Nursing and Midwifery Council v Eunice Ogbonna

Case No: C1/2010/0407 and (B)

Court of Appeal (Civil Division)

5 October 2010

[2010] EWCA Civ 1216

2010 WL 3807987

Before: Lord Justice Pill Lord Justice Rimer and Lady Justice Black DBE

Date: Tuesday, 5 October 2010

On Appeal from the High Court of Justice Queen's Bench Division, Administrative Court

(Mrs Justice Nicola Davies)

[2010] EWHC 272 ((Admin)

Representation

Ms Clare Strickland (instructed by Nursing and Midwifery Council) appeared on behalf of the Appellant.

Mr Lee Gledhill (instructed by Davies Gore Lomax) appeared on behalf of the Respondent.

Judgment

Lord Justice Rimer:

1 This appeal is a second appeal by the Nursing and Midwifery Council (“the NMC”). It is against an order of Nicola Davies J, dated 18 February 2010, made in the Administrative Court and allowing the appeal of the respondent, Eunice Ogbonna, a registered midwife, against a decision of the NMC's Conduct and Competence Committee (“the CCC”) striking Mrs Ogbonna off the Register of Midwives. The decision of the CCC was made on 24 June 2009, being the last day of a three-day disciplinary proceeding against Mrs Ogbonna brought by the NMC. The decision was thereafter formally confirmed in a letter of 25 June 2009 that the CCC sent to Mrs Ogbonna, repeating the reasons for its decision.

2 At the time relevant to the charges against her, Mrs Ogbonna was employed as an F Grade midwife by Homerton University Trust Hospital plc. There were three charges. Charge 1 raised allegations falling under four heads about events on 25 April 2005, when Mrs Ogbonna is said to have unjustifiably left the delivery suite. Charge 2 related to alleged misconduct on 26 April 2005 and raised seven heads of criticism in relation to the delivery of the baby of Patient A. Charge 3 alleged misconduct on the same day under three heads, relating to the alleged failure of Mrs Ogbonna in relation to the handing over of Patient A's care to another midwife.

3 The evidence against Mrs Ogbonna under Charge 1 was centrally dependent upon the evidence of Betty Pilgrim, the team leader. That evidence was adduced before the CCC in the shape of a written statement from Ms Pilgrim, in the face of objection by Mrs Ogbonna asserting that it was unfair for it to be admitted since she had no opportunity to cross-examine Ms Pilgrim. The CCC nevertheless admitted the statement and found Charge 1 proved. They also found Charges 2 and 3 proved. Ms Pilgrim's evidence was not relevant to Charge 2; and, although it

was relevant to one limb of Charge 3, the CCC does not on the face of its reasons appear to have placed reliance upon it in arriving at its finding that Charge 3 was proved.

4 The judge on the appeal concluded that the admission of Ms Pilgrim's evidence under Charge 1 was unfair and that the CCC's decision on that charge was in consequence unsustainable. She further held that the CCC had plainly taken account of its Charge 1 finding, as well as its Charge 2 and 3 findings, in further finding, as it did, that Mrs Ogbonna was guilty of misconduct and that her fitness to practise was impaired. The judge held that the CCC's error in relation to Charge 1 tainted its findings of misconduct and impairment and therefore its overall decision to strike Mrs Ogbonna off the register. She accordingly allowed the appeal. There was some suggestion in the papers that she might have intended to remit the matter to the CCC (either to the same or a different panel) to reconsider the charges against Mrs Ogbonna, but I can detect nothing in her judgment or order suggesting that that was her intention. The sense of the order, as I understand counsel to agree, appears to me simply to be to the effect that the CCC's decision was quashed.

5 The NMC sought permission for a second appeal against: (a) the judge's decision as to the fairness of the admission by the CCC of the hearsay evidence of Ms Pilgrim in relation to Charge 1; and (b) her failure to consider whether the proven Charges 2 and 3 could themselves support the findings of misconduct and impairment that the CCC had made and the striking-off sanction that it imposed. Sir Richard Buxton, on the papers on 25 March 2010, refused permission for a second appeal on ground (a) but granted permission on ground (b).

6 On 29 July 2010, well out of time, the NMC informed the court that it wished to renew its application for permission in respect of ground (a). Its point was that it was a regulatory body, with a statutory duty to protect the public, and it had become apparent to it that Nicola Davies J's judgment was being treated, or deployed, as laying down a general principle as to the requirements of fairness in the present context which the NMC regarded as conveying the wrong message. It therefore sought permission to renew out of time its application for permission under ground (a), and that application has been argued before us as well as the NMC's appeal under ground (b).

7 Mrs Ogbonna appeared in person before the CCC, assisted by Pamela Okenwas, who I presume was there in the capacity of a McKenzie friend. The NMC's case was presented by Ms Joanna Dirmikis, a barrister in the employment of the NMC. Mrs Ogbonna again appeared in person on her appeal before Nicola Davies J and Ms Clare Strickland, a barrister also employed by the NMC, represented the NMC, as she does before us today. Mrs Ogbonna now also has the benefit of counsel, Mr Lee Gledhill.

The Legal Structure.

8 The NMC was established by the Nursing and Midwifery Order 2001 , whose principal function is, by regulation 3(2), to establish from time to time standards of education, training, conduct and performance for nurses and midwives and to ensure the maintenance of those standards. Regulation 3(4) provides that the main objective of the NMC in exercising its functions is to safeguard the health and well-being of persons using or needing the services of registrants. Regulation 3(5) provides that in exercising its functions the NMC shall have proper regard to the interests of all registrants and prospective registrants and, in short, of those using or needing the services of registrants in the United Kingdom. Regulation 3(9) provides for the establishment of four NMC committees, of which one is the CCC, and each of which has the functions conferred on it by the 2001 order.

9 The CCC is the disciplinary body charged with hearing complaints against registrants including (as in this case) allegations that a registrant's fitness to practise is impaired. Relevant to a consideration of such issues is the NMC Code of Professional Conduct , which sets standards to be adhered to by registrants as to their professional conduct, performance and ethics. The NMC gave notice to Mrs Ogbonna on 13 March 2006 that Homerton had alleged that her fitness to practise was impaired.

10 The CCC's proceedings were and are governed by the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (SI 2004/1761) , in particular Parts 4, 5 and 6 . There is no need for present purposes to refer to those rules, apart only from rule 31 , headed “Evidence”, which is at the centre of the finding of unfairness the judge made in relation to the hearing of Charge 1.

The only material sub-paragraph is rule 31(1) , which provides:

> "Upon receiving the advice of the legal assessor, and subject only to the requirements of relevance and fairness, a Practice Committee considering an allegation may admit oral, documentary or other evidence, whether or not such evidence would be admissible in civil proceedings (in the appropriate Court in that part of the United Kingdom in which the hearing takes place)"

Charge 1

11 Charge 1 levelled allegations against Mrs Ogbonna as follows:

> "On 25 April 2005 [you] left the Delivery Suite in order to watch a training DVD when you:
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> (a) Were involved in providing care to a client at the time of the training;
>
> (b) Knew or ought to have known that the delivery suite was busy;
>
> (c) Ignored the direction of Betty Ann Pilgrim, Team Leader, who told you not to leave the suite as the ward was busy;
>
> (d) Replied to Betty Ann Pilgrim words to the effect that you did not care if the ward was busy, you were still going to go."

12 Ms Pilgrim's evidence was crucial for making good that charge since, as the CCC observed in its reasons for its decision to admit her hearsay statement, she was the only witness to certain of the Charge 1 allegations. She made a witness statement relating to them on 29 April 2008, which was some three years after the events of 25 April 2005, and dealt with the events of that day in paragraph 7. She did, however, attach to it a report of those events that she had sent to Agneta Bridges, Head of Midwifery at Homerton, on 23 May 2005 in which she covered the events of 25 April 2005 in four paragraphs.

13 On 6 February 2009 Ms Dirmikis wrote to Mrs Ogbonna on behalf of the NMC about the forthcoming disciplinary hearing, which was at that stage due to be heard on 18 February 2009, explaining in paragraph (d) that the NMC would seek to rely on Ms Pilgrim's 2008 statement in her absence by reading it out. The reason for this was said to be that:

> "… all reasonable efforts are being made to contact her and we have been told by her aunt that she resides in the Caribbean so would be unable to attend the hearing. However, you can (i) seek to argue that the statement should not be admitted or (ii) if it is admitted, seek to argue that it should not [sic: the "not" was a mistake] be given less weight than the other evidence in the trial because she is not subject to cross-examination."

14 Mrs Ogbonna replied to that letter on 10 February 2009 asserting that, as Ms Pilgrim was not to be present at the hearing, her statement should not be admitted. The implicit point was that Ms Pilgrim's absence would mean that she could not be cross-examined on her statement; and paragraph 2 of Mrs Ogbonna's own later statement on 15 April 2009 showed that what Ms Pilgrim had asserted about the events of 25 April 2005 was fundamentally in dispute.

15 There was an important development a few days later, by when the NMC had established an email address for Ms Pilgrim in Trinidad. On 16 February 2009 Mr Styles, an NMC case officer, emailed her as follows:

> "Dear Ms Pilgrim

> As you know the above case [that relating to Mrs Ogbonna] is listed to start this Wednesday. Mrs Ogbonna is objecting to us applying to read your statement and our application to read your statement on the grounds of you living in the Caribbean will be strengthened if we have the following information:
>
> a) When did you move to the Caribbean? And where are you living — I need the exact address.
>
> a) Is this your permanent residence and how long have you been here for?"

16 Ms Pilgrim replied to Mr Styles by an email of 17 February 2009 in the following terms:

> "I am so sorry for not responding sooner, but I have only just had the time to check my email after 3 weeks.
>
> I am now residing in Trinidad and Tobago. My permanent address (until my husband's contract is finished) is [and she gave her address in Trinidad].
>
> I moved to the Caribbean in September of 2007.
>
> I hope this clarifies any confusion. I can be contacted on [a given telephone number]. We are 5 hours behind UK"

17 In the event, the hearing fixed for 18 February 2009 was adjourned and it instead took place over three days commencing on 22 June 2009. On the first day there arose a debate over the NMC's claim to admit Ms Pilgrim's statement, which Mrs Ogbonna opposed. The NMC's ground for having the statement admitted was that Ms Pilgrim did not live in the UK any more and Ms Dirmikis produced a copy of Ms Pilgrim's email of 17 February 2009. Mrs Ogbonna objected to the admission of the statement, asserting that the NMC "did not make any plan for her [Ms Pilgrim] to attend" and saying that if she was not present her statement should not be read because, in short, Mrs Ogbonna would be prejudiced by the inability to cross-examine her.

18 At page 91 of the transcript of the first day, and after taking the legal advice of the legal assessor, the CCC gave its decision on that issue. It started its reasons on the wrong foot by saying that it had seen a February 2009 email "which explains she is unable to attend the hearing because she no longer lives in the United Kingdom". Ms Pilgrim had not, however, in fact said that. Having, as the judge held, so misdirected itself the CCC then concluded correctly that Ms Pilgrim's evidence was "relevant" (which is one of the key criteria referred to in rule 31(1)), pointing out that she "is the only witness to some of the allegations set out in the charges and is, in addition, able to give evidence about the other issues". Her evidence was of course central to Charge 1.

19 The CCC then said, also correctly, that the key issue was one of "fairness" (which is the other key criterion referred to in 31(1)). They recognised the prejudice to Mrs Ogbonna if the evidence were to be admitted without her having the opportunity to cross-examine Ms Pilgrim, but they reminded themselves that it would be for them to decide what weight to attach to the statement, "particularly where it is disputed by the registrant". They also noted that it would be prejudicial to the NMC to exclude the evidence, "particularly when Ms Pilgrim is the only witness to some of the matters set out in the charges". They therefore concluded that, on balance, and weighing the prejudice that each party would suffer by a decision adverse to her or it, they ought to admit the statement whilst reminding themselves that they might later need to treat it with caution.

20 The judge pointed out that Mrs Ogbonna's assertion that the NMC had made no plan to secure the attendance of Ms Pilgrim was not in dispute in the hearing before the CCC; and before the judge it became clear that the NMC had made no efforts to secure her attendance either in person or by a video link. As to the latter point, the judge was told, to her surprise, that video link facilities were not available and were not used at CCC hearings. The judge was further

told that the reason why no efforts were made to secure Ms Pilgrim's presence was because Charge 1 was not viewed as the important charge. The NMC therefore took the risk that it might not be permitted to adduce Ms Pilgrim's evidence, but would in that event be content to rely on Charges 2 and 3, which it did view as the important ones. The judge accepted that Ms Pilgrim was a witness of critical importance to Charge 1 and noted also that not only was her evidence disputed by Mrs Ogbonna but that the NMC accepted that there had been a difficult working relationship between the two women, as was apparent from their respective witness statements in the case.

21 The judge pointed out that the admissibility of evidence under rule 31(1) is governed by the two considerations of relevance and fairness and accepted that there was no issue that Ms Pilgrim's evidence was relevant because "the evidence of the sole witness of fact was critical". She continued as follows in her judgment:

> "19 … That fact together with the evidence of bad feeling between the two women meant that every effort should have been made to secure Ms Pilgrim's attendance. Fairness required that the appellant was entitled to test the evidence of Ms Pilgrim by way of cross-examination unless good and cogent reasons could be given for non-attendance. It is difficult to see what those reasons could be, given that her attendance had never been sought.
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> 20. The 'pragmatic' approach adopted by the respondents included little by way of consideration and fairness to the appellant. If a charge was not regarded as sufficiently important to warrant the attendance of the sole witness of fact, the fair course was not to proceed with that charge. This is particularly so given the clear evidence of ill feeling which existed between Ms Pilgrim and the appellant.
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> 21. I accept the point made in the appeal that in stating that Ms Pilgrim was "unable to attend this hearing", the panel misdirected itself. It did so having been told by the applicant that the NMC did not make any plan for Ms Pilgrim to attend, a point it failed to address. This one example illustrates the difficulty of the unrepresented practitioner. The appellant had never before been involved in proceedings of this sort. She was reliant upon those bringing the case for proper disclosure, in particular, the trail of letters or emails which would have demonstrated the inactivity on the part of the respondent.
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> 22. A further aspect relating to the lack of representation of the appellant, which concerns the court, is the fact that in paragraphs 5 and 6 of the statement of Ms Pilgrim, which was read to the Panel, are details of other incidents alleged by her against the appellant. They were irrelevant to the Heads of Charge and are prejudicial to the appellant. It is the opinion of the court that those who conducted this case or even the Legal Assessor should have sought the redaction of the irrelevant and prejudicial paragraphs from the statement before it was read to the Panel. That the respondent's representative was alive to the process of redaction is borne out by the fact that at her request paragraphs were redacted from the appellant's statement."

22 That conclusion by the judge is criticised as allegedly establishing some general principle relating to the admission of hearsay statements under rule 31(1) that will in practice prejudice the NMC's apparent notion that it ought to be entitled to have hearsay statements admitted under rule 31(1) almost as a matter of course, on the basis that it will always then be open to the CCC to attach such weight to the statement as it thinks fit. Ms Strickland did not put the NMC's case quite as high as saying that, under rule 31(1) , hearsay statements could and should in fact be admitted as a matter of course, but she at least came close to it. Her main point was that the criterion of fairness to which rule 31(1) refers can be fully and satisfactorily met by the consideration that it will always be open to a tribunal, having admitted a statement, then to make a careful assessment of the weight that it should attach to it, which is what she said the CCC did in the present case.

23 That submission appears to me to overlook the point that the criterion of fairness referred to in 31(1) is relevant to whether a statement should be admitted at all: the rule expressly requires decisions as to the admission or exclusion of a hearsay statement to be governed by considerations, inter alia, of fairness. In that context, the NMC should perhaps be reminded that it

was seeking to adduce Ms Pilgrim's statement as the sole evidence supporting the material parts of Charge 1 when it knew that that evidence was roundly disputed and could not be tested by cross-examination. It was, moreover, seeking so to adduce it in support of a case that it was promoting, whose outcome could be (as in the event it was) the wrecking of Mrs Ogbonna's career as a midwife, a career which had lasted over 20 years. I should have thought it was obvious that, in the circumstances, fairness to Mrs Ogbonna demanded that in principle the statement ought only to be admitted if she had the opportunity of cross-examining Ms Pilgrim upon it.

24 If the pursuit of Charge 1 against Mrs Ogbonna was regarded as important, it should have been obvious to the NMC that it could and should have sought to make arrangements to enable such cross-examination to take place — either by flying Ms Pilgrim to the UK at its expense, or else by setting up a video link. Mrs Ogbonna made the point to the CCC to the effect that the NMC had given no thought to anything like that, a point that the CCC appears to have ignored, proceeding instead on the groundless, and mistaken, assumption that Ms Pilgrim had said that she was unable to come to the United Kingdom. If, of course, despite reasonable efforts, the NMC could not have arranged for Ms Pilgrim to be available for cross-examination, then the case for admitting her hearsay statement might well have been strong. But the NMC made no such efforts at all.

25 What the judge did in her judgment was what the CCC failed to do, namely to consider and assess the fairness, in the particular circumstances she described, of admitting the witness's statement at all. She concluded, for the reasons she gave, that its admission was unfair. As I interpret her judgment, her reasoning was focused on the particular facts of the case and did not purport to lay down any more general principle than the need for a proper consideration to be given to the criterion of fairness when the question of the admission of a hearsay statement under rule 31 arises. When refusing permission to appeal on this ground, Sir Richard Buxton said:

> “Here the judge laid down no general rule, and certainly not a new rule, but examined the issue of fairness in the context of the particular facts, including the efforts made to secure the attendance of a witness and the particular implications, including the previous ill-feeling between her and the appellant, of her unavailability for cross-examination. Those were essentially matters for the judge, and she did not stray into a more general operation of laying down rules.”

26 I would respectfully agree with that. The resolution of the “fairness” arising under rule 31(1) will necessarily be fact-sensitive, and all that the judge decided in this case was that the CCC had misdirected itself on that issue. I would respectfully agree with the judge's disposal of that part of the appeal before her. At the conclusion of Ms Strickland's submissions on this point, the court informed her that it refused to re-open Sir Richard's refusal of permission. These are my reasons for subscribing to that refusal. The consequence of that is that, whatever is left of the CCC's decision, its findings on Charge 1 are quashed, and Ms Strickland recognised that that charge could not be re-opened against Mrs Ogbonna.

27 That leaves the second ground of appeal, on which Sir Richard did give permission. I propose to say relatively little about this. I agree with the judge that the CCC took account of its Charge 1 findings as well as its Charge 2 and 3 findings when making its consequential findings on misconduct, fitness to practise and the appropriate sanction. If, as I would hold, also in agreement with the judge, the Charge 1 finding was arrived at unfairly and should be quashed, there is a logical argument for the conclusion that the CCC's findings on these three consequential matters, including as to the appropriate sanction, were fatally tainted. There remains, however, the possibility, as Sir Richard recognised, that the findings by the CCC on the issues arising under Charges 2 and 3 (particularly Charge 2) may by themselves justify the sanction that the CCC imposed on Mrs Ogbonna.

28 Ms Strickland advanced cogent submissions to us to the effect that they did. She pointed out, correctly I consider, that the Charge 2 allegations were probably the most serious ones levelled against Mrs Ogbonna, and she demonstrated to us that, in giving its reasons for making the findings of fact that it did on both the Charge 2 and the Charge 3 allegations, the CCC appears to have placed no reliance on the evidence of Ms Pilgrim. Thus, she said, there was no question of

those findings having been tainted with the effects of the error in relation to the admission of that evidence. She also submitted that, for the reasons that the CCC gave, the sanction of striking off was rationally the only one available to it and that we should uphold the imposing of that sanction.

29 Mr Gledhill, however, in his submissions urged that this court cannot be satisfied that the CCC's acceptance of Ms Pilgrim's evidence did not have an effect on its assessment of Mrs Ogbonna's credibility also in relation to Charges 2 and 3, even though the CCC did not say in terms that they had been so influenced by Ms Pilgrim's evidence. Moreover, he was able to point to passages in the oral evidence where the CCC appeared clearly to be paying regard to what Ms Pilgrim had said in her statement when it was investigating the fact relevant to Charges 2 and 3.

30 I would accept Mr Gledhill's submission that, putting it at its lowest, there must be a real risk that the CCC factored into its assessment Mrs Ogbonna's credibility in relation to Charges 2 and 3 the fact that it preferred Ms Pilgrim's evidence to hers. On that footing I would accept that the CCC's findings on the primary facts in issue under Charges 2 and 3 may be unsafe and, in consequence, so also may be its findings as to misconduct, fitness to practise and as to the appropriate sanction.

31 It follows that I would not be prepared to accept Ms Strickland's submissions as to the disposition of the ground of appeal for which Sir Richard Buxton gave permission to appeal. I consider that the fair disposal of that ground of appeal is to allow the appeal against the judge's order and to make orders (i) quashing the decision of the CCC; and (ii) remitting the trial of Charges 2 and 3 alone for a re-hearing afresh before a differently constituted panel of the CCC. That is the order that I would make.

Lady Justice Black:

I agree.

Lord Justice Pill:

32 I also agree. Rule 31 of the Nursing and Midwifery Council (Fitness to Practice) Rules 2004 imposes a requirement of “fairness” on a Practice Committee. I would seek to underline my Lord's conclusion that fairness in this context includes the conduct of the parties in their approach to producing evidence. The judge was entitled to take into account that the respondents had, as the judge put it, “failed to make any effort to secure the attendance of a critical witness, Ms Pilgrim”. Fairness does not relate only to the approach to evidence which it had already been decided to admit. I would allow the appeal on the basis indicated by Rimer LJ.

Order: Appeal allowed