Sanction for professional misconduct within appeal court's powers (Hussain v General Pharmaceutical Council)

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Local Government analysis: David Morris, barrister at Serjeants' Inn, discusses the appeal against removal of a pharmacist's name from the Register of Pharmacists by a Fitness to Practise Committee of the General Pharmaceutical Council in a case which highlights the difficulty in persuading an appeal court that sanctions imposed by the disciplinary arm of bodies which regulate professional conduct are disproportionate and wrong. It also focuses on the importance of genuine insight for a registrant involved in a serious misconduct case.

Hussain v General Pharmaceutical Council [2018] EWCA Civ 22, [2018] All ER (D) 100 (Jan)

What are the practical implications of this case?

First, the Court of Appeal decision reinforces the lesson to be learnt from a long line of authorities that when advising registrant clients it needs to be made clear that, absent any serious procedural or other irregularity, it is difficult to persuade an appeal court that sanctions imposed by the disciplinary arm of bodies which regulate professional conduct are too severe and therefore disproportionate and wrong.

It is particularly difficult where

- the misconduct concerns matters relating to the registrant's professional performance and practice, rather than those matters which do not
- the registrant has displayed no or limited insight

Second, the development of genuine insight can be decisive in preventing a registrant from being removed/erased from their register even for very serious misconduct.

Third, even if genuine insight is only achieved after the announcement of a sanction of removal/erasure, an appeal court can, in certain circumstances, be persuaded that the sanction was disproportionate and wrong. See Lord Justice Jackson's concluding remarks set out in the final paragraph of this interview.

What was the background to the case?

In 2012 the BBC made a TV programme where it was alleged that prescription-only medicines had been supplied in the absence of valid prescriptions by a number of pharmacies in London. Mrs Hussain was the superintendent pharmacist at one of these pharmacies. An undercover reporter posing as someone wanting some antibiotics had filmed a counter assistant (Mrs Hussain's daughter) selling the reporter some amoxicillin without a prescription. At the time Mrs Hussain was the responsible pharmacist, and was found by the Committee to have been knowingly involved in the unlawful supply of the drug.

Before the hearing Mrs Hussain had had legal representation. However, at the hearing Mrs Hussain represented herself. She denied the allegation, asserting that the BBC's programme maker had maliciously doctored the film footage.

On the final day of the hearing the committee finalised and delivered its decision on the factual allegation.

It then proceeded to hear submissions on and decide the issues of misconduct and whether Mrs Hussain's fitness to practise was currently impaired. At 3.30pm the committee announced that it had found that Mrs Hussain's misconduct was serious (it was egregious and showed a blatant and casual disregard for the law), and that her current fitness to practise was impaired. In this context it concluded that, given her trenchant denial of the facts, it was difficult to say that she had any insight into her conduct or the impact of her proven behaviour on public confidence in the profession. Further, it was not satisfied that Mrs Hussain really understood the vital role entrusted to the profession as gatekeepers for the safe and lawful use of medicines.

The Committee immediately proceeded to consider sanction submissions and retired to make its decision at 4.05pm. It decided that the sanction of removal was necessary essentially because:

- her misconduct was fundamentally incompatible with continued registration albeit that it was a single incident, and
- she had displayed no insight to date and there was little or no prospect of her developing true insight

What issues arose for the court's consideration?

Procedural issues

Mrs Hussain raised a number of procedural issues which it was suggested made the proceedings unfair. The more important of these were:

First, the committee failed to adjourn the proceedings before embarking on deciding sanction. On the final day of the hearing, the committee had given its adverse decision on the facts. The chair took an hour to announce it orally between midday and 1pm. It then considered misconduct and impairment announcing its adverse decision at 3.30pm. Given the likelihood of a serious sanction, the stress and distress Mrs Hussain was suffering after an intensive and disheartening day, the late time of day and the fact that she was legally unrepresented and would have to make submissions on sanction without legal assistance, the committee should have adjourned the case and invited Mrs Hussain to seek legal representation.

Second, the committee had failed to warn Mrs Hussain that the committee was seriously considering removing her from the Register. The failure was aggravated by the fact that the council's submission on sanction was that any risk to patient safety and the wider public interest (declaring and maintaining proper standards and maintaining public confidence) could be dealt with by a period of suspension. Removal would therefore be disproportionate.

Third, the council did not tell the committee about, and the committee did not consider, the sanctions imposed by other committees dealing with similar cases involving other pharmacists caught unlawfully supplying medication without prescription by the BBC's undercover reporters. By the date of Mrs Hussain's removal, five other pharmacists had been disciplined. Of these, two were removed and three suspended.

Substantive issue

Was the sanction of removal disproportionate and therefore wrong?

What did the court decide and why?

Procedural issues

Lord Justice Newey gave the leading judgment. He found that none of the procedural issues raised was on their own, or taken together, unfair. In the language of the applicable Civil Procedure Rule [CPR 52.21(3)], they were not 'unjust because of a serious procedural or other irregularity'.

On the first issue (failing to adjourn) the judge found that

- the fact that Mrs Hussain had become distressed at two points during the argument on sanction did not mean the committee should have concluded that she was not in a position to continue with the hearing
- as the argument on sanction had been completed by 4.05pm, there was no question of Mrs Hussain having been required to make her submissions at an unreasonably late hour of the day
- Mrs Hussain was a professional woman. The committee had observed that over several days she had 'been fully able to participate in the hearing, asked pertinent questions and gave evidence at length'. She had had previous legal representation before the hearing. In the gap of a month between the previous hearing days and the final day she could have sought legal assistance. She had the help of her husband. In any event, it was not uncommon for people to represent themselves in court and other proceedings
- Mrs Hussain had not asked for an adjournment. In any event, authorities cited in argument made clear that 'an adjournment is not simply there for the asking'. Regard must be had to fairness to the council (as prosecutor) as well as the registrant. The discretion of the committee to adjourn could only be interfered with by an appeal court in limited circumstances. There was no justification for interfering

While Lord Justice Peter Jackson agreed that the committee had not been obliged to adjourn, he was more sympathetic to Mrs Hussain's submissions. He thought that:

'in the somewhat fraught circumstances that by then existed, the committee might have done better to consider adjourning after announcing its decision on impairment. …The fact that she did not ask for an adjournment herself does not relieve the committee of its own obligation to assess the matter.'

On the second issue (failing to warn that committee was considering removal) the judge found that:

- in pre-hearing correspondence the council had warned Mrs Hussain that, should the committee find the case proved, the sanction options open to it included removal
- when it adjourned the hearing a month earlier the committee had reminded Mrs Hussain that, if it found against her on the facts, it would go on to consider both impairment and, potentially, sanction
- the committee had implicitly suggested that it was considering removal in its discussion with counsel for the council and Mrs Hussain during submissions on sanction
- it was impossible to imagine that, in the particular circumstances, more explicit reference to the risk of removal would have been of any practical assistance to Mrs Hussain

Lord Justice Peter Jackson did not agree with the judge on this issue. He considered that:

'It would have been better if the committee had *explicitly* [emphasis added] warned Mrs Hussain that it was considering imposing the ultimate penalty. Its passing reference to erasure in exchanges with counsel for the council does not in my view take matters further and the fact that Mrs Hussain might not have been helped by being confronted with the position does not do so either.'

He did not, however, view this procedural irregularity as serious and agreed that overall her procedural challenge failed.

On the third issue (no consideration of other sanctions in similar cases), the judge found that neither the council nor the committee were at fault for not raising/considering the other cases. Apart from the fact that the misconduct of all the pharmacists was disclosed in a single TV programme, there was otherwise no relevant connection between them, and the sanction imposed will have depended on the individual facts in each case. He referred to two authorities which deprecated the citation of other first instance cases on sanction as being of limited assistance and in the great majority of cases unnecessary and inappropriate.

Substantive issue

Was removal disproportionate and therefore wrong?

The judge summarised the proper approach to answering this question spelled out by the authorities. In particular, the recent Supreme Court decision of *Khan v General Pharmaceutical Council* [2016] UKSC 64, [2016] All ER (D) 70 (Dec), stated that:

'An appellate court must approach a challenge to the sanction imposed by a professional disciplinary committee with diffidence. In a case such as the present, the committee's concern is for the damage already done or likely to be done to the reputation of the profession and it is best qualified to judge the measures required to address it: *Marinovich v General Medical Counci*l [2002] UKPC 36, [2002] All ER (D) 187 (Jun), para [28]. Mr Khan is, however, entitled to point out that:

- the exercise of appellate powers to quash a committee's direction or to substitute a different direction is somewhat less inhibited than previously: *Ghosh v General Medical Council* [2001] UKPC 29, [2001] All ER (D) 189 (Jun), para [34]
- on appeal against the sanction of removal, the question is whether it "was appropriate and necessary in the public interest or was excessive and disproportionate": the *Ghosh* case, again para [34], and
- a court can more readily depart from the committee's assessment of the effect on public confidence of misconduct which does not relate to professional performance than in a case in which the misconduct relates to it: *Dad v General Dental Council* [2000] Lexis Citation 2754, pp 1542–1543'

The judge also referred to

- the recent Court of Appeal case of *Professional Standards Authority v Health and Care Professions Council* [2017] EWCA Civ 319, [2017] All ER (D) 152 (Apr), where 'the need for the court to exercise caution when reviewing a disciplinary tribunal's decision on sanction' was mentioned
- *Yeong v General Medical Council* [2009] EWHC 1923 (Admin), [2009] All ER (D) 300 (Jul), at para [58] where Sales J had referred to disciplinary bodies having 'a margin of judgment to decide on sanction, even if a court might not itself have chosen to impose such sanction'

In assessing the circumstances of Mrs Hussain's case, the judge noted that the council's guidance on sanction, 'Good decision making: fitness to practise hearings and sanctions guidance', referred to removal as 'reserved for the most serious conduct'. He acknowledged that Mrs Hussain's misconduct could not be so described as it had occurred on a single occasion. Plainly, it was possible to imagine worse conduct (for example misconduct occurring on multiple occasions over an extended period).

By way of particular example, in *Rasool v General Pharmaceutical Council* [2015] EWHC 217 (Admin), [2015] All ER (D) 157 (Feb), one of the 'BBC cases', the pharmacist had supplied drugs

without prescription on five occasions. These drugs had included the controlled drugs Diazepam (a benzodiazepine) and Oramorph (an opiate analgesic). Mr Rasool's appeal against removal failed.

The judge, however, then proceeded to set out a number of factors which supported the committee's decision. These included:

- the 'Good decision making' document itself stated that its guidance on sanctions was 'not intended to interfere with the committee's powers to impose whatever sanction it decides in individual cases' and encouraged committee members to 'use their own judgment when deciding on the sanction to impose'
- the guidance stated that the committee should consider removal where the registrant's behaviour 'is fundamentally incompatible with being a registered professional'. In its determination, the committee took this view
- the judge's own assessment that the committee had been plainly entitled to take the view that Mrs Hussain's conduct involved a 'flagrant' and 'extremely serious' breach of the law that went to the heart of the profession's standards of conduct, ethics and performance
- the judge's view that he would not be justified in rejecting the committee's conclusions on insight
- unlike the conduct at issue in *Khan* (conviction for assault on his wife, breach of bail condition not to contact her, criminal damage in the matrimonial home and unlawful removal of his children from the home), Mrs Hussain's misconduct related to her professional performance
- while favouring suspension rather than removal, counsel for the council had in his submissions described the decision as 'very close'

The judge considered that it wasn't open to the court to conclude that the sanction of removal was disproportionate and wrong. Further, he said: 'The fact that a differently-constituted committee might possibly have opted for suspension rather than removal does not mean that this committee's decision was "wrong".'

The court's other two judges were more circumspect in reaching the unanimous decision that the appeal failed. Lord Justice Singh said that: 'Like Peter Jackson LJ, I have been troubled by the possibility that the sanction of removal from the register may have been disproportionate and wrong.'

Peter Jackson LJ expressed the view that:

> 'Making all allowances for its special expertise, the committee overstated matters in describing the misconduct as "extremely serious" and "on the face of it, fundamentally incompatible with continued registration". It was conduct that was serious, and the proper sanction would depend on aggravating and mitigating factors.'

The main aggravating factor was Mrs Hussain's lack of insight. However, he thought that to some extent the seriousness of the lack of insight could be qualified:

> 'The committee was considering a registrant who had shown no insight in the long course of the proceedings, but who had continued to practise without mishap for the better part of three years. As to Mrs Hussain's insight after the findings had been announced, the committee had a limited opportunity to make the more measured assessment that might have followed an adjournment. It was fully entitled to conclude that she had shown no insight whatever up to that moment, but its conclusion that her lack of insight was irredeemable was a strong one.'

However, he was in the end persuaded that the Committee's assessment of insight was one it was entitled to make and that the sanction imposed was properly within its powers.

As an illustration of the importance of insight, even if the registrant only develops it at a very late stage, it is important to note Peter Jackson's concluding remarks:

‘She continued to fight the misconduct finding (a) for over two years from early 2013, when she was first confronted, to September 2015, when the disciplinary proceedings ended, and (b) for another six months until March 2016, when her first appeal was refused. Even 18 months later at the [Court of Appeal] hearing before us, there was no sign of acknowledgment of her misconduct or of insight. Had Mrs Hussain acted differently at a very early stage, the committee would no doubt have taken a different view. Had she done so in the immediate aftermath of the disciplinary hearing, I might have been persuaded that the committee’s approach had been shown to be wrong. But that is not the case.’

David Morris of Serjeants’ Inn has acted for health professionals and organisations in difficulty for many years. He has represented them at disciplinary panel hearings, the tribunals of their regulators, at inquests in the Coroner’s Court, criminal trials in the Crown Court and appeals in the High Court. Whether medical student, senior consultant or hospital trust he deploys the same friendly, relaxed but rigorous approach. He aims to minimise the stress of a lengthy, lonely, career-threatening process and to secure the best possible outcome.

Interviewed by Barbara Bergin.

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