Neutral Citation Number: [2019] EWHC 2625 (Admin)

Case No: CO/271/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

DR COLLEN NKOMO	**Appellant**
- and -	
THE GENERAL MEDICAL COUNCIL	**Respondent**

- -
- -

Rob Kearney (instructed by **Olliers Solicitors Ltd**) for the **Appellant**
Peter Mant (instructed by **General Medical Council**) for the **Respondent**

Hearing dates: 5 June 2019

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Approved Judgment

The Honourable Mr Justice Julian Knowles

Introduction

1. This is an appeal by Dr Collen Nkomo against the decision of the Medical Practitioners Tribunal of 20 December 2018 erasing his name from the register of medical practitioners that is kept by the Registrar of the General Medical Council (the GMC) under s 2 of the Medical Act 1983 (the MA 1983). The GMC is the statutory regulator of the medical profession.

2. The appeal is brought pursuant to s 40 of the MA 1983.

The factual background

3. Dr Nkomo qualified as a doctor in Zimbabwe in 2002 before coming to the United Kingdom and becoming a British citizen. Between 2013 and 2015 he worked as a locum general practitioner at various times through various employment agencies. He was very well paid.

4. On 26 October 2015 Dr Nkomo was convicted at Manchester and Salford Magistrates Court of motoring offences relating to an incident on 8 February 2015 when he was stopped by the police on suspicion of drunk driving. He failed to provide a sample of breath at the roadside and on two occasions whilst in custody. He was convicted of failing to provide a specimen contrary to s 7(6) of the Road Traffic Act 1988. He was sentenced on 13 November 2015 to 60 hours of unpaid work and was disqualified from driving for two years. He did not report these charges or his conviction to the GMC at the time.

5. On 30 May 2017 Dr Nkomo was convicted at Manchester Crown Court of fraud by false representation contrary to ss 1 and 2 of the Fraud Act 2006. The particulars of the offence alleged that he had failed to provide full and accurate details of his income to the Child Support Agency in connection with maintenance payments for his child. On 24 July 2017 he was sentenced to 20 months imprisonment suspended for 24 months. The background was that between April 2013 and July 2014, Dr Nkomo made a series of representations to the CSA, in correspondence and over the telephone, to the effect that he was not working in the UK, or that he was just setting up a company, or that he was out of the country, when in fact he was working regularly in the UK as a locum doctor for a number of agencies with an income in excess of £200 000. He maintained his dishonest account when he was interviewed under caution on 3 December 2015, although he later pleaded guilty to fraud. As a result of the fraud, he avoided child maintenance payments that should have been made, totalling about £40 800.

6. Dr Nkomo self-referred to the GMC in respect of both convictions on 14 August 2017.

7. The Tribunal heard Dr Nkomo's case over four days between 17 December 2018 and 20 December 2018. He admitted the convictions and sentences, and the fact that he failed to notify the GMC without delay of the charges and subsequent convictions and sentences. In total, he admitted six misconduct matters.

8. The Tribunal directed itself in relation to impairment by reference to the decision in *Council for Healthcare and Regulatory Excellence v Nursing and Midwifery Council*

and Grant [2011] EWHC 927 (Admin) which requires a two-stage approach. First, the Tribunal must consider whether the facts as found amount to misconduct. Second, the Tribunal has to consider whether the misconduct is sufficiently serious to amount to impairment.

9. The Tribunal found that Dr Nkomo's fraud conviction related to sustained dishonesty and that this amounted to misconduct which impaired his fitness to practice. It said the motoring conviction alone would not have led to a finding of impairment.

10. In relation to sanction, the GMC submitted that the only appropriate sanction was erasure given the seriousness of Dr Nkomo's misconduct and convictions, in particular, his misconduct for fraud, which involved a loss of some £40 800. The GMC said there were few mitigating factors and Dr Nkomo had shown limited insight.

11. Dr Nkomo accepted that suspension would be an appropriate sanction but argued against erasure. He placed particular reliance on the GMC's Sanctions Guidance which, he submitted, distinguished between 'sustained acts of dishonesty' for which suspension was appropriate and 'dishonesty which is persistent and/or covered up' for which erasure was appropriate. The Tribunal found the following aggravating factors including: the seriousness of the fraud conviction, involving as it did criminal dishonest conduct over two years and seven months; that the primary victim of his dishonesty was his child; that he had failed to report either matter; he only had partial insight into his offending; and that he gained financially from his offending. It found the following mitigating factors (*inter alia*): his personal circumstances, including the breakdown of his relationship; that there were no issues with his clinical competence; he had begun repaying child maintenance arrears; a low risk of re-offending; a degree of insight; the effect of a more severe sanction; and expressions of remorse.

12. The Tribunal correctly approached its sanction determination by working its way up the list of potential sanctions in the manner required by the Sanctions Guidance. It held that suspension would not be appropriate because it found that Dr Nkomo's behaviour lay at the top end of the spectrum of gravity of misconduct. It had regard to *Theodoropoulos v General Medical Council* [2017] EWHC 1984 (Admin), in which the Court held (a) the importance of honesty and integrity in the medical professions is generally recognised in the case law; (b) findings of dishonesty lie at the top end of the spectrum of misconduct; (c) the case law recognises that where a doctor engages in deliberate dishonesty and lacks insight, erasure may in practical terms be inevitable; (d) the misconduct need not take place in a clinical setting before it renders erasure rather than suspension the appropriate sanction.

13. The Tribunal rejected suspension for the reasons it gave at [41] namely: Dr Nkomo's fraud lasted two years and seven months; it deprived his ex-partner and son of at least £40 800; he compounded matters by failing to report it; he only had partial insight; and he had made little acknowledgement of the impact his actions may have had on the profession as a whole. It therefore held that his misconduct lay at the top end of the spectrum.

14. The Tribunal addressed erasure as a sanction at [42] et seq. It had regard to [108] and [109] of the Sanctions Guidance. At [44] it held that Dr Nkomo's dishonesty was fundamentally incompatible with being a doctor, and said that this issue was, according to [97(a)] and [109(a)] of the Sanctions Guideline, the critical issue in determining

whether erasure or suspension was the appropriate sanction. It rejected the arguments based on a supposed distinction between 'sustained' and 'persistent' dishonesty. At [51]-[52] the Tribunal concluded:

> "The Tribunal concluded that Dr Nkomo's behaviour is fundamentally incompatible with continued registration given the serious, deliberate, and dishonest nature of the Fraud Conviction, and the length of time for which he delayed informing the GMC of both the Driving and the Fraud Convictions. Paragraph 109(a)(b) and (h) [of the Sanctions Guidance] all indicate that erasure is the appropriate sanction in such circumstances. The Tribunal considered that any lesser sanction, including suspension would not fulfil the over-arching objective, as it would fail to mark the seriousness of [the Registrant's] conduct, and thus undermine public confidence in the medical profession and undermine proper professional standards. In light of the guidance in the case law and the SG as to the weight to be given to the mitigating factors in this case, the Tribunal considers that it could not justify a lesser sanction.
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> 52. The Tribunal has therefore determined that erasure is the only sufficient sanction which would maintain public confidence in the profession and send a clear message to the profession and the public that Dr Nkomo's misconduct constituted behaviour unbefitting and fundamentally incompatible with that of a registered doctor."

Grounds of Appeal

15. Dr Nkomo does not challenge any of the Tribunal's findings on the facts or impairment. His appeal is against the sanction only. He submits that the appropriate sanction was one of suspension, not erasure.

16. Two grounds are raised in the notice of appeal, namely that the Tribunal:

    a. Failed to give due weight and consideration to the circumstances prevailing at the material time in 2012 and 2013 leading him into his conduct with the CSA; and

    b. Failed to adequately distinguish between standards of conduct meriting suspension as a sanction as opposed to erasure.

17. In his helpful Skeleton Argument and oral submissions Mr Kearney on behalf of Dr Nkomo focussed on the second of these grounds of appeal. He said that this was a case that fully deserved suspension, but the further step of erasure was wrong.

18. He pointed to [91] to [106] of the Sanctions Guidance, which prescribe the factors relevant to the imposition of suspension as the appropriate sanction. He said that [93] provides that suspension may be appropriate where there is acknowledgement of fault and where the tribunal are satisfied that the behaviour is unlikely to be repeated. He said this was such a case, and he relied on the finding that there was a low risk of re-

conviction and that Dr Nkomo was remorseful. He said that this was not a case of cover-up, but acknowledged that the dishonesty had been maintained over a period of time. But he emphasised the context of a marital dispute and denial of contact by the mother.

19. On behalf of the GMC, Mr Mant submitted that the Tribunal's decision to direct erasure in this case was unimpeachable and that the grounds on which an appellate court can interfere in a sanctions determination are not made out here. He said that the Tribunal carefully weighed all relevant factors and that no proper grounds have been identified for interfering with its judgment as to the sanction required to declare and uphold standards and maintain public confidence in the profession. The decision to impose the ultimate sanction was consistent with the case law and the principles it establishes. He relied, in particular, on *Theodoropolous*, supra, [35]) (findings of dishonesty lie at the top end of the spectrum of gravity of misconduct); *Naheed v General Medical Council* [2011] EWHC 702 (Admin), [22] (where dishonest conduct is combined with a lack of insight, is persistent, or is covered up, nothing short of erasure is likely to be appropriate); and *Nicholas-Pillai v General Medical Council* [2009] EWHC 1048 (Admin), [27] (the sanction of erasure will often be proper even in cases of one-off dishonesty).

Legal framework

20. This was not in dispute and is as follows.

21. Section 40 of the MA 1983 provides a right of appeal to the High Court against a sanction imposed by the Tribunal:

> "(1) The following decisions are appealable decisions for the purposes of this section, that is to say—
>
> (a) a decision of a Medical Practitioners Tribunal under section 35D above giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration;
>
> ...
>
> (7) On an appeal under this section from a Medical Practitioners Tribunal, the court may—
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> (a) dismiss the appeal;
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> (b) allow the appeal and quash the direction or variation appealed against;
>
> (c) substitute for the direction or variation appealed against any other direction or variation which could have been given or made by a Medical Practitioners Tribunal; or

> (d) remit the case to the TRIBUNALS for them to arrange for a Medical Practitioners Tribunal to dispose of the case in accordance with the directions of the court,
>
> and may make such order as to costs (or, in Scotland, expenses) as it thinks fit."

32. The over-arching objective of the GMC in exercising its functions is the protection of the public (s 1(1A)). The pursuit by the GMC of its over-arching objective consists of the following aims:

    a. to protect, promote and maintain the health, safety and well-being of the public;

    b. to promote and maintain public confidence in the medical profession, and

    c. to promote and maintain proper professional standards and conduct for members of that profession.

33. By virtue of CPR PD52D, [19.1], appeals under s 40 are by way of re-hearing. However, such an appeal 'is a re-hearing without hearing again the evidence': see *Fish v General Medical Council* [2012] EWHC (Admin) 1269, [28]. Applying CPR r 52.21, the Court must allow the appeal if the decision of the Tribunal was wrong or unjust because of serious procedural or other irregularity.

34. In *Yassin v the General Medical Council* [2015] EWHC 2955 (Admin), [32], Cranston J considered the scope of an appeal under s 40 in the following terms:

> "Appeals under section 40 of the Medical Act 1983 are by way of re-hearing (CPR PD52D) so that the court can only allow an appeal where the Panel's decision was wrong or unjust because of a serious procedural or other irregularity in its proceedings: CPR 52.11. The authorities establish the following propositions:
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> i) The Panel's decision is correct unless and until the contrary is shown: *Siddiqui v. General Medical Council* [2015] EWHC 1966 (Admin), per Hickinbottom J, citing Laws LJ in *Subesh v. Secretary of State for the Home Department* [2004] EWCA Civ 56 at [44];
>
> ii) The court must have in mind and must give such weight as appropriate in that the Panel is a specialist Tribunal whose understanding of what the medical profession expects of its members in matters of medical practice deserves respect: *Gosalakkal v. General Medical Council* [2015] EWHC 2445 (Admin);
>
> iii) The Panel has the benefit of hearing and seeing the witnesses on both sides, which the Court of Appeal does not;

iv) The questions of primary and secondary facts and the over-all value judgment made by the Panel, especially the last, are akin to jury questions to which there may reasonably be different answers: *Meadows v. General Medical Council* [197], per Auld LJ;

v) The test for deciding whether a finding of fact is against the evidence is whether that finding exceeds the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible: *Assucurazioni Generali SpA v. Arab Insurance Group* [2003] 1 WLR 577, [197], per Ward LJ;

vi) Findings of primary fact, particularly founded upon an assessment of the credibility of witnesses, will be virtually unassailable: *Southall v. General Medical Council* [2010] EWCA Civ 407 , [47] per Leveson LJ with whom Waller and Dyson LJJ agreed;

vii) If the court is asked to draw an inference, or question any secondary finding of fact, it will give significant deference to the decision of the Panel, and will only find it to be wrong if there are objective grounds for that conclusion: *Siddiqui*, paragraph [30](iii).

viii) Reasons in straightforward cases will generally be sufficient in setting out the facts to be proved and finding them proved or not; with exceptional cases, while a lengthy judgment is not required, the reasons will need to contain a few sentences dealing with the salient issues: *Southall v. General Medical Council* [2010] EWCA Civ 407, [55]-[56].

ix) A principal purpose of the Panel's jurisdiction in relation to sanctions is the preservation and maintenance of public confidence in the medical profession so particular force is given to the need to accord special respect to its judgment: *Fatnani and Raschid v. General Medical Council* [2007] EWCA Civ 46, [19], per Laws LJ.

x) An expert Tribunal is afforded a wide margin of discretion and the court will only interfere where the decision of the Tribunal is wrong: see *R(Fatnani) v General Medical Council* [2007] EWCA Civ 46."

35. The proper approach of an appeal court to the sanctions determination of a Tribunal was recently discussed in *Bawa-Garba v General Medical Council* [2018] EWCA Civ 1879, [60]-[67]. The Court of Appeal (Lord Burnett of Maldon CJ, Sir Terence Etherton MR and Rafferty LJ) said that a Tribunal's sanctions determination (in that case, that suspension rather than erasure was an appropriate sanction for the failings of

Dr Bawa-Garba which had led to her conviction for gross negligence manslaughter) is an evaluative decision based on many factors, a type of decision sometimes referred to as 'a multi-factorial decision'. This type of decision, a mixture of fact and law, has been described as 'a kind of jury question' about which reasonable people may reasonably disagree: *Biogen Inc v Medeva Plc* [1997] RPC 1, 45; *Pharmacia Corp v Merck & Co Inc* [2002] RPC 41, [153]; *Todd v Adams (t/a Trelawney Fishing Co) (The Maragetha Maria*, [2002] 2 Lloyd's Rep 293, [129]; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325, [46].

36. It has been repeatedly stated in cases at the highest level that there is limited scope for an appellate court to overturn such a decision. At [64] the Court of Appeal quoted Lord Clarke in *Re B (A Child) (Care Proceedings)* [2013] 1 WLR 1911, [137]:

> "… it has traditionally been held that, absent an error of principle, the Court of Appeal will not interfere with the exercise of a discretion unless the judge was plainly wrong. On the other hand, where the process involves a consideration of a number of different factors, all will depend on the circumstances. As Hoffmann LJ put it in *In re Grayan Building Services Ltd (In Liquidation)*[1995] Ch 241, 254, 'generally speaking, the vaguer the standard and the greater the number of factors which the court has to weigh up in deciding whether or not the standards have been met, the more reluctant an appellate court will be to interfere with the trial judge's decision'."

37. At [67] of *Bawa-Garba* the Court said that this general caution applies with particular force in the case of a specialist adjudicative body, such as the Medical Practitioners Tribunal, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts: see *Smech Properties Ltd v Runnymede Borough Council* [2016] EWCA Civ 42, [30]; *Khan v General Pharmaceutical Council* [2017] 1 WLR 169 at [36]; *Meadow* at [197]; and *Raschid v General Medical Council* [2007] 1 WLR 1460, [18]-[20]. It therefore said that an appeal court should only interfere with such an evaluative decision on sanction if (a) there was an error of principle in carrying out the evaluation, or (b) for any other reason, the evaluation was wrong, that is to say it was an evaluative decision which fell outside the bounds of what the adjudicative body could properly and reasonably decide (citations omitted).

Discussion

38. Applying these principles, in my judgment Dr Nkomo has not demonstrated that this is a case where I can conclude that the Tribunal erred in such a way that I can intervene to overturn its finding that erasure was the appropriate sanction in this case. The conclusion that it reached was one which was open to it. This was a case of serious dishonesty and the Tribunal's decision that it warranted erasure was not one which fell outside the bounds of what it could properly and reasonably have decided.

39. It is clear from the Sanctions Guidance that some cases of dishonesty may justify the sanction of suspension, whereas in other cases only erasure can be the appropriate sanction. Paragraphs [109(a)(b) and (h)] state:

> "109. Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).
>
> a. A particularly serious departure from the principles set out in *Good medical practice* where the behaviour is fundamentally incompatible with being a doctor.
>
> b. A deliberate or reckless disregard for the principles set out in *Good medical practice* and/or patient safety.
>
> …
>
> h. Dishonesty, especially where persistent and/or covered up (see guidance below at paragraphs 120–128)" (emphasis added).

40. Hence, dishonesty itself may place misconduct within the erasure bracket: where it is persistent, all the more so.

41. Paragraph 65 of *Good Medical Practice* requires doctors to make sure that their conduct justifies their patients' trust in them and in the profession. Paragraph 75 requires doctors to tell the GMC 'without delay' if they are convicted of a criminal offence. Paragraph 77 requires them to be honest in financial and commercial dealings with patients, employers, insurers and other organisations or individuals.

42. Paragraphs 124 and 128 of the Sanctions Guidance are also relevant:

> "124. Although it may not result in direct harm to patients, dishonesty related to matters outside the doctor's clinical responsibility (eg providing false statements or fraudulent claims for monies) is particularly serious. This is because it can undermine the trust the public place in the medical profession. Health authorities should be able to trust the integrity of doctors, and where a doctor undermines that trust there is a risk to public confidence in the profession. Evidence of clinical competence cannot mitigate serious and/or persistent dishonesty.
>
> …
>
> 128. Dishonesty, if persistent and/or covered up, is likely to result in erasure (see further guidance at paragraph 120–128)."

43. In relation to suspension, [92] states:

> "A period of suspension will be appropriate for conduct that is serious but falls short of being fundamentally incompatible with continued registration (ie for which erasure is more likely to be the appropriate sanction because the tribunal considers that the doctor should not practise again either for public safety reasons or to protect the reputation of the profession)."

44. This paragraph makes clear, as the Tribunal rightly noted, that there is an important dividing line between conduct which is fundamentally incompatible with continued registration (which requires erasure), and that which falls short of that standard (which may not). For the reasons that I have given, I am bound to afford a substantial degree of deference to the Tribunal's decision as to which side of the line Dr Nkomo's dishonesty lay.

45. The starting point is that dishonesty by a doctor is almost always extremely serious. There are numerous cases which emphasise the importance of honesty and integrity in the medical profession, and they establish a number of general principles. Findings of dishonesty lie at the top end of the spectrum of gravity of misconduct: *Theodoropolous*¸ supra, [35]. Where dishonest conduct is combined with a lack of insight, is persistent, or is covered up, nothing short of erasure is likely to be appropriate: *Naheed v General Medical Council* [2011] EWHC 702 (Admin), [22]. The sanction of erasure will often be proper even in cases of one-off dishonesty: *Nicholas-Pillai*, supra, [27]. The misconduct does not have to occur in a clinical setting before it renders erasure, rather than suspension, the appropriate sanction: *Theodoropolous*, supra, [35]. Misconduct involving personal integrity that impacts on the reputation of the profession is harder to remediate than poor clinical performance: *Yeong v General Medical Council* [2009] EWHC 1923, [50]; *General Medical Council v Patel* [2018] EWHC 171 (Admin) at [64]; In such cases, personal mitigation should be given limited weight, as the reputation of the profession is more important than the fortunes of an individual member: *Bolton v Law Society* [1994] 1 WLR 512 at 519; *General Medical Council v Stone* [2017] EWHC 2534 (Admin) at [34]*; Patel, supra,* [47].

46. In this case, the Tribunal found at [51] that Dr Nkomo's fraud offence was 'serious, deliberate and dishonest'. At [47] it concluded that his offending had lasted for over two years. It had resulted in a gain to him of £40 800 (and a consequent loss to his child and partner). It also found that his offence (and his driving conviction) was aggravated by his failure to report them in a timely fashion. It said that [109(a)(b) and (h)] were all engaged. At [41] the Tribunal said:

> "Dr Nkomo was convicted of a fraud lasting two years and seven months and depriving his ex-partner and son of at least £40 800. He compounded that behaviour by failing to notify the GMC without delay of that charge and conviction, and of the Driving Convictions. His behaviour clearly lies at the 'top end of the spectrum of gravity of misconduct'. He has only developed partial insight. There was little acknowledgement of the impact his misconduct may have on the reputation of the profession as a whole."

47. In my judgment these findings, taken together, more than entitled the Tribunal to conclude that the dishonesty in this case was fundamentally incompatible with Dr Nkomo's continued registration and that they justified the sanction of erasure.

48. The Tribunal did not err by failing to give due weight or consideration to the circumstances prevailing in 2012 and 2013 in Dr Nkomo's life when he committed the fraud offence. The Tribunal expressly referred to them at [29] and [50] of its

determination. In any event, weight was a matter for the Tribunal. Also, The Tribunal correctly stated at [50] that matters of personal mitigation carry less weight in the regulatory context.

49. Finally, Although Mr Kearney did not press the point, the submission below that there is a meaningful distinction between 'sustained' and 'persistent' dishonesty was rightly rejected by the Tribunal. The Sanctions Guidance is not intended to set a rigid tariff and it should not be construed like a statute. The Tribunal was required to consider all the circumstances of the case and to determine for itself whether Dr Nkomo's conduct was compatible with continued registration. For the reasons I have given, it did not err in this assessment.

Conclusion

50. The appeal is dismissed.