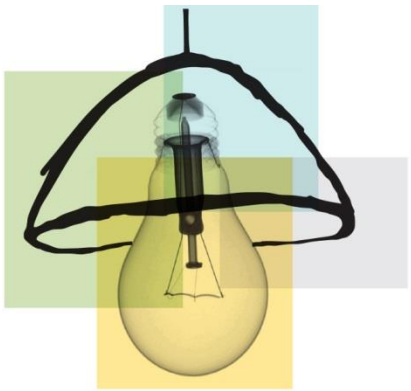

Regulatory Newsletter Summer 2018

Panel failed to properly evaluate mitigating factors when deciding on sanction

In *Arunachalam v General Medical Council [2018] EWHC 758 (Admin*), the Court held that a panel had failed to properly evaluate the mitigating factors when determining that erasure was the appropriate sanction for a doctor who had been found guilty of sexually motivated behaviour against two junior colleagues.

Dr Arunachalam was a registrar. Over the course of about three months he sent Dr A, who worked under him, unwanted and unnecessary personal messages by text, email and WhatsApp. The messages had an inappropriate tone of false familiarity and intimacy, but never contained any sexual character or language. After Dr A complained, Dr Arunachalam was summarily dismissed from his post. Later that year, Dr Arunachalam was working as a locum at a different hospital when Dr B complained that on at least four or five occasions, Dr Arunachalam had subjected her to unwanted touching, nudging, tickling and, on one occasion, hugged her and kissed her on the top of her head. Dr Arunachalam was given a final written warning by his employer.

The GMC charged Dr Arunachalam with misconduct. It alleged that his actions against Drs A and B had been sexually motivated. A Medical Practitioners Tribunal found that, in relation to Dr A, although the messages had not been sexually explicit, they were inappropriate and transgressed professional boundaries and concluded that his behaviour had been sexually motivated. In relation to the unwanted touching of Dr B, the panel noted Dr B's characterisation of Dr Arunachalam's actions as "sleazy" and making her "skin crawl" and again concluded that his conduct had been sexually motivated.

As to sanction, the GMC submitted that the appropriate and proportionate sanction was suspension, which was necessary to maintain public confidence in the profession and maintain proper standards of conduct. Dr Arunachalam's representative submitted that he was instructed not to argue against the sanction of suspension proposed by the GMC. The panel resolved that the only proportionate sanction was erasure.

Dr Arunachalam appealed against the sanction, arguing that it was disproportionately severe, unfair and wrong. At the appeal, the GMC submitted that the sanction of erasure was in no way wrong and that the Court should not interfere. The Court confirmed that there was no logical inconsistency in the GMC's position. It held that a regulator could advocate a particular sanction at a panel hearing and then on appeal defend the decision of the independent panel to impose a more serious one.

The Court confirmed that Dr Arunachalam's case was, undoubtedly, a sexual misconduct case. It went on to say that such cases are inherently serious and may well lead to erasure, even for a first time offender with a good clinical record, in order to maintain public confidence in the profession and uphold high standards of behaviour. It said that where the victim is a colleague, rather than a patient, severe sanctions are generally necessary to protect and uphold the dignity of workers in the profession and to protect their freedom to work without being molested. As a result, Dr Arunchalam's case was always a case in which the "potential for erasure loomed large". The Court also noted that the mainstream view in our society, which is reflected in our law, is to treat sexual misconduct, particularly in the workplace, with "virtual zero tolerance".

However, the Court then went on to say that the panel in Dr Arunachalam's case had not properly evaluated the factors weighing in the balance in favour of suspension and against erasure. There was, the Court held, a lack of

coherent reasoning. The panel had simply listed the mitigating factors and then stated that it had taken them into account. It was, the Court said, impossible to say from the decision what weight the panel had given to the mitigating features. This was, the Court held, not a mere drafting point; it was a failure of approach. There was, for example, no discussion of the point made by Dr Arunachalam that he had not offended further between November 2014 and the time of the hearing in 2017, which was a point that should have been weighed against the finding of "limited insight".

The Court then reconsidered sanction by reference to what a reasonable and informed member of the public would think. The Court bore in mind that a reasonable and informed member of the public would not underestimate or trivialise the seriousness of unwanted sexual conduct, even at the relatively low level that was present in this case. He or she would not, the Court held, overlook the affront to the dignity of workers, especially women workers, nor the suffering caused, particularly when authority is abused. However, the Court held that the GMC's stance was strong evidence of where on the scale of offending a reasonable and informed member of the public would place Dr Arunachalam's conduct. The Court said that, on balance, a reasonable, informed member of the public would not take a harsher view of Dr Arunachalam's behaviour than the GMC had, which the Court regarded as "pathetic and disgusting sexual pestering". The Court said that the system of justice in this country jealously guards the rights of women workers to be protected against predatory, ignorant men who feel entitled to prey on female colleagues in the way that Dr Arunachalam had, but it was not so inflexible that every transgression of this kind must be met with erasure. Dr Arunachalam's conduct was not at the very bottom of the scale. It was, the Court held, very serious but it was not anywhere near the top of that scale.

The Court set aside the sanction of erasure and substituted a period of suspension of 12 months.

Doctor erased for sexual relationship with a former patient

In *General Medical Council v Somuah-Boateng [2017] EWHC 3565 (Admin)*, the Court quashed the panel's decision to impose a suspension and instead erased a doctor from the register who had been found to have had a sexual relationship with a former patient.

Dr Somuah-Boateng carried out a consultation with Patient A, during which she received a provisional diagnosis of multiple sclerosis. After the consultation, he obtained Patient A's home address from hospital records. Dr Somuah-Boateng then entered an emotional and sexual relationship with Patient A. Patient A was not Dr Somuah-Boateng's patient at that point, but was instead receiving treatment from another doctor. Dr Somuah-Boateng told Patient A that having sex with him would be good for her medical condition. A panel of the Medical Practitioners Tribunal Service found that Dr Somuah-Boateng's actions were sexually motivated. It held that he had established the emotional relationship with Patient A in order to develop her dependence on him to allow him to pursue sexual advances. Patient A was a young female who was vulnerable, the panel held, and Dr Somuah-Boateng had seen an opportunity to exploit this.

When dealing with impairment, the panel said that Dr Somuah-Boateng's misconduct "offended" the parts of the statutory overarching objective regarding the promotion and maintenance of public confidence in the medical profession and the promotion and maintenance of proper professional standards for the profession. When it came to sanction, the panel noted that Patient A was deeply distressed by the relationship and it had ended on bad terms. However, there was evidence that the relationship was, at times, very affectionate. Moreover, there was nothing to suggest that Dr Somuah-Boateng's relationship had prevented Patient A from receiving proper care for her medical condition as she remained under the care of other doctors. Finally, the panel said that the relationship with Patient A developed at a time when she was coming to terms with a life-changing diagnosis and she was "vulnerable" in that sense. However, the panel said that she was not vulnerable in the sense of the description in the Indicative Sanctions Guidance. In the circumstances, the panel decided that erasure would be a disproportionate sanction and so imposed a 12 month suspension. In reaching this decision, the panel noted that there was no prior or subsequent history of inappropriate relationships with patients, Dr Somuah-Boateng was a competent doctor and had demonstrated a willingness and capacity to learn from his past wrongdoing.

The GMC appealed against the decision. As to impairment, the GMC argued that the panel had failed to have regard to the first limb of the overarching objective which was to protect, promote and maintain the health safety and well-being of the public. The Court said that this criticism was made out.

As for sanction, the GMC said that erasure was the only appropriate course in the circumstances. The Court said that the panel had wrongly undervalued the problems experienced by Patient A as a result of her relationship with Dr Somuah-Boateng. She gave unchallenged evidence that she no longer had any confidence in professionals. Moreover, the evidence accepted by the

panel was that Dr Somuah-Boateng was using his position as a doctor to persuade Patient A to have sex with him on the basis that it would be good for her recently diagnosed multiple sclerosis. This amounted to "predatory behaviour" within the terms of the Indicative Sanctions Guidance and therefore was amongst the matters that fell under the heading of cases that indicated more serious action was likely to be required.

The Court also said that the panel fell into error in confining its analysis of whether Patient A had been "harmed" to whether she had suffered medical harm. That was, the Court held, too narrow a focus as there was plain evidence of emotional harm. This error was compounded by the view that the panel had taken that Patient A was not vulnerable as per the description in the Indicative Sanctions Guidance, which said that some patients were more vulnerable than others because of "certain characteristics or circumstances, such as.." the presence of mental health issues, being a child, disability or frailty, bereavement or history of abuse. The Court held that the items listed in the guidance were not exhaustive and it was plain that Patient A should have been regarded for this purpose as vulnerable. Furthermore, the panel themselves had said she was vulnerable when deciding on the facts.

The Court noted that the panel had placed significant weight on the fact that Dr Somuah-Boateng had been on a course entitled "Maintaining Professional Boundaries" some months before the panel hearing. However, the Court said that the panel could not have rationally concluded that the decision of Dr Somuah-Boateng to go on the course meant he was aware of the consequences of what he had done, as he continued to deny at the hearing that he had used his position as a doctor to persuade Patient A to enter a sexual relationship with him. The Court also held that the panel's finding that Dr Somuah-Boateng was of "low risk of repeating the offence" was not the same as no risk and this point was not given sufficient weight by the panel. Such a risk was still, the Court held, a material issue. The Court also held that the panel had failed to explain by reference to the Indicative Sanctions Guidance why erasure was not merited on the facts of the case.

The Court quashed the panel's decision as it was materially flawed. The Court noted that although as a general matter the Court had to give deference to the findings of the panel, in a case concerning sexual misconduct, the Court was as well placed as the panel to assess for itself what the public interest required. Accordingly, the Court ordered that Dr Somuah-Boateng be erased from the register.

Court provides definition of sexual motive

In *Basson v General Medical Council [2018] EWHC 505 (Admin*), the Court held the panel had been correct to find a GP's conduct sexually motivated.

Dr Basson worked as a GP. A patient complained that he fleetingly touched her right leg when there was no reason to do so, while taking her blood pressure, and that he also commented on her "short skirt". She complained to the GMC and the police that Dr Basson had acted in a sleazy, sexual way. The police decided that there was no case to answer. Dr Basson maintained that he could not remember the consultation. Nevertheless, he admitted the facts of the case to the GMC and also that the behaviour was unwarranted and inappropriate, but he denied that it was sexually motivated. The panel of the Medical Practitioners Tribunal accepted Dr Basson's evidence that he could not remember the events in question but decided that his actions were carried out with a sexual motive. It imposed a 28 day suspension.

Dr Basson appealed against the finding of sexual motivation, saying that it represented an "indelible stain on his character". The GMC accepted that within the spectrum of sexual motivation, Dr Basson's conduct was right at the bottom end but that the sanction was the most lenient that could have been awarded following a finding of sexually motivated misconduct.

The Court dismissed Dr Basson's challenge. The Court held that it did not follow that just because Dr Basson could genuinely not remember the consultation in question, he could not therefore have formed a low grade sexual motive in what he said and did at the consultation. It was, the Court held, perfectly plausible that what had happened was a fleeting aberration by an otherwise impeccably behaved doctor who acted with a low grade sexual intent and that, over the next three weeks, he had banished all recollection of the event from his memory. The Court held that it would have been wrong for the panel to have reached any other conclusion than the one that it did. However, it emphasised that in the spectrum of misconduct of this nature, Dr Basson's conduct was at a very low level of culpability.

It is also worth noting that in the course of its judgment the Court gave a helpful definition of sexual motive. It said that "sexual motive means that the conduct was done either in pursuit of sexual gratification or in pursuit of a future sexual relationship".

Erasure upheld for doctor who sexually assaulted two junior female colleagues in the workplace

In *Yasin v General Medical Council [2018] EWHC 677 (Admin)*, the Court held that erasure was the appropriate sanction for a doctor who had sexually assaulted two junior female colleagues in the workplace.

Dr Yasin was a doctor in an Accident and Emergency department. In the space of two hours he sexually assaulted two young female colleagues. The first (Ms A) was a 21 year old student nurse, working as a healthcare assistant in a bank role. Whilst at the doctors and nurses station, Dr Yasin approached Ms A from behind and rubbed her shoulders. She moved away but when she came back, Dr Yasin hugged her and pressed his erect penis against her. She moved away again, but he approached her from behind and hugged and pressed against her. She walked away to the kitchen, but he followed her and asked her when she was next on shift.

Ms B was a healthcare assistant and was waiting for a patient to come out of the toilet when Dr Yasin approached her and asked her for a hug and then grasped her in a tight hug. He pushed his erect penis against her leg and moved it back and forth. When Ms B got out of the embrace, Dr Yasin said he wanted another hug before the end of his shift. Ms A and B complained about Dr Yasin's behaviour.

A panel of the Medical Practitioners Tribunal found all the facts proved and concluded that Dr Yasin's actions were sexually motivated. When considering sanction, the Court noted his previous good character, the absence of further complaints after the day in question, positive testimonials, the stressful environment in which he worked and his limited attempts at remediation. As for the aggravating factors, the panel noted that the complainants were young, junior, female colleagues. Ms A was not a permanent member of staff but was seeking a permanent post and so was concerned that she had a great deal to lose by making a complaint against Dr Yasin. The panel concluded that Dr Yasin had abused his position as a doctor preying on junior colleagues, that his behaviour during a two hour period was persistent and that his conduct would be regarded as deplorable by fellow practitioners and members of the public. The panel erased Dr Yasin's name from the register.

Dr Yasin appealed. He argued that the decision to erase was wrong and that an analysis of the seriousness of the offending, and the possibility of remediation ought to have led the panel to give him a second chance. The Court disagreed. It noted that this was a case in which more than one outcome was possible. However, the Court said that much would depend on the impression gained by the panel who heard all the evidence. It said that it may well be that there had been a recent shift in attitudes to sexual misconduct. It is possible, the Court said, that the sort of "low level assault" of the sort Dr Yasin carried out was now regarded more seriously than it once was, particularly when committed in a work environment. The Court said that it would be "hard to argue that that is a bad thing".

The Court went on to say that although Dr Yasin's actions "did not amount to very serious sexual offending", that should not minimise what he did. The Court held that he took advantage of two young women who were at an early stage of their healthcare careers while they were going about their normal work. The Court did not consider that the conclusion reached by the panel that only erasure would promote and maintain both public confidence in the medical profession and proper standards and conduct for members of that profession could be said to be wrong. The appeal was dismissed.

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