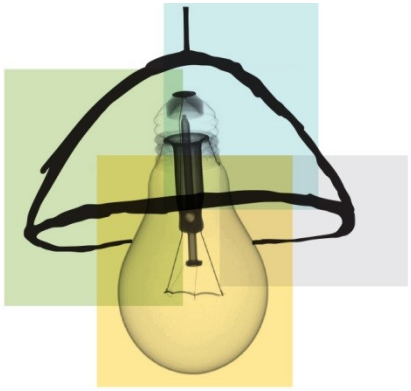

Regulatory Newsletter January 2020

Undercharging leads to panel's decision being quashed and the case remitted for rehearing

In *Professional Standards Authority for Health and Social Care v Health and Care Professions Council and Wood [2019] EWHC 2819 (Admin)*, the Court allowed an appeal by the Professional Standards Authority on the basis that there had been significant under-charging by the regulator.

Mr Wood, a paramedic, attended an emergency call with a colleague at the home of a highly vulnerable patient, Patient A. Patient A later alleged that she gave Mr Wood a document detailing her complex medical history, including her split personality disorder, but Mr Wood denied that this document had been given to him. Patient A also described Mr Wood's behaviour during the consultation as "flirty". At some point in the consultation, Mr Wood showed Patient A the HCPC's website and told her about professionals who had been struck off for having relationships with patients. Within ten or so minutes of leaving Patient A's address, Mr Wood began texting Patient A. In those messages, some of which were overtly sexual, he repeatedly attempted to arrange a meeting with Patient A for sex, and he asked her to keep their contact a secret.

A paramedic on a subsequent visit to Patient A was shown the text messages between Mr Wood and Patient A and reported the matter. Mr Wood was dismissed from his post and the matter referred to a Conduct and Competence Committee of the Health and Care Professions Council. The charges which Mr Wood faced did not cover events at the consultation at Patient A's home, but focused solely on the obtaining of a telephone number from Patient A and the sending of inappropriate text messages. Patient A did not give oral evidence at the hearing, but provided a statement. Mr Wood, who represented himself at the hearing, admitted the factual allegations but denied current impairment. The panel made a suspension order for six months with a review. By the time the appeal was heard, Mr Wood's review hearing had taken place and he had been restored to the register.

The Professional Standards Authority for Health and Social Care referred the decision of the original panel to the High Court under section 29 National Health Service Reform and Health Care Professions Act 2002 on the basis that the decision was not sufficient for the protection of the public, because the HCPC had failed to bring the real substance of Mr Wood's misconduct to the attention of the panel. The HCPC conceded the appeal.

The Court reviewed the relevant case law on appeals. The Court noted that an important qualification to the need for deference to a specialist tribunal arises where all the material evidence has not been put before that expert decision maker. In these circumstances, the decision will inevitably need to be reassessed (in the words of Laing J in *PSA v NMC and X (2018)*).

The Court decided that, in Mr Wood's case, a line should not have been drawn between the consultation and post-consultation events. In drawing this line, the prosecutor had missed the main point. Where a patient is particularly vulnerable, there is a greater duty on the healthcare professional to safeguard the patient, the Court said. There was a real issue as to whether Mr Wood knew

about Patient A's vulnerability. Using a professional position to pursue a sexual or improper emotional relationship with a vulnerable patient is, the Court held, an aggravating factor that increases the gravity of the concern and is likely to require more serious action against a healthcare practitioner. There was, the Court said, a clear evidential basis to put charges before the panel to the effect that Mr Wood had taken the opportunity to behave inappropriately towards Patient A both during and after the consultation. Accordingly, the Court held that limiting the charges to the text messages resulted in significant under-charging.

The Court also held that it should have been alleged that Mr Wood failed to give a truthful and accurate account to his employers when confronted with the fact of his contacts with Patient A. The Court noted that the evidence pointed to the fact that Mr Wood had sought to minimise the nature of his conduct with Patient A and place the responsibility on her as the instigator of communications. The Court said that the way in which a healthcare professional reacts to the discovery of their misconduct is an important part of an assessment of their attitude, their insight into the wrongdoing and effects on a victim, and the sanction necessary in the public interest. A person who gives a false or misleading account of actions and events when first confronted with allegations of wrongdoing is highly likely to be a person who does not understand the importance of his professional responsibilities, the Court said. A lack of candour in these circumstances could, the Court held, call into question the fitness of the person to hold a position of trust and responsibility. Accordingly, without charges directed to the misleading account that Mr Wood gave to his employer, the Court held that the panel had been deprived of the ability to undertake its function properly. The panel had been led into giving Mr Wood credit for early admissions when in fact he had given misleading answers.

The Court allowed the Authority's appeal and remitted the matter for consideration by a fresh panel.

Clarification of the definition of acting with sexual motivation

In *Sait v General Medical Council [2019] EWHC 3279 (Admin)*, Mr Justice Mostyn took the opportunity to clarify the definition of acting with sexual motivation that he had set out in the case of *Basson v GMC* (2018).

We first covered the case of Dr Sait in our newsletter of January 2019. In that case (the first appeal), the Court held that the failure to put the serious allegation of sexual motivation "fairly and squarely" to Dr Sait in cross examination had been procedurally unfair. The Court quashed the finding of sexual motivation and remitted the matter to be reheard by a fresh panel of the Medical Practitioners Tribunal Service.

At the remitted hearing, Dr Sait was "comprehensively and effectively cross-examined" (in the words of the Court) and the second panel was satisfied that his conduct had been sexually motivated. Dr Sait was given a sanction of suspension for two months. Dr Sait appealed again. His second appeal was given short shrift by the Court, which summarised Dr Sait's appeal as "an attempt to engage in narrow textual analysis to seek to demonstrate error when in truth there was none".

The judge in both Dr Sait's first and second appeals was Mostyn J. The second appeal is noteworthy for Mostyn J's clarification of the test which he first set out in the case of *Basson v GMC (2018)*. In *Basson*, he defined acting with sexual motive as "meaning that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship". In the second *Sait* appeal, Mostyn J noted that in formulating the test he "misspoke" and referred to "motive" rather than "motivation". He acknowledged that there is a subtle difference between the two concepts and he took the opportunity to make a correction. The *Basson* test should therefore be tweaked in future to use the word "motivation" and not "motive".

Mostyn J went on to reiterate that the key indispensable ingredient of motivation relates to the individual's state of mind, and that seeking to determine a person's state of mind is an evaluative exercise. He quoted further from the case of *Basson* in which he said that "the state of a person's mind is not something that can be proved by direct observation. It can only be proved by inference or deduction from the surrounding evidence".

Finally, he observed that where the specific facts from which the inferences have been drawn by a panel are undisputed or derive from unchallenged documents, the appeal Court will be not be disadvantaged by not seeing the witnesses and will be well placed to draw its own inferences. However, where the underlying specific facts are themselves found following oral evidence in respect of which a credibility assessment has been made, then an appellate court should be extremely cautious about upsetting the conclusion of the panel.

Dr Sait sought permission to appeal but on 3 January

2020 permission to appeal was refused by the Court of Appeal.

Decision to restore to register is quashed because of failure to put court judgment before panel

In *Professional Standards Authority for Health and Social Care v General Dental Council and Hussain [2019] EWHC 2640 (Admin)*, the Court held the failure to put before a restoration panel a High Court judgment in which Mr Hussain had been held to be dishonest was a serious procedural irregularity which led to the decision to restore being quashed.

Mr Hussain, a dentist, was erased from the register in 2011 following a conviction in 2010 for conspiracy to defraud the NHS and patients. Also in 2010, Mr Hussain was the defendant in a High Court case, in which the Court found in favour of the claimant for sums lost as a result of deceit on the part of Mr Hussain in the course of the sale of a dental practice in Droitwich. The judge in the 2010 High Court case held that Mr Hussain had given deliberately false evidence to the Court (the 2010 judgment).

In July 2017, Mr Hussain made an application for restoration to the dental register. In support of his application, he provided a witness statement in which he gave evidence about the reflection he said he had undertaken as to his behaviour in the past and the choices he had made, his identification of the changes that were necessary and his realisation of the importance of ethical and moral behaviour. He also recorded the mentoring he had undertaken, which he said had enabled him to retrain his ethical approach and delve deeply into professional standards. The pressures that had driven him at the time of his misconduct were no longer present, he noted.

In October 2017, Mr Hussain was the defendant in a second set of High Court proceedings, this time arising out of the sale of a dental practice by Mr Hussain in Wednesbury. Again, it was alleged that Mr Hussain had dishonestly made false representations during the sale about the practice's turnover. The Court found in favour of the claimant and concluded that Mr Hussain had given false evidence (the 2017 judgment).

The Professional Conduct Committee restoration hearing took place on 27 June 2018. The GDC opposed the restoration. Although the 2017 judgment had been received by the GDC in November 2017, because of an error it had been overlooked and not included in the draft hearing bundle that was served by the GDC on Mr Hussain's solicitors in advance of the hearing. The error was rectified when the draft hearing bundle was updated to include the 2017 judgment on 18 June, and it was updated again on 19 June to include the 2010 judgment. On 27 June, prior to the commencement of the restoration hearing, Mr Hussain (who was represented by counsel) opposed the inclusion of the 2010 and 2017 judgments on the basis that the GDC had only recently indicated that it intended to rely on them and, further, that the 2017 judgment was subject to an appeal. By way of compromise, it was agreed by the GDC that the 2010 judgment would go before the panel, but not the 2017 judgment.

The panel determined that Mr Hussain should be restored to the register with conditions. In the determination, it said it was satisfied that the factors that had caused him to act in the way he had were no longer present. It recorded that the risk of repetition of the behaviour was low as "there had been no further evidence of misconduct on the part of Mr Hussain since his erasure in 2011". It referred to his dishonest conduct as having spanned the period 2002 to 2010.

The Professional Standards Authority for Health and Social Care referred the decision to the High Court under section 29 National Health Service Reform and Health Care Professions Act 2002. It argued that the failure to refer the panel to the 2017 judgment was a serious procedural irregularity as a result of which the panel had made its decision on the basis of incomplete evidence. The appeal was supported by the GDC, but resisted by Mr Hussain.

The Court agreed with the Authority. It held that the 2017 judgment was plainly of relevance to the issue which the restoration panel had to decide, namely whether Mr Hussain had remediated his dishonesty in the way he claimed. On the face of the judgment, it showed that Mr Hussain had not remediated, as the judge had found him to be dishonest. It was, the Court said, obvious that the 2017 judgment should have been put before the restoration panel.

The Court went on to say that there had been two procedural irregularities. The first was the failure by the GDC to serve the 2017 judgment on Mr Hussain well in advance of the 2018 hearing when the draft bundle was served. The second error was made by counsel for the GDC at the hearing when he agreed to the compromise whereby the 2017 judgment was not placed before the

panel. That was, the Court said, a serious error of judgment. The matter should, the Court held, have been raised with the panel for a decision to be taken on the correct way forward, either by a decision on the admissibility of the 2017 judgment or on an adjournment or both.

The Court said it was aware that, in ordinary civil litigation, if a party at trial chose not to rely on a piece of evidence, than an appeal court would be unsympathetic to an appeal based on it (derived from the principles in *Ladd v Marshall (1954)*). However, the Court noted that in *Ruscillo v CHRP (2004)*, the Court of Appeal held that the principles in *Ladd v Marshall* would have at most only a limited application in section 29 referrals because of the public interest. In Mr Hussain's case, the Court was satisfied that the introduction of the 2017 judgment was truly in the public interest given its direct bearing on the issues in the case.

The Court also held that the agreement to withhold the 2017 judgment caused injustice as it had the effect of depriving the panel of the most recent evidence of Mr Hussain's dishonesty, which in turn meant the panel judged the evidence he called about his supposedly reformed character on a false and misleading basis. The Court highlighted a number of factors in the restoration panel's determination which were at least arguably wrong in the light of the 2017 judgment, including the finding that Mr Hussain's dishonesty only spanned the period 2002 to 2010.

Accordingly, the Court was satisfied that there had been a serious procedural irregularity which had produced an unjust result. It allowed the Authority's appeal and remitted Mr Hussain's application for restoration to a differently constituted panel for a fresh determination.

Legally qualified chair misdirected panel on how to approach evidence of propensity

In *Arowojolu v General Medical Council [2019] EWHC 3155 (Admin),* the Court held that a legally qualified chair had misdirected the panel in how to approach evidence of previous allegations made by the complainant. As a result, it quashed the decision of a panel to erase a doctor from the register for sexually motivated misconduct.

Dr Arowojolu was working as an out of hours GP and Ms A was working as a receptionist on the same shift. At the end of the shift, Ms A spoke to Dr Arowojolu about her desire to lose weight. Dr Arowojolu offered to examine her and took her into a consulting room. Two different versions of events emerged from that event. Ms A alleged that Dr Arowojolu seriously sexually assaulted her in two phases, in the middle of which she got up but then lay back down again. Dr Arowojolu alleged that he felt the firmness of her stomach, pinching her skin to test its elasticity and then advised her how to do sit ups. He advised her to see her GP and then later telephoned her from his car to repeat his advice.

Ms A complained to the police and, in October 2014, Dr Arowojolu was convicted and sentenced to two years' imprisonment. In April 2015, the Court of Appeal quashed the conviction and ordered a retrial. Before the retrial in February 2016, the prosecution disclosed some unused material that had not previously been disclosed which caused the trial to be adjourned. This disclosure related to Ms A's claim when she was a teenager that she had been sexually abused by her grandfather over a two-year period (the grandfather allegations). The grandfather allegations had been investigated by the police but no charges brought. Her family at the time had provided statements in which they not only disbelieved her, but provided evidence that undermined her claims. At Dr Arowojolu's first retrial, the jury could not agree and when he was retried the second time, the jury acquitted him.

Dr Arowojolu was charged with sexually motivated conduct towards Ms A by the GMC. A panel of the Medical Practitioners Tribunal Service held that Ms A had been subject to a sexually motivated examination by Dr Arowojolu. It held that Ms A was a plausible witness. Dr Arowojolu appealed.

His principal ground of appeal was that the legally qualified Chair of the panel had misdirected the panel as to how to approach the grandfather allegations, with the result that the panel failed to consider or address this evidence. As a result, Dr Arowojolu argued that the panel had not fairly or properly addressed the crucial question of Ms A's credibility, upon which the whole case turned.

At the hearing, the Chair had said that it was right for the panel to consider the grandfather allegations as part of the entirety of the evidence it heard. However, the Chair advised that the panel did not have to determine the truth or otherwise of the grandfather allegations but instead it should simply consider them alongside all of the other evidence in determining the issues of fact that it did need to decide. The panel in its determination noted the

grandfather allegations, but did not consider they assisted it in determining the truth of the allegations against Dr Arowojolu.

Dr Arowojolu argued on his appeal that the Chair's direction had been legally wrong. The Court agreed. In reaching its conclusion, the Court started with the reasons why the grandfather allegations were adduced before the panel, namely that the evidence supported Dr Arowojolu's contention that Ms A was a fantasist with a propensity for making false allegations against older men in a position of authority. The Chair's direction to consider the grandfather allegations as part of the entirety of the evidence was, the Court held, meaningless as it did not assist the panel on the issue to which the evidence was most relevant, namely Ms A's credibility. Instead, the Court held that the panel should have (contrary to the Chair's direction) been directed to try and determine the truth of the historic allegations because only then would it have been in a position to consider Dr Arowojolu's central contention on propensity. The Court also held that the panel's reasons showed a similar error of law, and as a result its findings could not stand. It was not, the Court held, an impossible task, to decide on the truth of the grandfather allegations, despite the evidential incompleteness (such as not hearing from Ms A's grandfather).

The Court upheld the appeal on this basis and quashed the decision of the panel to erase Dr Arowojolu's name from the register.

A panel's decision not to admit an email into evidence was unlawful

In *Professional Standards Authority for Health and Social Care v Nursing and Midwifery Council and Lembethe and Mkhize [2019] EWHC 3326 (Admin),* the Court held that a panel's decision not to admit an email had been wrong, leading to the Court quashing the panel's decision and remitting the case to be reheard.

Ms Lembethe was the deputy manager of a care home where she had worked for over ten years. Ms Mkhize was a staff nurse, who started working at the care home on 14 February 2017. The Nursing and Midwifery Council alleged that Ms Lembethe had produced a Basic Life Support (BLS) certificate for Ms Mkhize dated 25 January 2017 when she knew that she had not delivered the training because Ms Mkhize had not yet started work at the care home. Ms Mkhize was charged with dishonesty in that she provided the BLS certificate to a nursing agency (Nursing 2000) with the intention of misleading the agency into believing that the certificate was genuine when she knew it was not. The nurses' defence was that Ms Lembethe had delivered the training after Ms Mkhize had started work at the care home, and that Ms Lembethe had simply written the wrong date on the certificate.

At the hearing before a Fitness to Practise Committee of the NMC, it emerged during the cross-examination of a witness from Nursing 2000 that an email had been received by the agency that might have particular relevance to the case. The panel allowed a short adjournment, during which time the email was located. It was dated 27 January 2017 from an email address that appeared to be Ms Mkhize's and sent to an employee at Nursing 2000, with the subject line: BLS certificate. Attached to the email was a copy of the BLS certificate dated 25 January 2017.

The panel invited submissions from the parties on the admissibility of the email. The NMC noted that the email would confirm when the BLS certificate was sent to Nursing 2000, which was a key detail in the case and therefore the email should be admitted. Ms Lembethe and Ms Mkhize both objected to the production of the email, principally on the basis that the late production of the email gave them no opportunity to challenge it. The NMC then suggested that the remedy to this prejudice would be to allow an adjournment to allow the nurses to get an expert to examine the email. The panel decided that it would be unfair to the nurses to admit the email. It went on to find the allegations in respect of the BLS certificate not proved.

The Professional Standards Authority for Health and Social Care referred the case to the High Court, alleging that the panel's decision not to admit the email was unlawful. The Court agreed. The Court held that the email was not only relevant, it was crucial and potentially conclusive evidence on the central question before the panel, namely whether the BLS certificate had been submitted to Nursing 2000 in January 2017. It would, the Court held, have been unfair to admit the email without giving the nurses time to consider and address it, including by obtaining expert evidence if they wished. However, if the panel had admitted the email and adjourned the hearing, there would have been no prejudice to the nurses' ability to challenge the email. The Court acknowledged that adjourning the hearing would have caused a different type of prejudice, including the costs and inconvenience that would flow from having to attend and pay legal representatives to attend a further

hearing, as well as ongoing stress for the nurses. However, in the Court's view, the public interest in the panel considering the central piece of evidence substantially outweighed any prejudice to the nurses that would have flowed from the hearing being adjourned.

The Court allowed the appeal and remitted the charge to be considered afresh.

Finding of serious misconduct does not require striking off

In *Solicitors Regulation Authority v Dar [2019] EWHC 2831 (Admin)*, the Court held a finding of serious misconduct does not require striking off or an immediate suspension from practice, although that will be appropriate in most cases.

Mr Dar was a solicitor and sole director of Dar & Co, a firm in Manchester. He received instructions by email from a Mr A, to act on behalf of three people (Mr T, Mr M and Mr A) in relation to the sale of an Islamic community centre in Clapham, London for £1.5m to a buyer called Axmo. The three men were not existing clients and were unknown to Mr Dar. The email stated that the three men owned the property as trustees of a charitable trust. A few weeks later, the three men sent separate emails to Mr Dar, instructing him not to continue with the sale to Axmo but instead instructing him to transfer the property for no consideration to Mr Shafiq, the owner of an estate agency, Shields and Co. The men each said that Mr Shafiq was another community member who would then arrange to sell the property. Mr Shafiq was said to be based in Manchester but was in fact located in Nottingham. Mr Dar arranged for the transfer to happen, acting for both the transferors and the transferees. The following month, it emerged that the purported trustees of the property during the sale had been imposters and the transfer a fraud.

The Solicitors Regulation Authority filed a Rule 5 statement with the Solicitors Disciplinary Tribunal, setting out several allegations against Mr Dar. It set out the unusual elements of the transaction which it alleged rendered the transaction dubious. These elements included the fact that the property had an open market value of at least £1.5m but was being transferred to Shields and Co for no consideration. It also noted that, given the property was a community centre in London and was supposedly being transferred to a member of the organisation, it would be reasonable to expect that all the purported parties lived in the same general area as the property. However, the documents provided by the three sellers showed two of them lived in Manchester and one in a different area of London to the property. Mr Shariq's address was in Nottingham. The Rule 5 statement stated that, in these circumstances, Mr Dar should not have continued to act without making additional enquiries. Mr Dar formally admitted all these allegations but denied that he had acted with a lack of integrity and/or been reckless.

The Tribunal found that Mr Dar had been aware of a number of unusual features of the dubious transaction and yet he carried on without making further enquiries and that amounted to a want of integrity. The Tribunal also concluded that Mr Dar had been aware of the specific risks of the transaction and therefore he had acted recklessly. It imposed a sanction of a fine of £20,000 and 12 months suspension from practice, suspended for two years, with an indefinite restriction on his practice prohibiting him from accepting any instructions in conveyancing and/or trust related matters. He was also ordered to pay the SRA's costs of £23,000.

The SRA appealed the decision of sanction. Mr Dar cross appealed against the Tribunal's decision, arguing that it had wrongly conflated Mr Dar's appreciation of the unusual features of the transaction with an appreciation of the risk of fraud. Mr Dar accepted that he had not taken sufficient care in the transaction. However, he argued that in considering recklessness, the Tribunal should have asked itself whether he was aware of the risk of fraud when he proceeded with the transfer of the property. Instead, the Tribunal focused on the "unusual features" of the transaction and whether Mr Dar was aware of them. The conflation of the unusual features with indicia of fraud had, Mr Dar said, meant that the Tribunal had not addressed the correct question concerning Mr Dar's state of mind.

In response to this argument, the SRA maintained that a finding of lack of integrity/recklessness against Mr Dar did not require finding that he was aware of the risk in the narrow sense contended for by Mr Dar. The SRA's case had been that there was a series of obvious and highly unusual features of the transaction which signalled something potentially illegitimate and illegal, or "dubious", about the transaction which required a solicitor acting with integrity to investigate further before proceeding. It was not necessary that Mr Dar foresaw the precise nature of the illegitimacy or illegality involved, but only that he appreciated something was not right and that there was a risk that the transaction involved some form or illegitimacy or illegality that required further investigation before he proceeded.

The Court agreed with the SRA's submissions on this point. The Tribunal had made findings in relation to the unusual features and Mr Dar's appreciation of their unusual nature, and then gone on to consider whether he appreciated from those features that there was a risk that the transaction was fraudulent or otherwise illegal. The Court held that the Tribunal's reasoning was clear and adequately explained why it rejected Mr Dar's assertions that he did not appreciate that the features of the transaction were unusual or that there was risk that the transaction was illegitimate/illegal. The Court went on to say that, on the basis of the evidence, the Tribunal had not believed Mr Dar, making findings as to his credibility which were open to it to make and which were adequately explained in the decision. Mr Dar's appeal was dismissed.

As for the SRA's cross appeal, it was argued both that the Tribunal had erred in its approach to sanction and also that the sanction imposed by the Tribunal was clearly inappropriate. The SRA argued that, given the finding of serious misconduct, only striking off (or, alternatively, a period of immediate suspension) would be appropriate to reflect the seriousness of the misconduct and to protect the profession.

Although the Court held that the Tribunal's analysis of how they arrived at the sanction ultimately imposed was not as clear as it might have been, it did not think the Tribunal had erred. The Court also held that the combination of sanctions, whilst perhaps unusual, had not been wrong. In particular, the Court held that a finding of serious misconduct does not require striking off or an immediate suspension from practice, although no doubt that will be appropriate in most cases. Having seen and heard Mr Dar give evidence, the Tribunal was, the Court held, in the best position to assess the proper level of his culpability, and also the appropriate and proportionate measures that would properly protect the public and the reputation of the profession. It concluded that the Tribunal had only erred in failing to align the period of suspension with the period of restriction. The Court corrected that error by quashing the two year suspension and imposing instead an indefinite suspension of the suspension order.

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