Dr Eric Brew v The General Medical Council

Case No: CO/17580/2013

High Court of Justice Queen's Bench Division Administrative Court

10 September 2014

[2014] EWHC 2927 (Admin)

2014 WL 4636777

Before: His Honour Judge Gosnell (sitting as a Judge of the High Court)

Date: 10 September 2014

Hearing date: 28th August 2014

Representation

Mr Lee Gledhill (instructed by Lester Morrill inc. Davies Gore Lomax Solicitors) for the Appellant.

Mr Simon Phillips QC (instructed by GMC Legal) for the Respondent.

Judgment

His Honour Judge Gosnell:

1 This appeal is brought by the appellant pursuant to section 40 Medical Act 1983 against a sanction of erasure made by the Medical Practitioners Tribunal Service Fitness to Practise Panel (FTPP) on 21st November 2013. The decision was made after a four day hearing where the appellant was represented and gave evidence. The facts of this case are somewhat unusual in that in addition to claiming that the decision to erase him was unjust and disproportionate the appellant also claims that as a consequence of the negligent advice he received from the barrister who appeared for him below (who did not appear on this appeal) the original hearing was procedurally unfair leading to an unjust conclusion.

The Facts

2 The underlying facts concerning the original disciplinary proceedings are mainly agreed. The appellant is a doctor and in 2011 was employed at Leicester Royal Infirmary as an ST4 Trainee in Acute Medicine. This meant he was a qualified doctor in the fourth year of specialist training. He had previously been employed at Kettering General Hospital before February 2011. On 8th June 2011 the appellant received an email from Dr Jonathan Barratt the Head of School for the East Midlands (South) Postgraduate School of Medicine advising him that his e-portfolio containing records of various medical assessments evidencing his experience and training was inadequate. The appellant was told it would be reviewed on 27th June 2011 and if it remained inadequate he would be asked to attend an Annual Review of Competency Progression (ARCP) panel on 1st July 2011.

3 Between 13th and 22nd June 2011 the appellant accepts that he falsified 18 clinical assessment entries on his e-portfolio on four separate occasions giving the impression that the named assessors (mainly supervising consultants) had been involved in the completion of those entries when he now accepts they were not. When he was asked about these entries at the ARCP panel on 1st July 2011 he falsely informed its members that he had taken a week off work to visit the consultants at Kettering General Hospital and had “sat down” with the named assessors who had all been involved in the completion of the entries in relation to his e-portfolio.

The appellant did not correct this false information directly with the ARCP panel that day but went straight to the hospital at Kettering where he sought to meet with the consultants whose assessments he had forged in order to apologise to them. Not surprisingly, one of the consultants contacted his then current employers who referred the appellant to the Respondent's Fitness to Practise Panel in the light of their concerns about the probity of the appellant's conduct. The appellant admitted what he had done and expressed regret.

The hearing before the FTPP

4 The appellant has been permitted by order of Her Honour Judge Coe QC dated 28th April 2014 to rely on fresh evidence in this appeal and has filed a further statement dated 25th March 2014. In his statement he explains that when he realised he was about to face disciplinary proceedings he approached a local solicitor who instructed a local barrister, neither of whom had experience of hearings before the FTPP. He contended that he had always accepted he had been dishonest, both in completing the e-portfolio entries and in lying to the ARCP panel and that shortly before the hearing he had confirmed to his solicitor that he intended to accept all the charges brought against him.

5 On the first morning of the tribunal hearing he met with his barrister who advised him that if he accepted that he had been dishonest then his fitness to practise was automatically impaired and that he would not be able to explain to the panel what had happened. He was therefore advised to deny the third charge which was the allegation that his conduct had been dishonest. He admitted the first two charges which related respectively to the creation of the false entries on the e-portfolio and the giving of false information to the ARCP panel. The hearing proceeded on a contested basis with the appellant giving evidence and being cross-examined. Not surprisingly perhaps, the panel found that his conduct was dishonest in both respects. The panel then went on to find that his fitness to practise was impaired by his dishonesty which they found to be serious. At this point the appellant claims he had a discussion with his barrister in which he questioned the tactical approach which the barrister had recommended and he decided to tell the panel that he accepted he had been dishonest and had realised this as soon as he left the ARCP panel on 1st July 2011. He asserts that by this point in time the panel had formed a negative view of him particularly due to his failure to accept he had been dishonest at an earlier stage in the hearing. Although his barrister continued to represent him and submitted that a short suspension might be a sufficient sanction the panel resolved to erase him from the medical register. After the hearing the barrister recommended an appeal but felt that he may have a conflict of interest and could not personally conduct it.

The Law

6 Counsel for both parties have prepared very helpful skeleton arguments which set out the appropriate legal tests. There was little if any disagreement between them as to the relevant principles. Mr Justice Mostyn has helpfully summarised them in Luthra v General Medical Council [2013] EWHC 240 (Admin) as follows:

> 2. “The appeal is governed by CPR 52.11(3) which provides:
>
> > “The appeal court will allow an appeal where the decision of the lower court was –
> >
> > (a) wrong; or
> >
> > (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court”
>
> 3. I have been given a bundle of authorities but the principles have all been succinctly captured by Laws LJ in the decision of *Raschid v General Medical Council [2007] 1 WLR 1460* .
>
> 4. Taking the reasoning of Laws LJ in combination with CPR 52.11(3) the governing principles are:

i) I can only overturn the decision of the FTPP if I am satisfied that it was either wrong or unjust because of a serious procedural or other irregularity in its proceedings (CPR 52.11(3))

ii) In determining whether the decision was wrong I must pay close regard to the special expertise of the FTPP to make the required judgment (Raschid paras 16, 19).

iii) Equally, I must have in mind that the exercise is centrally concerned with the reputation and standards of the profession, and the protection of the public, rather than the punishment of the doctor (paras 16, 18).

iv) The High Court will correct material errors of fact and of law and it will exercise a judgment, though distinctly and firmly a secondary judgment, as to the application of the principles to the facts of the case (para 20).

v) Where the appeal is against a sanction (as here) my decision must not constitute an exercise in re-sentencing or the substitution of one view of the merits for another (paras 21, 22).

5. In considering factor (iii) I remind myself of the words of Sir Anthony Clarke MR in *General Medical Council v Meadow [2006] EWCA Civ 1390 [2007] 1 QB 462* at para 32:

> "the purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past.""

7 There is very little authority dealing with how to approach an appeal brought on the basis of incompetent representation. Counsel for the appellant relied on the decision of Mr Justice Moses as he then was in R on the application of Aston v Nursing and Midwifery Council [2004] EWHC 2368 (Admin). He first dealt with how the topic was approached by the Court of Appeal Criminal Division and then opined:

> 10. "In the context of part 52, rule 11 , the test is not safety. The appellant need not show that the decision was wrong, but he must show that the decision was unjust. The decision will only be unjust if the incompetence led to irregularities which rendered the process of the trial unfair or the conclusion unsafe.
>
> 11. However, in the case before me both sides agree that the court should not allow the appeal unless the incompetence was of such a degree as to be described as Wednesbury unreasonable. That concept is not easily applied to the question of the incompetence of an advocate, but I take the Vice President's reference to Wednesbury unreasonable to mean that the conduct of the advocate must be such that he or she took such decisions and acted a way in which no reasonable advocate might reasonably have been expected to act.
>
> 12. But that by itself, as I have said, is not enough. It must further be shown that that wholly inadequate conduct did affect the fairness of the process. Only then could the conclusion of the committee be shown to be unjust."

An assessment would appear to be required firstly, whether the advice given was sufficiently unreasonable and if so, whether that advice adversely affected the fairness of the panel hearing and the conclusions that it reached.

The submissions of the parties

8 The appellant's case is neatly summed up in paragraph seven of the Amended Grounds of Appeal which state as follows:

"7. It is asserted that:

i) it was not necessary, taking into account all relevant material considerations, to erase the appellant from the Medical Register;

ii) it was not a proportionate sanction;

iii) there is a want of reasoning as to the Panel's statement that erasure was necessary;

iv) the incorrect advice given to the appellant doctor, by defence counsel at the MPTS hearing affected the overall fairness of the hearing and the disposal of the case;

v) the decision as to sanction was wrong"

9 The appellant contends that the panel's impression and assessment of him was detrimentally affected by the way he had denied the most serious charge relating to dishonesty in that the approach his barrister had taken had prejudiced his best point, that he was wholly regretful and had full insight into the nature of his wrongdoing. If the panel had appreciated from the outset that he was accepting his actions were dishonest they would have accepted he had insight into his behaviour which may have persuaded them that there was no risk of repetition and no risk to the public in the future. The appellant also contends that taking into account the limited number of false entries over a short period of time, coupled with his admissions and insight, a period of suspension would have been the appropriate sanction and that the decision to erase was disproportionate. It was also submitted that the panel gave insufficient weight to the appellant's previous good character and admissions made and under-estimated the insight which the appellant had demonstrated into his past wrongdoing. It was contended that the panel's reasons for preferring to impose the sanction of erasure rather than suspension for up to 12 months with or without a review were inadequately recorded or expressed. The appellant sought to rely on a number of other decisions of the FTPP which, it was contended were comparable with the appellant's case in terms of seriousness, where the sanction imposed had been suspension.

10 The respondent does not necessarily accept that the appellant was given negligent legal advice but, even if he was, submits that a party is not obliged to accept advice which is contrary to his own case. In addition the fact that the appellant was advised to contest the issue of dishonesty does not prevent him giving whatever evidence he wishes to give to the panel at the tribunal hearing. In any event, the respondent contends that by the end of the hearing the appellant had given the evidence he wished to give and his explanation that his earlier decision to contest dishonesty had been made on legal advice. The respondent submits that the panel heard extensive evidence and asked a number of pertinent questions over the four day hearing. They then went into private session and referred to both *Good Medical Practice* and Indicative Sanctions Guidance in reaching a decision to erase which was more than adequately reasoned. The respondent submits that the decision to erase the appellant was open to the panel on the evidence and an appellate court should be slow to interfere with a decision reached by a specialist tribunal on an issue which they are best placed to determine.

Analysis

11 Whilst I accept that the appellant has permission to introduce fresh evidence and has done so by means of a further statement I am somewhat uncomfortable about his assertion that he was advised that he had to dispute the issue of dishonesty in order to be able to explain to the court why he had behaved in the way that he had. In criminal proceedings, where an allegation is made of incompetent or inadequate representation, privilege is normally waived and a statement is obtained from the advocate concerned to prove what advice was actually given to the client. This has not been done in this case save that an email from the barrister concerned has been disclosed in which he recommended an appeal (based upon the fact that he felt the decision was wrong) and that he may have a conflict of interest. Of course another explanation for the decision to dispute dishonesty would be because the appellant did not actually accept he had been dishonest. I have to accept however, that on 21st October 2013 the appellant appears to have instructed his solicitor that he intended to plead guilty to all three charges and that his witness statement contains full admissions to charges one and two and at least an admission of dishonesty in relation to the second charge. I have also reviewed the transcript of the tribunal

hearing and the barrister did appear to make submissions that dishonesty was completely disputed in circumstances where an experienced advocate would know that this submission was virtually hopeless. He also did not withdraw from the case when the appellant said that he had disputed the issue of dishonesty on legal advice. I have not heard any oral evidence in this appeal and in order to deal with it fairly I intend to assume that the appellant's evidence about what he was advised is accurate. This is the only fair way to deal with an issue where the only evidence is in writing and I have no other evidence to gainsay it.

12 If the appellant was advised to dispute the third charge as this would be the only way for evidence of his explanation for his conduct to go before the court this would clearly be negligent advice and *Wednesbury* unreasonable. The only issue would then be whether the consequences of this advice led to the trial being unfairly conducted and the conclusion unjust. The panel clearly had the benefit of hearing from the appellant at the first stage of the hearing (when the charges were considered) as he gave evidence extensively and was cross-examined and gave answers to questions from the panel. He did not refuse to give evidence about any topic or seem to exhibit any problem in answering the questions. He certainly put forward a full explanation dealing with the difficulties he had in accessing the computerised system before March 2011, the fact that the assessments he compiled were based upon actual patients he had treated, and the assessments he wrongly recorded were likely to have accorded with the assessments which the consultants would have given him if asked. The only complaint he can perhaps make is that when he was directly asked whether he had been dishonest in creating the entries on the e-portfolio he denied that he had been. It is fair to say that even at the first stage of the hearing he conceded that he had lied to the ARCP panel which was effectively an admission of dishonesty although not expressed explicitly.

13 Counsel for the appellant took me through much of the evidence which the appellant gave at the first stage of the hearing. He accepted that the appellant had denied being dishonest about creating the false entries but this was due to a misunderstanding on the part of the appellant. At no stage did the appellant deny creating the entries, or that he was wrong to do so. He wanted to reassure the panel that the entries were based on real patients who he had actually treated and that the assessments he had effectively given himself were likely to be identical to the assessments which the consultants would have given him if asked. In that sense he was not dishonest as he was not completely making up assessments which were intended to mark him higher than he deserved, he was merely creating entries that were similar to those he would have obtained if he had gone about it the right way. Counsel described this as the appellant “splitting hairs” but the panel may have taken the view that it reflected a lack of insight on the appellant's part.

14 If this was the only evidence which had been given to the panel I would have accepted the appellant's submission that the incorrect legal advice had irredeemably damaged his case. He did have the opportunity however to put this misunderstanding right when he gave evidence at the third stage of the tribunal hearing (no evidence was given at the second stage when impairment was considered). When the appellant gave evidence at the sanctions stage of the hearing he told the panel that he had suffered sleepless nights for the last couple of days and had not really said what he wanted to say. He accepted the decisions which the panel had already announced on the first two stages and said that he had not acknowledged it in the right manner when he presented himself to them (up to that point). He said he should not have waited to be cross-examined before he admitted dishonesty and should have admitted it from the outset. When the chairman of the panel understandably asked the appellant why, given his recent evidence, the panel had spent a day determining whether he was dishonest as he had disputed the third charge he replied that it was because of legal advice which had been given. He was reminded that the content of the advice was privileged and the panel went into no more detail.

15 The appellant contends that whilst the truth did eventually emerge at the tribunal hearing the appellant's case was already damaged as the panel had at the second stage of the hearing found that the appellant did not yet have full insight into the seriousness of the allegations. The issue is really whether the panel did take into account the reasons why the appellant had disputed dishonesty when it would appear that he had accepted for some time that he had been dishonest and the relevance of that information to the issue of whether he had full or partial insight. The answer to this question can be found in the panel's written decision in the following two passages:

> "You have given additional evidence to the Panel at this stage of the proceedings, in which you stated that you knew that your actions had been dishonest but you did not make that admission prior to today because of the legal advice which you had received….
>
> The Panel considers that, based on your most recent evidence, your insight may be developed to a slightly greater extent than previously thought, but not so fully that it fundamentally alters the very serious concerns which lie at the heart of these matters"

The first passage shows that the panel did record and accept the evidence which the appellant had given about his reluctance to concede dishonesty being based on legal advice. The second passage showed that the panel accepted that it showed more insight than his evidence on the previous three days had suggested.

16 This seems to me to be conclusive evidence that the panel were prepared to accept and take into account the explanation put forward by the appellant about his unwise decision to contest dishonesty and to determine the issue of the appropriate sanction on the basis of the totality of his evidence, not just the evidence given on the first few days. The panel dealt with the difficulty in the fairest way that they could, by admitting and accepting the evidence at the third stage of the hearing and then by recording in their decision that they had taken it into account. The appellant contends that this misled the panel into making an incorrect assessment of the extent to which the appellant had insight into his past behaviour but, in my view, there is no evidence in the panel's written reasons to support this. The issue of whether the panel did accurately assess the extent of the appellant's insight is one that I will return to later in this judgment.

17 The next issue is whether there was a want of reasoning in the panel's decision to impose the sanction of erasure. I questioned whether this could be seriously pursued in the light of the detailed reasons in the decision letter but counsel for the appellant complained that the reasons why suspension with or without a review was not preferred to erasure were not adequately expressed. The extent and nature of the duty to give reasons was authoritatively stated by the *Court of Appeal in English v Emery Riembold and Strick Limited [2002] 1 WLR 2409* . There are two essential requirements. It must be apparent to the parties why one has won and the other has lost and the judgment must enable an appellate court to understand why the tribunal reached the decision that it did. Both of these requirements are adequately met in the panel's written decision.

18 The panel reminded itself that it was applying the principle of proportionality, by balancing the doctor's interest with the public interest. It then went through each of the possible sanctions, starting with the least serious and decided whether such a sanction was appropriate. Having referred to the Indicative Sanctions Guidance the panel recorded that the appellant's actions were fundamentally dishonest and he did not possess full insight. The panel recorded in the light of those findings no less a sanction than suspension would be appropriate and that the threshold between suspension and erasure required very careful consideration. The panel referred to the doctor's personal mitigation and his clinical competence but felt this did not detract substantially from the gravity of his actions and the serious consequences. The importance of public confidence in the doctor's training programme and the integrity of training records was emphasised. The panel referred to aggravating features, such as the fact that the records were falsified on four separate occasions. The panel also referred to the fact that when challenged about the integrity of these entries, the appellant fabricated an account of taking time off work to meet with the named consultants. The panel also found that the grades submitted were inflated beyond simply meeting expectations to exceeding them in many aspects of the assessments. The panel felt this attempt to cover up his wrongdoing was a particularly serious departure from the standards expected and fundamentally incompatible with continued registration. In my view, the decision was adequately reasoned and expressed. This only leaves whether the decision was justified on the evidence before the panel.

19 One of the major complaints made by the appellant is that the panel either misinterpreted the evidence about whether he had insight about his past behaviour or gave the positive evidence about his developing insight insufficient weight. This would not be determinative of the decision to impose a sanction of erasure rather than suspension but is clearly a relevant factor to weigh in the balance. At the second stage of the hearing, before hearing of the appellant's change of approach, the panel found that in failing to accept that his wrongdoing was dishonest and in

concentrating on the technical difficulties which triggered this episode, he had demonstrated a lack of insight which gave rise to concerns of repetition. At the sanction stage of the hearing, having heard the appellant's explanation for his failure to admit dishonesty the panel accepted that his insight may be developed to a slightly greater extent than previously thought. It referred to the "absence of full insight". The question arises whether this was a finding the panel were entitled to reach on the evidence before them.

20 The appellant contends that from the moment he left the ARCP panel meeting he realised he had done wrong and took steps to remediate his actions, by apologising to the consultants concerned, and developing insight by ensuring his records were properly recorded and kept up to date. It does however somewhat beg the question why he did not realise he had done wrong as he was creating the forged entries. His case as put at the appeal was that he had always accepted dishonesty and would have admitted it at the disciplinary hearing, were it not for the misguided advice he had received. The panel clearly did not accept this entirely and felt that his insight was not full. It is therefore necessary to examine the material they had before them and decide whether it was a finding which was open to them on the evidence.

21 Although the appellant is entitled to credit for going to see the consultants in Kettering and trying to apologise to them, it is somewhat odd that he did not speak to his supervising educational clinician at Leicester to admit he had falsified the entries on the e-portfolio and lied to the ARCP panel. He did admit this when he was challenged by Dr. Boyle after she had been informed of his visit to Kettering and the reasons why but it is fair to say that his approach to the problem was unusual. In support of his claim to developing insight the appellant relied on the contents of his reflective practice log dated 29th November 2011 which read as follows:

> "I made an error which could easily have been prevented. I look back and ask myself the question why did I allow it to happen. I have always had the support of my Consultant supervisors and should have made any difficulties I faced clear to them. I failed to put them in the picture and took it upon myself to deal with it. It is an error that I wish I could reverse. This is something that will never happen again"

Whilst this entry shows that he has reflected on the episode and recognised his mistake it does, in my view, tend to minimise the importance of what occurred. To intentionally falsify training records and then lie to cover it up afterwards would normally be described as more than an error.

22 The appellant made two statements as part of the disciplinary process. The first was his initial response dated 25th April 2013. In this statement he related his technical difficulties in accessing the system and then says "for inexplicable reasons" he decided to enter the assessments using the names of doctors who had actually assessed him and on the basis of real patients who had treated. He admitted to "inappropriate conduct" in making these entries and a "serious error of judgment" on 1st July 2011. I have to say again, however, that this is less than a full admission.

23 A further more detailed witness statement was prepared for the disciplinary hearing on 18th November 2013. The first thirteen paragraphs of the statement dealt with introductory matters but mainly the complexities and difficulties the appellant experienced with the e-portfolio system. He described making the entries due to his concerns about the forthcoming ARCP panel but did not admit they were made dishonestly. He made the same points about them being based on actual cases and the grades not being inflated. He did accept that he panicked at the ARCP panel meeting and "ended up lying about seeing the consultants". This is how things stood before the hearing started. It is fair to say that there was no explicit admission of dishonesty in any of the documents although the last witness statement confirmed he lied at the ARCP panel meeting which could be termed an implied admission.

24 I fully accept that the misguided decision to contest the issue of dishonesty did not give the panel a good impression of the appellant particularly when he effectively admitted dishonesty at the ARCP panel in cross-examination. He did however seek to right that poor impression by explaining his motivation at the sanction stage which the panel appear to have accepted. The question is whether there was anything about his evidence other than the refusal to formally admit dishonesty which could have supported the panel's decision that he had less than full insight into his wrongdoing. It is certainly the case that during his evidence whether in cross-examination by counsel for the respondent or in answer to questions by panel members the appellant concentrated on his technical difficulties in accessing the system as some sort of

justification for his actions. He also relied very heavily on the fact that his assessments were based on real cases and that the grades he fictionally allocated were not beyond those he would have achieved anyway. It is clear the panel were not impressed with these arguments. The panel recorded as follows:

> "members of the public would expect a doctor to resist that temptation and identify other ways of dealing with technical difficulties, no matter how frustrating"
>
> "There is evidence that before the Panel that you not only created false records but that the content of the fabricated records might have presented a more positive picture than would have been the case if the assessors had completed them"

25 In addition, although it is not reflected in the decision, the panel heard evidence which showed that the case histories may well not have been recorded as accurately as the appellant contended. There was one assessment where the appellant was unable to say whether the patient was an 88 year old lady or an 86 year old man and he had to admit he had filled in the e-portfolio on the basis of the sorts of conversations he would have had rather than an accurate recollection of a conversation he actually had. He was then asked about a particular entry which contained the results of an ECG test when no contemporaneous note had been made. He had to accept that he was "filling in the gaps". In my view, the panel were entitled to conclude that this note was totally fabricated.

26 Even ignoring the fact that the appellant did not admit dishonesty at the start of the hearing as he should, there were a number of features of the evidence that the panel were entitled to take into account in concluding that the appellant had less than full insight into his wrongdoing: he had not admitted his full culpability in his reflective log or in either of his witness statements; he had sought to blame technical difficulties with accessing the website when other solutions must have been available; he sought to suggest that all the entries were based on real cases when the evidence showed that some of them were not; and he claimed he had not inflated his grades when the evidence showed that he probably had in some respects. In addition the panel were entitled to take into account his evidence as a whole and his demeanour when giving evidence, which this court cannot have the benefit of. In my judgment, there was more than adequate material available for the panel to conclude he had less than full insight into the seriousness of his actions.

27 There is no real dispute about the remainder of the panel's factual findings and the real issue is whether the panel were wrong to impose the sanction of erasure because that was too severe or was a disproportionate sanction. The panel considered the guidance set out in the document " Indicative Sanctions Guidance for the Fitness to Practise Panel" in particular paragraphs 69-76 and 82. Relevant entries are as follows:

> 69 …However a period of suspension will be appropriate for conduct that falls short of being fundamentally incompatible with continued registration and for which erasure is more likely to be the appropriate response (namely conduct so serious that the panel considers that the doctor should not practice again either for public safety reasons or in order to protect the reputation of the profession)
>
> 75. This sanction may therefore be appropriate when some or all of the following factors are present (this list is not exhaustive):
>
> a) a serious breach of Good Medical Practice where the misconduct is not fundamentally incompatible with continued registration and where therefore complete removal from the register would not be in the public interest, but which is so serious that any sanction lower than suspension would not be sufficient to serve the need to protect the public interest
>
> f) no evidence of repetition of similar behaviour since incident
>
> g) panel is satisfied doctor has insight and does not pose a significant risk of repeating behaviour.
>
> 82. Erasure may well be appropriate when the behaviour involves any of the following

> factors (this list is not exhaustive)
>
> a) particularly serious departure from the principles set out in Good Medical Practice i.e. behaviour fundamentally incompatible with being a doctor
>
> h) dishonesty, especially where persistent and/ or covered up(see further guidance at paragraphs 105-111 below)
>
> 111. Dishonesty, especially where persistent and / or covered up, is likely to result in erasure."

28 It is clear from this guidance that the decision whether to impose a sanction of erasure or suspension in a case such as this is a matter of judgment for the panel depending on their view of the seriousness of the doctor's conduct. It is really a question whether the misconduct is such as to be fundamentally incompatible with continuing registration. This is a value judgment to be made in every case depending on the facts of the individual case before the panel. For this reason I do not find the comparable cases before the FTPP produced by the Appellant and the authority produced by the Respondent of Uddin v GMC [2012] EWHC 1763 (Admin) particularly helpful. None of the factual examples produced by the appellant were like the present case and although the facts in Uddin were similar, there were sufficient factual differences for a panel to be able to say that it should make up its own mind on the facts of the case before it using the general principles outlined in the Indicative Sanctions document.

29 I am conscious that the experience of the panel in this case in deciding what is the appropriate sanction for misconduct such as this by a doctor exceeds my own. Their decision was taken to uphold the standards of training in the medical profession and protect the reputation of the profession before the public. It seems to me that I should give due deference to their particular expertise in this respect. There have been a number of successful appeals to the High Court against decisions of FTPP in the past but these are often decided on the basis that the panel has reached a finding of fact that the evidence did not truly support. This is a decision which a Judge is well-qualified to give. Where, however, the issue is what the appropriate sanction should be for misconduct based on facts which the panel were entitled to find on the evidence the appeal court is likely to give appropriate deference to the panel's views whilst retaining an overview and an ability to overturn the decision if it is shown to be wrong.

30 I suspect that this decision was finely balanced. On the one hand the doctor was a man of good character with an otherwise exemplary clinical record. On the other hand, these were serious allegations of professional misconduct and the panel were well conscious of the need to uphold the robust standards of medical training and protect the reputation of the profession. My reading of the transcript of the tribunal hearing revealed that the panel had gone to great lengths to investigate this case thoroughly. They asked a number of telling questions which were particularly well-directed to the important issues in this case and I was impressed with the thoroughness with which they approached their task. They gave the appellant every opportunity to impress them but, as I have found, their decision that he did not show full insight into his wrongdoing cannot be impugned. It is possible to argue that this case could qualify on its facts for either suspension or erasure applying the considerations set out in the Indicative Sanctions document. Which side of the line it falls is a matter of judgment for the tribunal concerned having considered all the facts and their experience of applying professional standards to those facts.

31 The fact that this decision was, in my view, finely balanced makes it much more difficult for the appeal to succeed. Where a case falls truly on the cusp of two alternative results it is very difficult for an appellate court to say that the original tribunal was wrong to reach either decision. In my view the decision to erase the appellant from the Medical Register was one which the panel was entitled to reach on the evidence before them even if another panel might possibly have reached a different view. For myself I cannot find that the decision was wrong and so I am bound to dismiss the appeal although not without expressing some personal sympathy for Dr Brew.


Westlaw UK