for Colleague A to be compelled against his wishes to go over the details of the events that he states happened;

iii) He was not a regulated pharmacy professional and therefore does not have a duty to assist the Council;

iv) He did not raise the concern with the Council himself.

48. The Committee set out these reasons at Decision/31 and adopted them in the final sentence of Decision/36. The first reason was plainly illogical as the whole purpose of a witness summons is to require the attendance of a witness who is reluctant to attend. As to the fourth reason, Colleague A did make a complaint to the Trust which resulted in a full investigation and the Registrant's dismissal. In the appeal, the Council submitted that it would have been "unfair or oppressive" to apply for a witness summons. However, that was not the test set out by the Committee at Decision/31.

49. The main reason that the Committee gave for their decision not to apply for a witness summons differed from those advanced by the Council. The Committee stated at Decision/36:

> "Nor would it be appropriate to issue a witness summons to compel Witness A to attend as a witness. He would be deemed a vulnerable witness under the Rules and entitled to the application of special measures were he to attend. It would be wholly inappropriate for a vulnerable witness to be compelled to participate in a hearing in such circumstances."

50. I accept the Authority's submission that, in this passage of its Decision, the Committee misinterpreted and misapplied Rule 44. Rule 44(1)(e) is a discretionary rule. It does not follow from the fact that a witness is the alleged victim of an act of a sexual nature that they are automatically to be treated as a vulnerable witness. The Committee has to decide "whether the quality of their evidence is otherwise likely to be adversely affected" and if so, whether they should be treated as a vulnerable witness. This requires a reasoned decision. The Committee in this case did not follow the wording of Rule 44. Instead it based its decision not to apply for a witness summons on the assumption that Colleague A "would be deemed a vulnerable witness under the Rules and entitled to the application of special measures were he to attend" (Decision/36).

51. If the Committee did decide that the test for a vulnerable witness was met, it should then have proceeded to consider potential special measures, but it did not do so. The objective of Rule 44 is to assist vulnerable witnesses in giving evidence. Rule 44 does not provide that once a person is designated as a vulnerable witness, they need not attend the hearing, and should not be compelled to do so. Routine non-attendance by vulnerable witnesses would be contrary to the public interest in maintaining proper conduct by members of the profession, promoting the welfare of the public, and maintaining public confidence in the profession (Article 6(1A) of the Pharmacy Order 2010). Of course, there may be cases where, on the evidence, a committee might legitimately decide that it would be inappropriate or unnecessary for a vulnerable witness to be compelled to attend a hearing, but such a conclusion would require careful consideration, including exploration of other means of obtaining the witness' evidence.

52. It follows that the Committee's reasons did not adequately address the issues which it was required to consider.

53. For these reasons, Ground 1 succeeds.

Ground 2: refusal to consider hearsay evidence

The Authority's submissions

54. The Committee's decision not to consider Colleague A's hearsay evidence was infected by a serious procedural irregularity with the consequence that the Committee did not substantively consider the allegations against the Registrant thus rendering it impossible to determine whether or not the Committee's decision was appropriate.

55. When deciding, at Decision/30 and 36, that Colleague A's evidence was "the sole, decisive evidence" of the events, the Committee erred in failing to properly take into account the facts that (i) core elements of Colleague A's account had been accepted by the Registrant, (ii) there was photographic evidence of the scene; and (iii) there were near contemporaneous written communications between the Registrant and Colleague A.

56. The Committee erred in failing to consider whether any part of Colleague A's evidence could properly be admitted as hearsay.

57. When refusing to admit Colleague A's evidence as hearsay, the Committee erred in failing to properly weigh the competing relevant factors, see *Thorneycroft*, at [56].

58. The Authority did not pursue the point made in paragraph 38 of its skeleton argument regarding the weight to be given to Colleague A's evidence, in the light of *El-Karout v NMC* [2019] EWHC 28 (Admin).

The Council's submissions

59. The Council submitted that the Authority's approach was overly general or broad. Although parts of Colleague A's evidence were accepted and admissions had been made by the Registrant, Colleague A's evidence was sole or decisive on the disputed charges and was subject to a fundamental challenge by the Registrant. Of particular importance was the extent to which any other evidence was capable of supporting the disputed charges or whether it would allow for Colleague A's reliability to be tested. The messages were capable of supporting the assertion that some kind of incident took place which the Registrant accepted. The words "I misread and misunderstood' could support the general assertion that the Registrant had crossed a boundary, but not the specifics of the disputed charges. Although this could mean that Colleague A's evidence was not the sole evidence in relation to the disputed charges, it would be decisive. The photographs merely showed the desk area where the incident occurred, and so did not take the case any further.

Conclusions

60. The Committee's conclusions on the admissibility of Colleague A's evidence were set out at Decision/30 and 36, as follows:

> "30. Applying the principles in *Thorneycroft*, Ms Birks submitted that Colleague A's evidence should not be adduced as hearsay evidence for the following reasons:
>
> a. Colleague A's evidence is the sole, decisive evidence. The only other evidence came from witnesses not present at the time of the alleged events; they did not provide any first-hand evidence.
>
> b. It was anticipated that there would be significant challenges to Colleague A's statement at the hearing. The Registrant had already outlined some challenges in his response documentation;
>
> c. It was likely that the Registrant would wish to cross examine in relation to fabrication of Colleague A's statement at the hearing, the Registrant having suggested, in his response documentation, a possible motive for fabrication; and
>
> d. The allegations were serious as they related to sexual motivation/touching."
>
> "36. … Given the clear guidance in *Thorneycroft*, the Committee agreed with Ms Birks that it would be unfair and prejudicial to the Registrant to allow the hearsay evidence of Colleague A to be admitted. It adopts the reasoning put forward on behalf of the Council (as summarised above) for that conclusion; this is a case where the prejudice to the Registrant outweighs the public interest in the pursuit of these proceedings….."

61. The Committee's Decision did not acknowledge that the Registrant also gave evidence of the incident. However, the Committee was plainly aware of the Registrant's evidence, and those allegations which he accepted and those which he disputed. The charges had been considered and the case had been opened. All the documentary evidence was in the hearing bundle. I agree with the Council's submission that Colleague A's evidence was sole or decisive on the disputed charges. I do not consider that the messages were sufficiently specific to support the disputed allegations. The photographs of the desk area did not assist at all. The fact that there were areas of agreement in the evidence of Colleague A and the Registrant did not support the disputed allegations.

62. At the hearing, the Council addressed the Committee on the authorities and I am satisfied that the Committee was aware of the factors identified in *Thorneycroft* and the balancing exercise required: see the references to *Thorneycroft* at Decision/30 and 36. The Committee was entitled to conclude that it would be unfair and prejudicial to the Registrant to admit Colleague A's evidence when that evidence could not be tested at the hearing.

63. In my judgment, the Authority's criticisms of the Decision under Ground 2 were essentially forensic and legalistic and did not identify any genuine error in the Committee's approach and its conclusions.

64. For these reasons, Ground 2 does not succeed.

Ground 3: offering no evidence

Ground 4: no case to answer

65. I propose to consider these two Grounds together.

The Authority's submissions on offering no evidence

66. The Council erred in failing to put sufficient evidence before the Committee and the Committee failed to exercise sufficient oversight of the Council's decision to offer no evidence. These failings constituted serious procedural irregularities with the consequence that it is not possible to determine whether or not the Committee's decision was appropriate.

67. The Council offered no evidence and therefore failed to draw to the attention of the Committee the communications between Colleague A and the Registrant, details of the Registrant's own admissions and explanations of the case, and evidence from Ms Grey and Mr Fisher as to relevant background circumstances. The Authority relied on *Professional Standards Authority v NMC and Jozi* [2015] EWHC 764 (Admin), per Singh J. at [30] and [32]. Furthermore, the Committee erred in failing to intervene and direct the Council to place relevant evidence before it.

The Authority's submissions on no case to answer

68. The Committee erred in its approach to the submission of no case to answer. This constituted a serious procedural irregularity with the consequence that it is not possible to determine whether or not the Committee's decision was appropriate.

69. The Authority submitted that the Committee erred in its application of the test set out in *R v Galbraith* [1981] 1 WLR 1039 at 1042B. On a proper application of that test, a Committee must accept that, on no possible view of the facts was there evidence on which it could properly come to the conclusion that the allegation was made out against a registrant. In light of the admitted/uncontested facts in the present case, no reasonable Committee could properly have reached that view.

70. The Authority relied in particular on:

i) the Registrant's admissions that he did touch Colleague A's penis and that he did ask Colleague A not to tell anyone;

ii) the admitted nature of the conversation taking place at the material time;

iii) the Registrant's admission that he knew his actions "…would have given the impression that I was hitting on him in a homosexual way…" (see the Registrant's "Comments on the Allegations made about Azhar Ahmed" para. 2.4, point 6, hearing bundle page 184)*;*

iv) the messages;

v) the fact that it was open to the Committee to infer sexual motivation from the primary facts (see e.g. *Haris v General Medical Council* [2021] EWCA Civ 763 at [37], and *Basson v General Medical Council* [2018] EWHC 505 (Admin) at [18]-[19]).

71. The Authority did not pursue Ground 4(a) in its skeleton argument.

The Council's submissions on offering no evidence

72. The Council submitted that all the relevant evidence was in the hearing bundle and referred to in the Council's opening. The Committee had sufficient knowledge of the facts to enable it to scrutinise the application to offer no evidence and reject it, if appropriate.

The Council's submissions on no case to answer

73. The Council's application was properly made on two limbs. First, that in the absence of Colleague A's evidence, there was no evidence to support the disputed particulars of the allegation. Second, that the particulars of allegation admitted by the Registrant could not amount to serious professional misconduct.

74. The material relied upon by the Authority to support a case to answer was insufficient because the Registrant's explanation for the touching of Colleague A was that it was an accidental brush when in close proximity in front of the computer screen, and very different to the account given by Colleague A (a deliberate grab whilst the Registrant also touched his own penis). Unlike the cases relied upon by the Authority (e.g. *Haris*), it could not safely be said that an accidental brush when in close proximity was inherently sexual, nor could it amount to misconduct.

Conclusions on offering no evidence and no case to answer

75. At the hearing in this case, there was some confusion as to the correct procedure to follow for an application to offer no evidence and a submission of no case to answer: see the transcript at internal pages 4 to 6.

76. Those issues were considered in *Professional Standards for Health and Social Care v NMC and X* [2018] EWHC 70 (Admin), where Elisabeth Laing J. held:

> "53. The NMC has made the Nursing and Midwifery Council (Fitness to Practise) Rules Order 2004, 2004 SI No 1761 ('the Rules') pursuant to various powers conferred by the 2001 Order. Rule 2 defines 'Case Examiner' as a professional or lay officer

of the NMC appointed by the Registrar for the purposes of exercising the functions of the Investigating Committee in accordance with article 26A of the 2001 Order. Rule 2A(2) of the Rules requires the Registrar to refer any allegation which (he or she considers) falls within article 22(1)(a) of the 2001 Order to the Case Examiners for consideration under rule 6C of the Rules. Where the Case Examiners 'agree that there is a case to answer', they must refer the allegation (if it is an allegation of misconduct) to the Committee (rule 6C(2)(a)(ii)).

54. Rule 12 requires the Committee to conduct a hearing in accordance with the procedure set out in Part 5 of the Rules, and to 'dispose of the allegation' in accordance with articles 22(4) and 29(8)-(4) of the 2001 Order. Rule 24 of the Rules requires the Committee 'unless it determines otherwise' to conduct the initial hearing of an allegation 'in the following stages'. Four stages are then described in rule 24(1)(a)-(d). The possible components of each stage are then described in rule 24(2)-(5), (6)-(11), (12), and (13). Some of the components of those stages are mandatory ('shall') and some discretionary ('may').

55. It is sufficient for the purposes of this case, first, to record Mr Bradly's realistic concession that, even though this is not expressly provided for in the Rules, it must be open to the NMC, in an appropriate case, to offer no evidence. I note that the NMC has produced operational guidance about offering no evidence which makes it clear that this course is only appropriate in limited circumstances. None of those circumstances applied in this case. I accept Mr Bradly's further submission that the cases in which it would be appropriate to offer no evidence will be rare.

56. Second, my clear view is that:

i) rule 24(6) requires the NMC to open the case; and

ii) rule 24(7) and rule 24(8) permit the Committee to accept a submission of no case to answer, but only (1) where the NMC has closed its case, and presented its evidence, and (2) only at the instigation of the registrant, or where the Committee does so 'of its own volition'. It is inherent in a submission of no case to answer that it can only be made at the end of the Council's evidence. The test in *R v Galbraith* [1981] 1 WLR 1039 can only be applied if a tribunal has considered evidence; if it has not, there is nothing to which that test can applied.

57. I accept Miss Fleck's submission that rule 24(1) gives the Committee power to decide, in an appropriate case, not to conduct a hearing in accordance with the stages set out in rule 24. In my judgment that general power cannot be used to contradict the effect of the specific provisions in rule 24(6), (7)

> and (8) which I have just described. It follows that that rule 24(1) does not enable the Committee to take short cuts, such as releasing the NMC from its obligation to open the case, or as accepting a submission of no case to answer without hearing any evidence, or at the instigation of the NMC. I consider that it is especially important, if the NMC considers that it is appropriate to offer no evidence, that it fully opens the case, so that the Committee is able to make a decision, informed by a sufficient knowledge of the facts, whether it is appropriate for the NMC to offer no evidence, or whether it should require the NMC to reconsider that view, and try and obtain more evidence. In this case, for reasons which should be clear from what I have said before, and which I elaborate to some extent below, the Committee were not given the information they needed to make a fully informed decision."

Offering no evidence

77. Applying the principles in *X* to this case, the Council was entitled to apply to offer no evidence, provided it fully opened the case, so that the Committee was able to make an informed decision as to whether the Council should instead try to obtain more evidence.

78. I agree with the Authority that the Council failed to place sufficient evidence before the Committee, in particular the communications between Colleague A and the Registrant, details of the Registrant's own admissions and explanations of the case, and evidence from Ms Grey and Mr Fisher as to relevant background circumstances. Thus the Committee did not have a sufficient opportunity to scrutinise the evidence before making its decision.

79. Furthermore, in my judgment, the Council's application to offer no evidence, and the Committee's acceptance of that course, was wrong as the Committee had not properly considered whether it should apply for a witness summons to require Colleague A to attend (see Ground 1). If the Committee had decided that an application for a witness summons should be made, it would have rejected the application to offer no evidence and it is very likely that the case would have been adjourned, and not proceeded to a submission of no case to answer.

Submission of no case to answer

80. Applying the principles in the case of *X*, a submission of no case to answer by the Registrant, and/or on the initiative of the Committee, could only be determined by the Committee once the Council had fully opened its case and called its evidence. As explained in *X*, the "test in *R v Galbraith* [1981] 1 WLR 1039 can only be applied if a tribunal has considered evidence; if it has not, there is nothing to which that test can applied".

81. The test in *Galbraith* is helpfully summarised in Archbold at paragraph 4-364:

> "In *Galbraith* (1981) 73 Cr. App. R. 124, CA, the earlier authorities were reviewed and guidance given as to the proper approach:
>
> > "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty—the judge will stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury" (per Lord Lane CJ at p.127)."

82. At this hearing, the Council did not fully open its case nor did it take the Committee through the documentary evidence in the hearing bundle. Colleague A was not the only potential witness as witness statements had been taken from Ms Gray and Mr Fisher of the Trust. Thus, the Committee did not have a proper opportunity to consider the evidence in its entirety, including:

i) the Registrant's admission that he did touch Colleague A's penis and that he did ask Colleague A not to tell anyone;

ii) the admitted nature of the conversation taking place at the material time; the Registrant's admission that he knew his actions "…would have given the impression that I was hitting on him in a homosexual way…" (see the Registrant's "Comments on the Allegations made about Azhar Ahmed" para. 2.4, point 6, hearing bundle page 184);

iii) the messages exchanged between the Registrant and Colleague A soon after the incident;

iv) that it was open to the Committee to infer sexual motivation from the primary facts.

83. It is possible, though far from certain, that the Committee would have reached a different conclusion if it had considered the Council's evidence in full.

84. For these reasons, Grounds 3 and 4 succeed.

Final conclusions

85. The appeal is allowed on on Grounds 1, 3 and 4. The appeal is dismissed on Ground 2. The Decision will be quashed and the case remitted for reconsideration by a differently constituted Fitness to Practise Committee.

86. The Council will be ordered to pay 80% of the Authority's reasonable costs of the appeal, which I consider to be a proportionate and reasonable order. The Authority has been successful overall, but failed on Ground 2, and did not pursue two sub-grounds in the light of justified criticism by the Council in its skeleton argument.