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IN THE HIGH COURT OF JUSTICE DIVISION ADMINISTRATIVE

CO/1585/2018 QUEEN'S BENCH COURT

**[2018] EWHC 3512 (Admin)**

Royal Courts of Justice Thursday, 8 November 2018

Before:

MRS JUSTICE LAMBERT

B E T W E E N :

GENERAL MEDICAL COUNCIL — Appellant

- and -

DR XAVIER MMONO — Respondent

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Hearing Dates: 31 October 2018 and 8 November 2018

MS JENNI RICHARDS QC (instructed by GMC Legal) appeared on behalf of the Appellant

THE RESPONDENT was not present and not represented

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**J U D G M E N T**

MRS JUSTICE LAMBERT:

1 This is an appeal by the General Medical Council ("the GMC") under s.40A of the Medical Act 1983 from the decision of the Medical Practitioners Tribunal ("the Tribunal") of 23 March 2018 suspending Dr Mmono's registration for a period of 12 months. The basis of the appeal is that the GMC considers that the sanction imposed by the Tribunal is not sufficient for the protection of the public.

**Background**

2 Dr Mmono graduated from Manchester University in 1988. Following house jobs, he went into private practice undertaking mainly "aesthetic work," initially in London but, from around 2010, from his clinic in Manchester. His aesthetic work included what he described in his evidence to the Tribunal as "*a milder form of plastic surgery, a milder form of dermatology all mixed together, mainly done with laser but also with creams and other things.*" A proportion of his work involved gynaecological procedures. His patients were mainly self-referrals, that is, "walk in" patients who had not been referred via a general practitioner.

3 On 24 October 2015 a female patient ("Patient 1") made a complaint against Dr Mmono to the GMC and in consequence Dr Mmono was required to attend a hearing before the Interim Orders Tribunal ("IOT") on 16 November 2015 when a raft of interim conditions was imposed on his registration. So far as material, the conditions included the following: that except in life-threatening emergencies he should not carry out any intimate examination of either male or female patients without a chaperone being present; he should keep a log detailing every case where an intimate examination had been carried out; the log should be signed by the chaperone; and he should keep a log detailing every case in which he carried out an intimate examination of either a male or female patient in life-threatening circumstances without a chaperone being present.

4 Patient 1's complaint was considered by the Tribunal between 24 October and 2 November
2016 and led to the imposition of a period of suspension from the Register of four months. The particular facts giving rise to Patient 1's complaint are not relevant to this appeal. However, during the course of the hearing, Dr Mmono handed up to the Tribunal his chaperone log which he had maintained in purported compliance with the interim order of 16 November 2015. This comprised a bundle of 54 documents, two of which concerned a further female patient ("Patient 2"). The first document (dated 15 October 2016) related to his examination of Patient 2 for the purposes of a planned labiaplasty procedure; the other (dated 18 October 2016) related to the labioplasty/hood reduction procedure which was performed on that day. Both of those documents had apparently been signed by a chaperone, indicating that the chaperone was present during the examination/procedure. No document was provided in respect of a further consultation with Patient 2, which had taken place part way through the Tribunal hearing, on 26 October 2016.

5 On 22 November 2016, Patient 2 made a complaint against Dr Mmono to the General Medical Council. On 24 March 2017, Dr Mmono attended the IOT in connection with that complaint. During the course of that hearing, and in response to questions from the Panel, he informed the Panel that his consultation with Patient 2 on 26 October 2016 had "*appeared on my log as a non-chaperoned person.*"

**The Determination of the 2018 Tribunal**

6 The hearing arising from Patient 2's complaint took place between 19 and 23 March 2018. At the fact-finding stage, the Tribunal found proved that:

(i) on 15, 18 and 26 October 2017, Dr Mmono had carried out an intimate examination of, or a procedure on, Patient 2 without a chaperone being present;

(ii) the failure to ensure that a chaperone was present and maintain a log signed by the chaperone in respect of the consultations was in breach of the interim order imposed in November 2015;

(iii) on 18 October 2017, Dr Mmono had inappropriately communicated with Patient 2 by referring to her as "babes" in a text message;

(iv) on 31 October 2016 Dr Mmono had produced to the 2016 Tribunal a chaperone log which contained information which was untrue;

(v) on 24 March of 2017 Dr Mmono had informed the IOT that he had presented a log to the 2016 Tribunal which recorded the fact of and reason for the non-chaperoned consultation with Patient 2 on 26 October 2016 and that was not true;

(vi) in producing the chaperone log to the 2016 Tribunal, Dr Mmono's intention had been to mislead the 2016 Tribunal into believing he had complied fully with the terms of the interim order regarding the use of chaperones, even though he knew that, as recently as during the week preceding the hearing, this had not been the case;

(vii) in providing the information about the log to the IOT in March 2017, his intention had been to mislead the IOT into believing that he had presented a log to the 2016 Tribunal purporting to show that Patient 2 had been seen without a chaperone including his reasoning for this;

(viii) Dr Mmono's conduct on 31 October 2016 and 24 March 2017 had been dishonest.

7 The Tribunal found that the facts found proved amounted to misconduct and that Dr Mmono's fitness to practise was impaired by reason of his misconduct. In so doing, it reasoned that:

(i) the sections of Good Medical Practice which related to the importance of honesty were engaged. Paragraph 72 of Good Medical Practice provides that a doctor must be honest and trustworthy when giving evidence to courts or tribunals and that a doctor must make sure that any evidence or documents written for court or tribunal hearings are not false or misleading. The Tribunal noted that on three occasions Dr Mmono had failed to tell the 2016 Tribunal that he had seen a female patient without a chaperone being present. On two of those occasions the non-chaperoned consultations had taken place in the week preceding the hearing. On one occasion, it was during the hearing itself. It concluded that the 2016 Tribunal had been misled into believing that Dr Mmono had complied with the interim order and chaperone requirements when he had not, in fact, done so;

(ii) there were two aspects of the case which were the most serious. First, the breach of conditions imposed by the IOT in November 2015; and second, his dishonesty in misleading the 2016 Tribunal and the 2017 IOT. The Tribunal considered that

lying on oath to a professional regulator was a serious matter which demonstrated a disregard for the interim conditions imposed on him by the regulatory body and of the authority of the previous tribunal.

(iii) In relation to bringing the profession into disrepute, the Tribunal considered that a member of the public would have serious concerns about a doctor who had failed to comply with Good Medical Practice and adhere to conditions which had been imposed by his regulator. Further, it found that Dr Mmono had breached a fundamental tenet of the profession, namely honesty; that there was a lack of insight and an ongoing risk to the reputation of the medical profession.

8 Having concluded that Dr Mmono's fitness to practise was impaired by reason of his misconduct, the Tribunal then went on to consider sanction. It considered aggravating and mitigating features. It noted that the aggravating features included a repeated and serious departure from the tenets of Good Medical Practice; a failure to comply with Interim Order Tribunal conditions; a lack of insight; dishonesty at two tribunal hearings, and the repeated failings on his part to recognise the seriousness of what he had done.

9 The Tribunal also listed mitigating features as follows which I need to set out in full:

a. there had been no issues raised concerning Dr Mmono's clinical performance;

b. there were positive character references;

c. there had been expressions of regret and apologies;

d. Dr Mmono was of good character, save in respect of the findings of the previous MPT;

e. all the matters before it related to one patient only, that being Patient 2;

f. Dr Mmono had cooperated with the GMC by presenting evidence which would not otherwise be available, e.g. the text message;

g. he had demonstrated some continued reflection on his communications with patients;

h. the Tribunal also noted the circumstances surrounding the consultations with Patient 2.

10 The Tribunal considered and rejected the submission (by Dr Mmono) that the imposition of conditions would constitute a sufficient sanction: it determined that there were no conditions which would be workable and which would protect the public interest and maintain public confidence in the profession. The Tribunal reminded itself of Dr Mmono's good character and that it had accepted his explanation as to why he had seen Patient 2 without a chaperone. It also noted that at an intervening review hearing had found, following the four-month suspension, that Dr Mmono had been suitable for unrestricted practice.

11 The Tribunal determined that Dr Mmono had demonstrated "*a blatant disregard for the truth in presenting his case at the MPT in October 2016… no matter what the mitigating circumstances at the consultations might have been.*" His dishonesty in March 2017 had been less blatant as the deliberately misleading information had been advanced in a more spontaneous fashion arising, as it did, from questions posed to him by the IOT. Even so, the Tribunal was clear that Dr Mmono's answers were dishonest and not the conduct expected of a doctor upholding the standards of the profession.

12 The Tribunal recorded that it found little evidence of insight or remediation. Although Dr Mmono had apologised, his apology had not appeared to the Tribunal to be genuine. The Tribunal recognised that dishonesty was a quality difficult to remediate, but that insight and the capacity to reflect on dishonesty was not so difficult to demonstrate. It saw little evidence of reflection by Dr Mmono. Save for some "eleventh hour" recognition by Dr Mmono of the seriousness of his conduct, the Tribunal found that Dr Mmono's attitude, as demonstrated during the hearing, had been self-centred, demonstrating little consideration of the impact of his conduct on others.

13 The Tribunal considered the various factors referred to in the Sanctions Guidance, any one of which, if present, may indicate erasure to be the appropriate sanction. It concluded that the following six factors "*were engaged and relevant*" and carried weight:

a. this was a "*particularly serious departure from the principles set out in Good Medical Practice where the behaviour is fundamentally incompatible with being a doctor;*"

b. there had been "*a deliberate or reckless disregard for the principles set out in Good Medical Practice and/or patient safety;*"

c. Dr Mmono had abused his position of trust;

d. Dr Mmono was guilty of dishonesty which had been persistent and covered up;

e. Dr Mmono had put his own interests before those of his patients; and

f. Dr Mmono demonstrated a "*persistent lack of insight into the seriousness of his actions or the consequences*."

14 The Tribunal considered the principle of proportionality and recognised that it should impose the least restrictive sanction to protect the public weighing the public interests against the interests of Dr Mmono. Having noted that there was serious repeated misconduct and lack of insight, it stated:

> "*In summary, having considered the background and circumstances of this case and having considered all of the above factors the Tribunal found that there is serious repeated misconduct, impairment and lack of insight. There are also significant mitigating factors. The Tribunal noted that the time of the new allegations by Patient 2 had not perhaps given Dr Mmono a proper opportunity to reflect on what had occurred before the three hearings concerning his cases which were heard in a relatively short space of time. The Tribunal considered that a longer suspension without the distraction of further hearings would give a better opportunity to reflect further on the findings of the previous MPT to reflect on the findings made at this hearing and the opportunity to develop real insight into this misconduct.*"

15 In those circumstances, the Tribunal determined that Dr Mmono's registration should be suspended for a period of 12 months and directed that a review hearing should take place. It concluded that such a determination or sanction would be sufficient to protect the public and the reputation of the profession: it would give Dr Mmono an opportunity to develop full insight and would send a signal to Dr Mmono, the public and the profession that any type of dishonesty by a member of the medical profession was wholly unacceptable. It added that the conclusion had been "*a finely balanced decision*" and that Dr Mmono should be aware that misconduct of this nature will often result in erasure and that "*without some of the factors in this case which mitigated his misconduct*" the

Tribunal might well have concluded that erasure was the appropriate sanction. It stated that Dr Mmono would also be aware that any repeated misconduct was likely to result in nothing other than erasure.

**Legal Framework**

16 Against this background, I address the legal framework for this appeal. I can do so succinctly.

17 Section 40A of the Medical Act provides so far as material that the General Medical Council may appeal against a relevant decision if it considers that the decision is not sufficient for the protection of the public. Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient to (a) protect the health, safety and wellbeing of the public (b) maintain public confidence in the medical profession and (c) maintain proper professional standards and conduct for members of that profession.

18 The correct approach to be adopted for s.40A appeals was set out by the Divisional Court in *GMC v Jagjivan and PSA* [2017] EWHC 1247 (Admin) at [40].

i) "Proceedings under section 40A of the 1983 Act are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR Part 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.

ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong'

iii) The Court will correct material errors of fact and of law. But any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing.

iv) As to inferences to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR Part 52.11(4).

v) In regulatory proceedings the appellate court will not have the professional expertise of the tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence: see *Khan v General Pharmaceutical Council* [2016] UKSC 64; [2017] 1 WLR 169, at [36].

vi) However there may be matters, such as dishonesty or sexual misconduct, where the appellate court is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal: see *Council for the Regulation of Healthcare Professionals v GMC and Southall* [2005] EWHC579 (Admin).

vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.

viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust."

**Grounds of Appeal**

19 Ms Richards submitted that the Tribunal decision was wrong in that it did not adequately reflect the severity and nature of Dr Mmono's misconduct; and that, having considered the Sanctions Guidance, the Tribunal then failed to accord the Guidance sufficient weight. The Tribunal failed to explain why Dr Mmono's conduct (which it had characterised as a blatant disregard for the truth) was compatible with continued registration and had failed to explain why a 12 months suspension was sufficient in such circumstances for the purposes of public profession. It failed to explain why the mitigation which had been advanced by Dr Mmono tipped the balance in favour of suspension over erasure.

20 On the basis of the findings of fact which had been reached by the Tribunal, Ms Richards submitted that the only sanction consistent with the discharge of the Tribunal's function of public protection was erasure. This was a case in which, so the Tribunal found, there had been repeated and serious departures from Good Medical Practice and a failure to comply with IOT conditions. There was a lack of insight and an ongoing risk to patient safety. There had been dishonesty at two tribunal hearings and there were repeated failures by Dr Mmono to recognise the potential risks to patients and the public confidence.

21 In her oral submissions, Ms Richards submitted that the Tribunal had been correct to focus upon the findings of dishonesty: those findings were, by far, the most serious. The Tribunal had found that Dr Mmono's conduct had demonstrated a blatant disregard for the truth and that a number of factors listed in the Sanctions Guidance were "engaged and relevant" any one of which might indicate erasure to be the appropriate sanction. The Tribunal had evidently considered its judgment on sanction to be finely balanced but that the mitigation tipped the scales in favour of suspension over erasure. However, and critically, Ms Richard's submitted that none of the mitigating factors which the Tribunal

listed in the determination were particularly relevant to or had a bearing upon the feature of the case which it considered to be the most serious, namely, Dr Mmono's dishonesty.

22 Ms Richards submitted that the determination reveals both errors of principle and an absence of reasoning.

a. The sanction did not reflect the severity of the misconduct which the Tribunal had chosen to characterise as demonstrating a "blatant disregard for the truth." Ms Richards submitted that the Tribunal had concluded that suspension was a proportionate outcome which was sufficient to protect the public and the reputation of the profession and to send out a signal to the profession that dishonesty by a doctor was wholly unacceptable. However, in the light of its findings of fact and on misconduct, she submitted that the sanction of suspension did no such thing. An appropriate application of the Sanctions Guidance pointed clearly in the direction of erasure.

b. She also submitted that there was an absence of reasoning in the Tribunal's determination. Although it clearly stated that mitigation had been highly

influential in swaying the balance in favour of suspension over erasure, the Tribunal had not identified which piece of mitigation had been so persuasive as to cause them to conclude that suspension was appropriate. There was a missing link in the reasoning on the crucial issue.

c. She submitted before me that for either/or both of those reasons the determination was unlawful and it cannot stand. It should be quashed.

23 Dr Mmono has played no part in the oral hearing of this appeal. He did not attend either the appeal hearing or the judgment. He provided me with a witness statement however which I have read with care and have taken into account. Dr Mmono sets out the background to his involvement with the GMC and with the Medical Practitioners Tribunal. He has drawn my attention to press coverage of his case. He has informed me of aspects of his personal and family background. He reminds me of the decision of Holgate J in *Brookman v General Medical Council* [2017] EWHC 2040 and the criticisms which Holgate J expressed concerning the length of time it had taken for the investigation. He has informed me of the stress of the proceedings on him and the toll which such proceedings generally take on practitioners. He drew my attention to the case of *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879. He reminded me that he is a practitioner with 30 years' unblemished career. He expressed his personal view that the GMC is biased against people of colour.

**Discussion and Conclusion**

24 I start by considering the Sanctions Guidance and its role in decision-making. The role of the Guidance has been described in various ways. In *Bawa-Garba* the Court of Appeal described it as useful guidance to help provide consistency in approach and outcome in MPT hearings but that, although the Guidance should always be consulted by Tribunals, it is no more than non-statutory guidance, the relevance of which will always depend upon the precise circumstances of the particular case. In *GMC v Khetyar* [2018] EWHC 813 Ms Richards' description of the Sanctions Guidance as an "*authoritative steer for tribunals as to what is required to protect the public, even if it does not in any particular case dictate the outcome*" was approved by Andrew Baker J. These descriptions are not controversial.

The Guidance is just that, guidance. It will be a matter for the Tribunal to determine the appropriate sanction in the light of the Guidance taking into account the public interest and the individual interests of the doctor, having evaluated the particular facts, mitigating features and aggravating features. However, if, having considered the particular facts and features of the case, the Guidance points clearly in the direction of a particular sanction, then the Tribunal must explain in the determination why that sanction is not to be imposed, if that is its conclusion.

25 As Ms Richards accepts, in this case, unlike in *Khetyar*, the Tribunal did grapple with the Sanctions Guidance, at least insofar as it related to erasure. Although it did not focus upon the suspension indicia, it expressly found little evidence of insight or remediation, the presence of which would have favoured suspension. It found that six factors, any one of which pointed in the direction of erasure, were "*engaged and relevant*" (ie present). Erasure was thus squarely indicated by the Sanctions Guidance as proportionate and appropriate and likely to be correct, absent some good reason. As Andrew Baker J observed in *Khetyar*: "*a tribunal ought to consider erasure very seriously when paragraph 109 does apply, especially if it does so on multiple grounds, in which case powerful case specific reasons ought to be required if a decision against erasure is to be justified.*"

26 The Tribunal does not identify any good reason for imposing a suspension, rather than erasure. Although the Tribunal stated that some of the factors which it had identified as mitigation tipped the balance, it does not identify which of those factors had that effect. Of the factors which it listed in the determination, none was of particular relevance to the elements of the case which the Tribunal had (correctly) determined to be the most serious, namely Dr Mmono's dishonesty and his blatant disregard for the truth and his disregard for the system of regulation. The only mitigating factor which might conceivably have carried any weight in the balancing exercise was Dr Mmono's good character. But this factor must be considered in the context of the Tribunal finding as an aggravating factor the previous disciplinary proceedings and that the current impairment arose from dishonesty on two occasions in proceedings involving his regulator. None of the other mitigating factors (absence of clinical performance issues; testimonial evidence; cooperation with the GMC; continued reflection on communications with patients) have any real relevance to the central probity issue. Although the Tribunal noted that Dr Mmono had apologised, it went on to consider and find that that apology was hollow and made clear findings of lack of insight and limited reflection.

27 The Tribunal determination makes no sense. There is a missing link. To an informed reader it simply begs the question of why suspension was found to be consistent with public safety, rather than erasure. I accept Ms Richards submission that it cannot stand for this reason.

28 The determination is also flawed for another reason. It fails to reflect the serious nature of its findings against Dr Mmono. The Tribunal found that there had been repeated and serious breaches of Good Medical Practice. It found that six of the indicia for erasure were present including the finding that Dr Mmono was guilty of a particularly serious departure from the principles set out in Good Medical Practice. It found that Dr Mmono had been dishonest in his dealings with his Regulator which undoubtedly places his dishonesty at the more serious end of the spectrum. It found little evidence of insight or remediation or reflection. No good or cogent reason is provided by the Tribunal to justify suspension over erasure for the simple reason, I find, that no good or cogent reason was present. I accept Ms Richards' submission that, on the facts found proved and in the light of the Tribunal's determination on misconduct and impairment, erasure was appropriate and proportionate and in the public interest. The Tribunal failed to accord sufficient weight to the Sanctions Guidance which pointed squarely in the direction of erasure. I find the conclusion that Dr Mmono should be given the opportunity to develop insight over a 12-month period and return with written reflection on his dishonesty and impact of such misconduct on the patient and on public confidence in the profession is illogical and flawed. The determination therefore cannot stand for this reason also.

29 I therefore set the determination aside on the basis of both the reasons challenge and the error identified by Ms Richards in the Tribunal's approach to sanction.

30 I move on to deal with Ms Richards' further submission that this is one of those rare cases in which I can be satisfied that the correct outcome is clear, such that there is no point in remitting the case back to be determined by the Panel again. She submits that this is a clear case in which the correct approach was erasure. The question for me therefore is whether I am satisfied that the correct and clear outcome is erasure.

31 I bear in mind the following features.

a. the Tribunal's finding of blatant dishonesty on more than one occasion;

b. the Tribunal's finding that Dr Mmono deliberately set about misleading the IOT and the 2016 Tribunal;

c. the Tribunal's finding that Dr Mmono had breached the interim order imposed in November 2015;

d. the Tribunal's finding of absence of insight and poor reflection and his hollow apology to the Tribunal;

e. that dishonesty by a medical professional is always serious but that a dishonest misleading of the Regulator is at the most serious end of the spectrum as it undermines the system of professional regulation upon which the public is entitled to rely;

f. that it does not require the expertise of a specialist tribunal to recognise the very serious nature of the findings made by the Tribunal;

g. the absence of relevant mitigation;

h. the Sanctions Guidance which points squarely in the direction of erasure;

i. The Tribunal itself recognised that its conclusion was "*finely balanced*" and that "*misconduct of this nature will often result in erasure*." It found that "*without some of the factors in this case which mitigated his misconduct, the Tribunal may well have concluded that erasure was the appropriate sanction*." However, none of the mitigation factors listed by the Tribunal had any relevant bearing on Dr Mmono's dishonesty.

32 This is not a case which is on the cusp. I am satisfied that the outcome is clear such that there is no need for me to remit this case back for consideration by the Tribunal, either newly constituted or otherwise. On the facts found proved and on the Tribunal's own evaluation of those facts, the only outcome is erasure.

33 I therefore allow the appeal. I quash the decision and substitute the sanction of erasure.

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**CERTIFICATE**

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

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This transcript has been approved by the Judge.