Neutral Citation Number: [2019] EWHC 3483 (Admin) Case No: CO/2176/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 20.12.2019

Before :

MRS JUSTICE MCGOWAN DBE

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Between :

Dr Temi Felicia Ogbe Uwen	**Claimant**
- and -	
General Medical Council	**Defendant**

- -

Mr Alastair Panton (instructed by **R.O.C.K Solicitors**) for the **Claimant**
Mr Peter Mant for the **Defendant**

Hearing dates: 10.10.2019

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Judgment Approved

Mrs Justice McGowan DBE :

Introduction

1. This is the statutory appeal of Dr Temi Felicia Ogbe Uwen, ("the Registrant"), against the findings of fact and determination of sanction by a Medical Practitioners Tribunal ("the Tribunal") of the General Medical Council, ("GMC"), the Respondent. Its decision of 1 March 2019 and the sanction imposed on 2 May 2019 are both the subject of this appeal.

2. The first issue is whether the Tribunal applied the correct test of dishonesty in considering the allegation that she had dishonestly declared she had valid insurance to practice and secondly having found her conduct to be dishonest whether erasure from the register was the necessary and appropriate sanction.

Factual Background

3. The Registrant was working as a locum consultant psychiatrist. She was registered with MIND Professionals, a recruitment agency. Through them she worked at Life Works Community Ltd, ("Life Works"), part of the Priory Group. There were two periods, between 7 March 2017 and 26 June 2017 and between 21 November 2017 and 23 November 2017, during which she worked as a Substance Misuse Psychiatrist.

4. It is common ground that it was an obligation on her to have in place adequate insurance or indemnity. She confirmed that she had such insurance. The issue of fact was whether she mistakenly believed she had such cover or dishonestly represented that she did when she knew she did not.

5. The tribunal found as a fact that the Registrant had received an email on 4 July 2016 from her Responsible Officer which told her that adequate insurance or indemnity cover was mandatory.

6. The Registrant provided a copy of a letter from her solicitors dated 7 December 2016 which said, "*"We continue to act as solicitors for [the Registrant].....This cover includes acts or omissions in the course of her practice which includes medical malpractice, negligence and legal matters arising from her work.....We confirm that we have been acting for [the Registrant] in these respects over the last 2 years and this is continuing."*

7. She received an email from the Professional Compliance team at MIND which included an email dated 15 March 2017 which set out, *"…the letter from your solicitors does not confirm your medical cover for malpractice indemnity insurance……."*.

8. On 22 March 2017 the Registrant sent an email to MIND stating there were, ……"*no issues with regards to my medical indemnity/malpractice insurance cover. I have already forwarded my solicitor's letter of legal cover for me if there are any issues when practising. I have been with this solicitor for years and always submitted their name as legal cover. I tried explaining to Ella but she didn't understand. This same legal cover by my solicitors was accepted by GMC for my revalidation*".

9. On 29 March 2017 she was asked, *"would it be possible to seek assurance from your solicitor that your legal cover extends to private practice work, outside of the NHS?"* The work she performed for LifeWorks was outside the NHS. That is relevant as it meant that no Crown Immunity or protection could attach. The Registrant accepted that she understood that it was necessary for her to have insurance for malpractice in place.

10. The Registrant replied and maintained the position that the term "legal cover" meant adequate professional indemnity and malpractice insurance. She wrote on 29 March 2017 saying, *"Yes I have confirmed that my legal cover has private practice included".* MIND accepted these representations as assurance that the Registrant did have adequate indemnity and the matter was not pursued further until she applied for the second period of work in December 2017.

11. By email dated 11 December 2017, MIND asked for a copy of the insurance certificate covering her for indemnity and malpractice. They would not authorise payment until the certificate was provided. On 12 December 2017 the Registrant replied saying that she had just discovered that the solicitor was not providing her with medical indemnity insurance. She went on to say that she had not previously been informed of the need for indemnity cover and that the fault lay with her employer for not notifying her of such a requirement.

12. At the hearing she told the tribunal that she had not realised she was mistaken in that belief until December 2017. It was not until then that she had understood that the letter from her solicitors meant she had only cover for her legal representation.

13. The tribunal had to assess the issue of whether it had been established that in the statements she made that she had "legal cover" the Registrant was dishonestly representing that she had adequate insurance cover. The issue in this appeal is that the tribunal applied the wrong legal test.

Legal Test

14. *Section 40 of the Medical Act 1983* provides a right of appeal to the High Court against decisions of the Tribunal. Pursuant to CPR PD52D, para 19.1, such appeals are by way of re-hearing without evidence being called. The test that is to be applied is whether the tribunal was wrong or unjust due to serious procedural or other irregularity.

15. The tribunal is a specialist body and it is constituted to bring expertise of the medical profession and its workings. It hears evidence and forms its own view of the witnesses and their credibility. It makes findings of fact which are "virtually unassailable", *Southall v General Medical Council* [2010] EWCA Civ 407.

16. The issue was whether, to the required standard, the Respondent had proved the Registrant's dishonesty. The parties agreed that the correct test of dishonesty to be applied is that set out by Lord Hughes at paragraph 74 in *Ivey v Genting Casinos (UK) Limited [2017] UKSC 67.*

> *"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."*

17. The tribunal was not applying the criminal standard of proof, rather they had to be satisfied of the Registrant's dishonesty on the balance of probabilities.

Tribunal's Findings

18. The tribunal set out the test in Ivey verbatim as above, they broke it down into two steps in paragraph 18 of the Record of Determinations [tab 3/47].

19. The tribunal found at paragraph 46-47 as follows:

> "46. *The Tribunal considered that Dr Ogbe-Uwen intended to represent the content of her solicitor's letter as her having adequate Indemnity Insurance cover. However, the Tribunal was of the view that the content of the letter does not lend itself to be interpreted in that way. The content of the letter only confirms the terms of their engagement as Dr Ogbe-Uwen's solicitors acting in legal matters if and when the need arises.*
>
> *47. Therefore, on the balance of probabilities, the Tribunal determined that Dr Ogbe-Uwen knew at all material times that her legal cover did not constitute a policy of adequate insurance or indemnity cover required for the work she undertook at Life Works. During cross-examination evidence, Dr Ogbe-Uwen was clear she understood what constitutes an insurance policy"*

Submissions

Appellant

20. On behalf of Dr Ogbe-Uwen it is submitted that the tribunal, "got the test for dishonesty the wrong way around". It has decided what the letter says, by an objective test, and then found, using a subjective test, that the Registrant therefore knew that she did not have adequate insurance cover.

21. It was accepted that it was the function of the tribunal to assess her state of mind when she asserted that she believed that the letter from her solicitor provided her with adequate medical indemnity and malpractice insurance. It was submitted that the Tribunal was in error because it did not look subjectively at the Registrant's state of mind before looking objectively at the statements she made in correspondence.

22. It was argued that the tribunal had formed their own objective test of what she thought before going on to determine, applying a subjective test, what she actually believed. That should have been done differently, namely, determining what she actually believed, before applying an objective test of whether that was dishonest.

23. In evidence the Registrant answered a question about her understanding of what professional indemnity insurance was. It is submitted that the answer only dealt with her contemporaneous understanding not what she understood the position to be at the time of the representations she made about her cover. It is submitted that the tribunal was wrong to conclude from that answer that she knew at the relevant time.

Respondent

24. The principal submission made by the Registrant is that the tribunal heard the Registrant give evidence about what she said she believed the position to be at the time she made the representations she did. They submit that this court should not interfere unless the tribunal had demonstrably misread the evidence or applied the wrong test of dishonesty.

25. In its submissions on the test of dishonesty the Respondent argues that in using the phrase that the letter "does not lend itself" to the interpretation which the Registrant said she took, the tribunal was not expressing the totality of its reasoning process. The determination as a whole made it clear that it had found that she knew what an insurance policy was and understood the nature of the relationship between her and her solicitors.

Discussion

26. The credibility of the Registrant is at the core of the case. This court is not making a finding about her dishonesty or otherwise. It can only look to see if the findings were based on a misreading of the evidence or in some other way so flawed as to be incapable of standing up to scrutiny. The tribunal did not believe her when she told them that she believed that the letter from her solicitor provided her with adequate insurance cover.

27. That assessment of her credibility was the function of the tribunal. They made that assessment by considering her evidence and all the other evidence called or read. That included the finding that she well knew what an insurance policy was at the relevant time and that it was a requirement that she had professional indemnity insurance.

28. Nothing in their fulfilment of their function as a tribunal of fact has been shown to be capable of criticism.

29. The finding of the tribunal on dishonesty amounts to the following:

    i) That the Registrant intended to represent to enquirers that the letter from the solicitor amounted to providing adequate cover, an assessment of her subjective state of mind,

    ii) The letter was incapable of such an interpretation and her claimed belief was unreasonable, an objective test, and therefore,

    iii) She was dishonest when she represented the letter as providing adequate cover because she did not genuinely believe that to be the case.

30. That application of the legal test of dishonesty is criticised as a mistaken or wrong application of the proper test. The first part of the test as enunciated by Lord Hughes includes an objective test of the reasonableness of the belief which the individual claims to have held. *"The reasonableness or otherwise is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held".*

31. The tribunal found that the claim that she believed the letter was adequate cover was unreasonable, "the letter does not lend itself to be interpreted in this way" and went on to find "therefore" she did not genuinely hold the belief that it was adequate cover.

32. The tribunal found, on the facts, that the belief which the Registrant purported to hold was unreasonable, therefore they found, as contemplated in the Ivey test, that she did not hold that belief and was as a consequence dishonest when she made the representations that she did about her insurance cover.

33. Those are findings of fact, applying the correct test, that she was dishonest when she made the representations she did. There is no sufficient basis in fact or law to challenge those findings.

Sanction

34. On 2 May 2019 the tribunal found that the Registrant's fitness to practise was impaired by reason of misconduct, [tab3/50]. It ordered erasure of her name from the Medical Register.

35. The Registrant submits that the sanction of erasure from the register was too harsh in all the circumstances and therefore disproportionate. That submission is in part based on the fact that the GMC did not ask for erasure in its initial contact with the Registrant. She relies upon their letter of 29 January 2019 [tab36/333] which said:

> *"applying the Sanctions Guidance to the alleged facts in this case, it is the GMC's current position that a sanction of suspension is appropriate. We will not inform the Tribunal of our position unless it makes a finding of impairment. In addition, we may alter our position in light of evidence presented and findings made at the hearing."*

36. It is submitted that the position has not worsened since the letter and it was therefore wrong that a sanction greater than suspension should be imposed. On behalf of the Registrant it is conceded that she still does not acknowledge her dishonesty. It is said in her favour that she now fully understands the requirement of adequate insurance cover. It is further submitted that she has put such insurance in place, both current and retrospective and that no claims have arisen for the period through which she did not have adequate cover.

37. In the period between the findings on the allegations and on sanction the Registrant wrote to the GMC and made wholly unfounded allegations of racism against the panel. It is submitted that that should not be held against her because she was unrepresented at the time.

38. It is argued that consideration should have been given as to whether her fitness to practise is currently impaired, the dishonesty occurred in 2017 and the findings on sanction were made on 2 May 2019. It is accepted, given the findings, that it would have been a proper matter to find her fitness to practise was impaired at the time of the dishonesty.

39. It is argued that no patient was disadvantaged and that no criticism has been made of her clinical abilities.

40. The Respondent argues that all relevant matters were canvassed before the tribunal and they reached a decision based on their expert judgment. It is submitted that the sanction is consistent with guidance and authority.

41. It accepts the content of the letter of 29 January 2019 but that the position by the date of the determination of the sanction had changed. The GMC had contacted the Registrant notifying her that their position had changed in light of the view that she lacked insight and posed a risk of repeating her behaviour.

42. Dishonesty had been proved but was still denied by the Registrant. Rather than accepting the findings of the tribunal she had written to the panel making unfounded allegations of racism.

43. The law is well established. The sanction to be imposed has more than one function, it is not simply to impose punishment upon the Registrant but also to protect the public and to maintain public confidence in the medical profession and its ability to regulate practitioners.

44. The Registrant is right to argue that erasure is not an inevitable consequence of findings of dishonesty. There are many other considerations, as follows;

    i) She has not accepted or acknowledged her conduct and therefore shows no insight,

    ii) The dishonest conduct proved was serious and persistent,

    iii) Her reaction to the findings was to make unfounded allegations of racism against members of the panel and

    iv) The sanction must adequately meet the need to protect the public and maintain public confidence in the profession and its ability to regulate practitioners.

45. It is not for this court to consider what sanction it would impose. Consequently, it is not sufficient to upset the tribunal's finding to conclude that the sanction was harsh. To be susceptible of variation the sanction must be disproportionate to the allegations and the other obligations of the panel.

46. The tribunal gave fully argued reasons for its findings. It considered, as it was required to do, whether any lesser sanction would suffice. It considered all the testimonials produced on behalf of the Registrant and, in particular, that no direct harm had been caused to any patient.

47. Taking all proper matters into consideration the expert panel found that the required sanction was erasure from the Register. There is no sufficient reason for this court to interfere with that finding.

48. Accordingly the appeal against the findings of the tribunal is refused.