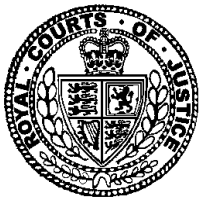

Neutral Citation Number: [2019] EWHC 2192 (Admin)

Case No: CO/250/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2019

Before:

MR JUSTICE FREEDMAN

- -

Between :

The Professional Standards Authority for Health and Social Care

Appellant

- and –

(1) The General Medical Council

(2) Mr Hilton

Respondent

- -
- -

Ms Fenella Morris QC (instructed by **Browne Jacobson LLP**) for the **Appellant**
Mr Christopher Knight (instructed by **GMC Legal)** for the **First Respondent**
Mr Richard Booth QC (instructed by **DWF Law LLP**) for the **2nd Respondent**

Hearing dates: 22 May 2019

- -

Approved Judgment

Mr Justice Freedman:

Introduction

1. I delivered judgment in this matter Neutral Citation Number: [2019] EWHC 1638 (Admin). Since handing down the matter in Court, I have received the following submissions as to costs and as to the form of the warning, namely

   (1) The Appellant of Fenella Morris QC dated 5 July 2019;

   (2) The Second Respondent of Richard Booth QC dated 12 July 2019;

   (3) The First Respondent of Christopher Knight dated 17 July 2019;

   (4) The Appellant of Fenella Morris QC in reply dated 23 July 2019;

   (The Second Respondent has informed the Court through his solicitor that he intends to make no further submission in reply, no doubt recognising sensibly that his submission of 12 July 2019 sufficed.)

Costs

2. The Appellant is partially the successful party. It has succeeded in the sense that there now will be a sanction for the misconduct. It has not succeeded in that it argued on impairment, but the Court has imposed a warning only. The Court rejected the third ground about inadequacy of reasons, but this did not add significantly to the costs.

3. The question is what order should be made as between the Appellant and the Second Respondent to reflect the fact that the warning challenge succeeded, but the impairment challenge failed. The Second Respondent says that 80% of the time was spent on impairment, but 20% of the time was spent on warning. I do not accept that that correctly reflects the time spent.

4. There is a more fundamental point of cross-over between the two issues. Looking at the judgment, there is considerable cross-over in the analysis of the background (paragraphs 1-39) and the discussion regarding respect for the decision-making body, the consequences of a finding of misconduct, where misconduct is dishonesty and features about the facts in the instant case (paragraphs 88-102). There are matters in respect of the consideration of the grounds relating to impairment (paragraphs 40-59) and the decision on impairment (103-117). However, that discussion was informative to the decision on warnings. Thus, in my judgment, if the appeal had been limited to warnings, I find that the cross-over was such that substantially more than 50% of the costs would still have been incurred.

5. If it were possible to identify a percentage of time relating solely to impairment, that would be substantially less than 50% of the time. It follows that substantially more than 50% of the time was taken up either on matters relating solely to warning or matters crossing over between warning and impairment, and which in my view would have been incurred if the appeal had been restricted to warning alone. I recognise that the judgment and the time in the hearing does not necessarily reflect the time spent in preparation for the hearing. I recognise also that a finding of impairment would have had even harsher consequences than a warning, and in that sense may have represented the more critical part of the case for the Second Respondent.

6. One possible approach is to make costs orders in different directions, that is to say the costs of impairment to be paid by the Appellant to the Second Respondent and for the costs of the warning to be paid from the Second Respondent to the Appellant. However, this does not seem to be appropriate having regard to the fact that the overall successful party, albeit partial, was the Appellant whose appeal as a whole was intended to give a consequence to the finding of misconduct. Further, a matter which I take into account in the exercise of my discretion is that the appeal was brought by the Appellant in its public function which it was required to perform and it did not act unreasonably in pursuing the appeal on impairment. In any event, a split order as to costs would not adequately reflect the true impact of the cross-over point referred to in paragraph 4 above.

7. The Court has also taken into account that its Order must reflect not simply the percentage of the Appellant's costs referable to impairment alone, but also give some recognition to the fact that the Second Respondent will have suffered costs in respect of impairment alone, and, as noted in paragraph 5 above, impairment was a very significant issue. In order to reflect all of the above matters and taking into account the submissions which the Court has received, the Order which I make is that the Second Respondent shall pay 50% of the costs of the Appellant.

8. The Second Respondent submitted that if in fact the Tribunal had imposed a warning, but not found impairment and the appeal had been on impairment, then there would be no question of ordering costs against the Second Respondent. However, that does not advance the case because that did not occur, and therefore the Court has dealt with different facts. Further, this is not a case where the Second Respondent said that he would submit to a warning either openly or without prejudice save as to costs: on the contrary, he fought the appeal as heavily on warning as he did on impairment, and the Appellant succeeded on warning.

9. I make no order against the First Respondent. It has taken no part in the appeal, as it was entitled so to do on the facts of this case. It did not have a duty to make the appeal in the circumstances of this case. I accept that it is independent of the Tribunal and that if there was a failure of the Tribunal, it is not responsible for this on the facts of this case. In this regard, I accept broadly the submissions set out at paragraph 4 of the submissions of Mr Knight for the First Respondent, not as matters of general import for all cases, but as regards the instant case. In any event, even if the First Respondent was responsible in some way for the decision of the Tribunal, if the Tribunal had been made a party to the proceedings and had not opposed actively the appeal, then it is usual for no order as to costs to be made against a tribunal. The position is no different here by reason of the fact simply because the First Respondent had the power to initiate the appeal and elected not to do so. Here too the Court takes into account the fact that the First Respondent has a public function, and in deciding not to bring the appeal on warning, it did not act unreasonably.

10. The Appellant seeks to invoke matters of general principle in this regard. This decision rests on the particular features of this case and not on general principle. The decision is not intended to have any application beyond the facts of the instant case.

11. As regards summary assessment of the costs which I have ordered, I say the following. The costs sought by the Appellant comprise the sum of £28,494.77. This contrasts with the costs of the Second Respondent of £28,548 plus VAT. It is stated in its costs schedule that there is no claim for VAT because this is recovered as an

input against outputs. It therefore follows that the costs of the Appellant and the Second Respondent are very similar.

12. Mr Hilton at paragraph 9 says that if costs have to be paid, he takes issue on the attendance of both partner and a senior associate at the hearing. That seems to me to be a fair criticism in the sense that a party is entitled to have that benefit for itself, but in a case like this, it does go beyond a reasonable sum to be passed on to the losing party. There is also said to be excessive costs in respect of having that level of costs from partner and senior associate when there has been extensive involvement of Leading Counsel. However, this is a speculative criticism, and the fact that the overall costs are so similar between the parties indicates that if there has been charged some items beyond a reasonable sum, that has been minor in nature.

13. I bear in mind that a summary assessment obviates the scrutiny of a detailed assessment. In circumstances, where there is some criticism of the costs sought, it is usually, but not always, appropriate to have some reduction of the costs sought, but in the instant case, it will not be great. There does have to be a broad assessment absent a detailed assessment. In all the circumstances, I have come to the view that a sum of £26,000 is appropriate. 50% of those costs comprise the sum of £13,000.

14. For the purpose of clarity, the Court has made a deduction of 50% to reflect not simply the percentage of the Appellant's costs referable to impairment alone. It is also to give some recognition to the fact that the Second Respondent will have suffered costs in respect of impairment alone and, as noted in paragraph 5 above, impairment was a very significant issue.

The warning

15. The First and Second Respondents were unable to agree the terms of the warning and provided their respective drafts and submissions as to the wording. The Appellant has not made submissions as to the terms of the draft. I was cautious about drafting the warning. I was very reluctant to draft myself. Accordingly, I proposed some words myself with the benefit of the draft warnings of the parties and their submissions. I indicated which submissions I accepted. In the event, wording has been agreed between the Respondents (with two changes agreed between them, which I have incorporated). In receiving the submissions in particular of the First Respondent and the Second Respondent prior to my draft, I stated the following.

16. I agreed with the submissions made by the First Respondent in this regard to the effect that the warning must refer to the background of the surgery. This is necessary in order to explain what were the lies on 2 November 2016, and to explain why the Second Respondent's conduct impacted on public confidence in the profession.

17. I agreed also with the Second Respondent that the use of words "failed to recognise…" might imply that there was a finding of professional negligence, which there was not. That was to be avoided: the warning was to concentrate on the fact that the decision was about the provision of dishonest information to Patient A, albeit that the dishonesty cannot be understood without reference to the background of the surgery.

18. To this end, it was important that there is set out in some detail not only that the Second Respondent performed a spinal fusion procedure on Patient A, but that there

came a time when there was a recurrence of pain during which Patient A went to another surgeon.

19. In these circumstances, the warning is in the following terms.

"On 26 March 2014, you performed a spinal fusion procedure on Patient A. Unfortunately, after an initial apparently successful outcome, Patient A had a recurrence of pain and sought assistance from another surgeon in April 2016. The other surgeon observed that a screw inserted by you was misplaced post-operatively. Patient A complained to you and suggested that there was x-ray evidence available to you after the operation to show the presence of this complication.
You met with Patient A on 2 November 2016. You informed Patient A that (a) you had noted that this screw was misplaced post-operatively, but that (b) having identified that misplacement, you had decided to take a 'watch and wait' approach and not to inform him so as not to worry him. This was not true because (a) you had not noted that the screw was misplaced post-operatively (you had not seen any CT scans), and (b) you had not decided not to inform Patient A or to take a 'watch and wait' approach (because you could not inform him about something which you did not know).
You had a duty of candour and would be expected by a member of the public to be open and transparent about the treatment you had provided to Patient A. In circumstances where you had a duty to act with integrity and honesty, your assertions at the meeting were dishonest because they were not truthful and you knew this."
This conduct does not meet with the standards required of a doctor. It risks bringing the profession into disrepute and it must not be repeated.
The required standards are set out in Good Medical Practice and associated guidance. In this case, paragraphs 1, 31, 55, 65 and 68 of Good Medical Practice are particularly relevant:

1 Patients need good doctors. Good doctors make the care of their patients their first concern: they are competent, keep their knowledge and skills up to date, establish and maintain good relationships with patients and colleagues, are honest and trustworthy, and act with integrity and within the law.

31 You must listen to patients, take account of their views, and respond honestly to their question.

55 You must be open and honest with patients if things go wrong. If a patient under your care has suffered harm or distress, you should:
a…..
b…..
c explain fully and promptly what has happened and the likely short-term and long-term effects.

65 You must make sure that your conduct justifies your patients' trust in you and the public's trust in the profession.

68 You must be honest and trustworthy in all your communication with patients and colleague.

Whilst this failing in itself is not so serious as to require any restriction on your registration, it is necessary in response to issue this formal warning.

This warning will be published on the medical register in line with our publication and disclosure policy, which can be found at:
www.gmc-uk.org/disclosurepolicy<http://www.gmcuk.org/disclosurepolicy*"*

20. I am grateful to the parties for their cooperation in respect of the Warning following this judgment being released in draft. Finally, I wish to express my thanks to Counsel for their excellent written and oral submissions which have been of great assistance to the Court throughout this case.