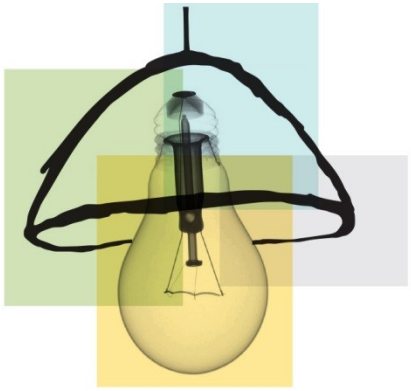

Regulatory Newsletter September 2019

Panel wrong not to find current impairment on public protections grounds

In *Professional Standards Authority for Health and Social care v Nursing and Midwifery Council and Ndlovu [2019] EWHC 1181 (Admin)*, the Court held that a panel had been wrong not to find current impairment on public protection grounds in the case of a nurse who had lied to a Coroner and during an internal investigation regarding her assessment of a patient who later died.

Ms Ndlovu was a mental health nurse. Patient A, who had a long history of mental illness, was taken to Leicester Royal Infirmary by her support worker who was worried about her suicidal ideation. Patient A was assessed by Ms Ndlovu and a fellow nurse (Registrant C). Together they determined that Patient A did not require admission to hospital. Two days later, Patient A was found dead on a railway track. The Trust carried out a Serious Incident Investigation (SII) into the conduct of the assessment and a Coroner undertook an inquest. Some months later, it emerged that Patient A had recorded the assessment by Ms Ndlovu and Registrant C on a mobile phone. A review of that recording by the Trust showed inconsistencies between the account both nurses had given to the Coroner and the SII on the one hand, and the recording on the other.

Before a Fitness to Practise panel of the Nursing and Midwifery Council, Ms Ndlovu admitted several charges of failing to ensure that an adequate mental health assessment of Patient A was completed and recorded adequately, and that those failings had contributed to the loss of a material chance to prevent Patient A's death. Further, the panel determined that Ms Ndlovu had been dishonest in providing incorrect information to the SII and Coroner in an attempt to cover up the inadequate assessment. Having concluded that the conduct of the assessment and Ms Ndlovu's subsequent dishonesty amounted to serious misconduct, the panel went on to consider impairment. It concluded that she had demonstrated an extremely good level of insight into her clinical failings which had been remediated, and there was a low risk of those clinical errors being repeated. Accordingly, it held that a finding of current impairment was not necessary on public protection grounds. However, given the two serious incidents of dishonesty, the panel held that public confidence in the nursing profession would be undermined without a finding of current impairment on the grounds of public interest. The panel imposed a three-year caution order.

The Professional Standards Authority for Health and Social Care referred the decision to the High Court on the basis that the panel had been wrong to conclude that a finding of impairment was not needed on public protection grounds. The Court agreed. It noted that the panel had found that the assessment that Ms Ndlovu had carried out was "wholly inadequate" and contributed to the loss of a material chance to prevent Patient A's death. When the Trust carried out the SII, it was critical that those giving evidence should be candid but Ms Ndlovu had been dishonest. It could not, the Court held, be reasonably said that Ms Ndlovu's dishonesty was anything other than serious. Public protection requires nurses to be honest as honesty is, the Court said, the bedrock of the profession. Accordingly, the Court held that the panel had been wrong to hold that Ms Ndlovu's fitness to practise was not to be regarded as impaired on public protection grounds. It followed, the Court held, that the panel sanctioned Ms Ndlovu on an inadequate assessment of the extent of her impairment and imposed a sanction that could not reasonably reflect the seriousness of her misconduct. The Court quashed the caution order and remitted the case for a decision on sanction.

Sexual relationship undermines the fundamental trust which patients put in their healthcare professional

In *Kern v General Osteopathic Council [2019] EWHC 111 (Admin)*, the Court upheld a decision to erase from the register an osteopath who had a sexual relationship with a patient.

Mr Kern was an osteopath as well as a teacher and writer on craniosacral therapy (CST). Patient A was studying CST and sought treatment from Mr Kern for educational purposes in 2006. A sexual relationship began, which lasted for about a year, although there was some contact by email and once telephone call in 2008. In 2017, Patient A complained to the General Osteopathic Council, stating that she was still affected by what had happened. Mr Kern accepted that he had behaved inappropriately. A Professional Conduct Committee of the GOsC found him guilty of unacceptable professional conduct and removed him from the register.

Mr Kern appealed. He argued that the panel failed to weigh up the mitigating and aggravating factors and for that reason the conclusion was flawed in its reasoning. He submitted that the sanction of erasure was excessive in the overall circumstances of the case, and that there should have been suspension. The mitigating factors included the fact that this was an isolated example in 31 years of practice, there had been no repetition since 2008, he had expressed genuine remorse, there was substantial evidence that he had taken rehabilitative and corrective steps, and he had a large body of references from patients, students and colleagues.

The Court disagreed. It referred to the case of *Bolton v Law Society (1994)*, in which it was said that in a case involving dishonesty by a solicitor, which strikes at the heart of the trust put into the solicitor's profession by the public, the protection of the reputation of the profession means that less regard will be had to personal mitigation. The Court said that "what is true of dishonesty in relation to solicitors is equally true of sexual relationships in relation to health care professionals". The Court went on to say:

> "Members of the public reveal to health care professionals their most intimate details and secrets in the belief that the professional will remain just that, professional and objective. The crossing of the boundary into a sexual relationship with the patient, and that is a sexual relationship of any kind, whether or not it includes penetrative sex, undermines the fundamental trust which patients put in their therapists and thus strikes at the heart of the relationship between doctor or any other health care professional, including osteopaths, and patient."

The Court concluded that the sanction of removal was within the reasonable band of sanctions available to the panel in the case of an inappropriate sexual relationship between an osteopath and his patient. Further, the reasoning of the panel was adequate in explaining to Mr Kern and the public why it had decided to take the course which it did. The Court dismissed Mr Kern's appeal.

Prolonged and hostile questioning by panel member leads to proceedings being judged unfair

In *Beard v General Osteopathic Council [2019] EWHC 1561 (Admin)*, the Court held that the prolonged and hostile questioning of the osteopath by one of the panel members was a serious procedural error which rendered the proceedings unfair.

Ms Beard was an osteopath. In July 2016, Patient A consulted Ms Beard regarding his left foot. According to Ms Beard's handwritten notes, Ms Beard and Patient A had a discussion about ultrasound treatment. Ms Beard thought ultrasound was of value, but Patient A was sceptical. Patient A later alleged that Ms Beard had indulged in two "rants" at him, which she denied. On 22 July, Patient A sent a long email to Ms Beard, with links to academic literature, supporting his condemnation of ultrasound. The Court described this email as "inappropriately long, opinionated, personal, over-familiar with a false bonhomie covering an underlying aggression". On 30 July, Patient A sent a three page formal letter of complaint about the quality of Ms Beard's treatment, and her professional conduct. He then complained to the General Osteopathic Council on 7 September, before writing a further letter to Ms Beard, which was described by the Court as "aggressive and offensive".

Five allegations were brought against Ms Beard. The key allegations were that Ms Beard did not conduct an adequate assessment of Patient A's foot, provide a diagnosis, discuss or explain the treatment or get valid consent. It was also alleged that Ms Beard did not explain why ultrasound treatment was appropriate and communicated inappropriately and unprofessionally with Patient A. Ms Beard denied these charges.

A hearing before the Professional Conduct Committee of the GOsC took place. The panel comprised a lay chair, an osteopath and a lay member (Ms N), who was also a solicitor. The panel were supported by a legal assessor. After Ms Beard had given her evidence and been cross-examined and re-examined on it, the chair indicated that the panel had questions to ask her. After questions from the osteopath member of the panel and the chair, Ms N questioned Ms Beard about matters ranging from ultrasound, her feelings when she received Patient A's email of 22 July, the language of the correspondence and the characterisation by Ms Beard of Patient A's correspondence as "verging on harassment".

The Court described the tone of the questions as "becoming increasingly frosty", during which time Ms Beard became more upset. After 1 hour and 20 minutes of questioning, the legal assessor suggested that she have a short break. On the resumption, the chair then questioned Ms Beard for a further 34 minutes. Most of his questions were about how Ms Beard produced her notes of consultations with patients. The total time taken for the panel's questioning was longer than her cross-examination, and the number of questions put was well over 200. The panel found all charges proved and the matter was adjourned for consideration of whether the conduct found proved amounted to unacceptable professional conduct. After obtaining the transcript and audio tapes of the questions asked by the panel, Ms Beard made an application that Ms N recuse herself, or that the two other members of the panel should recuse her or themselves as there was a clear appearance of bias or at least pre-judgment. The application failed. The panel went on to find that Ms Beard's conduct amounted to unacceptable professional conduct and made a 12 month conditions of practice order, followed by a review.

Ms Beard appealed against the decision, arguing that the questioning by Ms N and the chair rendered the proceedings unfair. She complained that the questioning amounted to "assuming the role of a second prosecutor and stepping into the ring". She alleged that Ms Ns questions were "hostile and oppressive" and the tone and length of the questions were unfair, especially when contrasted with the fair questioning of Ms Beard under cross-examination and the absence of any questions by the panel to Patient A. The unequal questioning was, she argued, particularly telling in a case where the credibility of one or other of Ms Beard and Patient A was likely to be decisive of the case. The GOsC contended that Ms N's questions were inquisitive rather than oppressive. The panel's function was inquisitorial. The panel had been required to inquire into what happened and was entitled to do that applying a broad and thorough approach.

The Court noted that case law had long recognised a "judicial duty to stay above the fray". The GOsC's submission that the function of the panel was inquisitorial should only be accepted up to a point for a variety of reasons. First the Court noted the procedural rules applicable to hearings before the professional conduct committee closely resemble those that apply in civil proceedings. Secondly, the function of the panel in Ms Beard's case was to decide between contested factual versions of events, not matters of clinical judgment or policy, which meant that the contest was adversarial in this particular case. Further, the Court did not accept that the applicable principles were different or less rigorous in a disciplinary case than those applying in other types of proceedings, which hold that the duty of the adjudicating body is not to transgress the bounds of fairness in conducting the hearing.

The Court noted that the questioning of Ms Beard was of particular importance in this case because of the stark conflict between her evidence and that of Patient A. As a result, the Court said that the panel should have taken particular care to ensure an even-handed approach. The Court was concerned that the panel had not considered the tone and content of Patient A's correspondence which was aggressive and bullying. The Court could not understand why Ms N thought it appropriate to ask Ms Beard lengthy questions about the correspondence when it was "blindingly obvious that it would upset many persons of ordinary fortitude and that it did upset and frighten Ms Beard". Further, it was the content and tone of Ms N's questions that troubled the Court more than the length of time it took her to ask them. The Court did not think it was a good argument to say that the questioning must have been fair because the legal assessor would have intervened sooner if it had not been. The Court said it was "difficult" for a legal assessor to interrupt a panel member when the situation leading to unfairness was evolving and did not happen in one instant.

The Court concluded that there had been a serious procedural irregularity which rendered the decision unjust. The credibility of Ms Beard, measured against that of Patient A, was the crucial issue in the case. It was of the utmost importance to the fairness of the proceedings that this issue was dealt with in an even-handed manner, not marred by inappropriate protracted and hostile questioning. There was, said the Court, a serious risk that Ms N's descent into the arena may have hampered her ability properly to evaluate and weigh the evidence before her.

The Court therefore set aside the panel's decision. The Court stated that it would expect the GOsC to "hesitate long and consider very carefully" before referring the

allegations to a differently constituted professional conduct committee.

Court of Appeal confirms that panel not obliged to pause before deciding on sanction in case of voluntarily absent doctor

We covered the case of *Sanusi v General Medical Council [2018] EWHC1388 (Admin)* in our Autumn 2018 newsletter. In that case, the High Court held it would "rarely be unfair" for a panel to proceed straight to a decision on sanction rather than pausing to invite the attendance of a doctor who has voluntarily absented himself. The case has now been considered by the Court of Appeal, which agreed with the conclusions reached by the High Court. (*Sanusi v General Medical Council [2019] EWCA Civ 1172*.)

The brief facts of Dr Sanusi's case are as follows. Various allegations were brought against Dr Sanusi, including allegations of a clinical nature and an allegation of dishonesty in relation to an application for a job. In advance of the hearing before a panel of the Medical Practitioners Service, Dr Sanusi submitted a witness statement, making it clear he would not attend the hearing as he could not afford legal representation and could not take sufficient time off from his GP training programme. He also supplied the GMC, on a piecemeal basis, with various testimonial letters, appraisal documents, and certificates of courses completed. The panel hearing proceeded in Dr Sanusi's absence. In relation to possible mitigation, the documents put before the panel only included two testimonial letters, and not the other materials that Dr Sanusi had sent to the GMC's caseworker. In relation to sanction, the panel concluded that there was no evidence of any meaningful insight, or remediation. It concluded that erasure was the appropriate remedy.

Dr Sanusi appealed to the High Court. He argued that the panel should have paused briefly before embarking on the sanction stage of the process to ask him whether he wished to either produce further documentary evidence as to remediation, insight or remorse and/or to attend to give evidence of this. The High Court disagreed. It held that in the context of the disciplinary jurisdiction exercised in the case of doctors, it would "rarely be unfair" for a panel to proceed straight to sanction, rather than pausing to invite the attendance of a doctor who has, up to that point, voluntarily absented himself. The High Court also found procedural unfairness in the failure by the GMC to ensure the panel had all Dr Sanusi's documents available to it, but held that this failure was not reasonably capable of making a material difference to the outcome. His appeal was dismissed.

Dr Sanusi appealed to the Court of Appeal. The Court of Appeal referred to the case of *GMC v Adeogba (2016)*, in which the Court of Appeal gave guidance on the approach to proceeding in the absence of a registrant in regulatory proceedings, concluding that "any culture of adjournment is to be deprecated". The Court of Appeal said that the considerations in *Adeogba* applied with equal, if not greater, force to adjournments part way through a hearing. Accordingly, the Court of Appeal held that "there is no general obligation on a panel to adjourn or to provide a registrant with the opportunity to make submissions in mitigation of sanction once adverse findings have been made against him or her". The Court of Appeal noted that hearings in the absence of a registrant are relatively common and the regulatory system could not operate on the basis that a failure to attend should inevitably lead to an adjournment mid hearing before sanction.

The Court of Appeal acknowledged that the position may be different when there is unchallenged medical evidence that a registrant, who has otherwise fully engaged in the process, is taken ill and so is not fit to attend the hearing or part of it, or where there is some other compelling reason justifying an adjournment. In such circumstances, the Court of Appeal held that careful consideration of the public interest and fairness to the registrant and the regulator would have to be weighed in exercising the discretion whether to proceed or not. However, Dr Sanusi's case was not such a case. He had elected not to attend in favour of continuing with his GP training and he did not send a legal representative on his behalf. He was aware that the hearing would continue without him and that sanction would be addressed. The Notice of Hearing drew his attention to the fact that erasure was a possibility and he had made submissions on sanction, albeit brief, in his witness statement. There was accordingly no justification for an adjournment, the Court of Appeal held.

As for the failure to put the missing materials before the panel when it was considering mitigation, the Court of Appeal agreed that this was a procedural irregularity, but also agreed that there was no realistic prospect that the missing materials would have led the panel to impose a different sanction. The appeal was dismissed.

Demonstrating insight at a review hearing where original panel's findings are still denied

In *Blakely v General Medical Council [2019] EWHC 905 (Admin)*, the Court held a review panel had been correct in deciding that a doctor had not demonstrated sufficient insight and that it had been right to conclude that a further suspension was required. In so doing, the Court acknowledged the difficult exercise that review panels must take in balancing concerns about ensuring that a registrant understands why conduct is unacceptable, so that there is no risk of repetition, whilst not forcing the registrant to admit guilt for something that they do not accept doing.

Dr Blakely was the medical director of a clinic. She covertly recorded the consultations between another doctor in the clinic and their patients, as she suspected the doctor of discounting treatment costs. Before she did this, she telephoned the GMC and the CQC anonymously to tell them what she intended to do. When patients found out about the covert recordings and complained, Dr Blakely emailed them and said that she had sought and taken advice from the GMC and CQC to make the recordings. Before a Medical Practitioners Tribunal, she admitted making covert recordings without doctor or patient consent. The panel concluded that the anonymous telephone calls to the GMC and CQC did not amount to seeking advice and it found that Dr Blakely had acted dishonestly in relation to the statements made in the correspondence with the complainants. The panel suspended Dr Blakely for six months.

At a subsequent review hearing, Dr Blakely submitted a statement in which she said that she now accepted that the emails had been misleading in that they gave the impression that the GMC and CQC knew exactly what she was doing. However, in her oral evidence under cross-examination, she made it clear did not accept the original panel's finding that she had been dishonest. The review panel concluded that, given this discrepancy between the written and oral evidence, it still had serious concerns with respect to Dr Blakely's insight and determined that the evidence in support of her remediation was insufficient. There was still a risk of repetition and accordingly the review panel suspended her registration for a further period of nine months.

Dr Blakely appealed. She argued that the review panel had been wrong to find that her fitness to practise remained impaired simply because she maintained her position that she had not acted dishonestly. The Court referred to the case of *Yussuf v GMC (2018)*, in which the Court set out the relevant principles to be applied at a review hearing. Applying those principles to Dr Blakely's case, the Court held that the essential question was how to reconcile the need to ensure that the doctor has acquired the requisite insight into their conduct so that there is not an unacceptable risk of repetition, with the fact that a doctor cannot be required to accept that he or she has done something which is denied, or done something which the panel thinks is dishonest but that the doctor does not accept as dishonest. The Court said in such cases:

> "remediation, and insight, may be demonstrated in a number of ways. These include, by way of example, the following. A doctor may accept that, with the benefit of hindsight, what he or she did was wrong (or dishonest) even though the doctor did not consider at the time consider that he or she was acting dishonestly. Alternatively, the doctor may accept that members of the public would view the conduct as dishonest and undermining their trust in the doctor even if the doctor considers that the conduct, viewed in context, was excusable or not dishonest."

The Court accepted that it can be a difficult exercise for a review panel to balance concerns about ensuring that the doctor understands why conduct is unacceptable, so that there is no risk of repetition, whilst not forcing the doctor to admit guilt for something that he or she does not accept doing. The Court said that a bland reference by the doctor to accepting the findings of the panel might not be enough. The doctor has to reassure the review panel that sufficient insight has been acquired, that he understands why the conduct was considered acceptable and cannot be repeated. The Court noted that this is subtly different from the doctor having to accept that he did what he was accused of. The Court said that questioning of doctors by the legal adviser or members of the panel at a review needs to bear this distinction in mind when dealing with insight at a review hearing.

In Dr Blakely's case, the Court did not consider the review panel's decision to be wrong. There was nothing unfair in the GMC's questioning, which focussed on whether Dr Blakely understood the problems in stating to a patient something as fact which was not correct. The review had, the Court held, been entitled to view Dr Blakely's responses as not demonstrating insight on that issue. Dr Blakely's appeal was dismissed.

Adverse inferences in healthcare disciplinary proceedings

In *R (on the application of Kuzmin) v General Medical Council [2019] EWHC 2129 (Admin)*, the Court held that a healthcare disciplinary tribunal does have the power to draw an adverse inference from a registrant's failure to give evidence.

Dr Kuzmin was charged by the GMC with dishonestly failing to notify an agency through which he obtained work that he was subject to an interim order of conditions. Dr Kuzmin filed a signed witness statement in which he strenuously denied dishonesty. A hearing took place before the Medical Practitioners Tribunal. At the conclusion of the GMC's case, Dr Kuzmin made an application of no case to answer, which was rejected by the panel. Dr Kuzmin then indicated that he would not call any evidence and he applied to withdraw his witness statement. The GMC submitted that it was open to the panel to draw an adverse inference from Dr Kuzmin's failure to give evidence. The GMC argued that the failure to give evidence was capable of giving rise to the inference that he had no innocent explanation for his failure to disclose the conditions or at least no innocent explanation that would withstand the scrutiny of questioning. Dr Kuzmin argued that the panel had no right to draw any adverse inference from his silence.

Both parties agreed that there was no precedent for the drawing of adverse inferences in proceedings before any of the healthcare disciplinary tribunals. However, the panel concluded that, despite there being no definitive precedent, having regard to the overarching objective and the requirement of Good Medical Practice that doctors cooperate with enquiries, it was in the public interest for doctors to provide a response to serious allegations made against them. Accordingly, adverse inferences from their silence when faced with such allegations were permissible in principle.

Dr Kuzmin obtained an adjournment of the proceedings to allow him to challenge the panel's ruling by way of judicial review. Before the Court, he argued that adverse inferences could not be drawn in disciplinary proceedings and a change to that position could only be effected by some formal means such as statute, a statutory instrument or guidance or policy issued by the regulator after full consultation with the profession.

The Court, however, disagreed. It concluded that disciplinary tribunals have the legal power to draw adverse inferences from the silence of an individual charged with breaches of the regulatory regimes to which they are subject. The fact that healthcare disciplinary tribunals have not in practice drawn such inferences was a matter of the tribunal's own procedure, and not one required by law.

The Court went on to say that, even where it has the power to do so, a tribunal cannot draw an adverse inference if it would be procedurally unfair to the charged individual to do so. Whilst emphasising that whether an adverse inference is drawn is highly dependent on the facts of the case, the Court said, in general, no inference will be drawn unless:

- A prima facie case to answer has been established.
- The individual has been given appropriate notice and a warning that, if he does not give evidence, then such an inference may be drawn. He should be given an opportunity to explain why it is not reasonable for him to give evidence and, if it is found that it is not reasonable, he should be given an opportunity to give evidence.
- There is no reasonable explanation for his not giving evidence.
- There are no other circumstances which make it unfair to draw an inference.

Although the Court confirmed that tribunals can exercise this power without express sanction by statute or guidance, the Court expressed the hope that regulators would consider publishing guidance, confirming the existence of the power and how it might be used.
Dr Kuzmin's claim for judicial review was dismissed.

This bulletin is produced for the interest of those involved in regulatory proceedings. It does not constitute legal advice or seek to direct decision makers in any way.

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