IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 3283 (Admin)

No. CO/2159/2019

Royal Courts of Justice

Wednesday, 27 November 2019

Before:

MR JUSTICE MOSTYN

B E T W E E N :

SAMUEL OJO OLATIGBE — Applicant

- and -

GENERAL MEDICAL COUNCIL — Respondent

MR O. OJO (instructed by Taylor Wood Solicitors) appeared on behalf of the Applicant.

MS A. HEARNDEN (instructed by General Medical Council Legal) appeared on behalf of the Respondent.

J U D G M E N T

MR JUSTICE MOSTYN:

1 This is a sad case. On 2 May 2019 the Medical Practitioners Tribunal erased the name of Dr Samuel Olatigbe from the medical register. He appeals to this court against that decision, arguing that the sanction was flawed by virtue of an error of law, and was in any event disproportionate. If the appeal is dismissed it will be five years before the appellant can apply to be restored to the register.

2 The reason that the ultimate sanction of erasure was applied was that the appellant was guilty, on his own admission, of a series of acts of dishonesty between 2013 and 2015. Having regard to all the evidence, including the oral evidence under cross-examination of the appellant, the Tribunal concluded in para.53 of its reasons as follows:

> "The Tribunal finds that Dr Olatigbe's dishonesty is fundamentally incompatible with continued registration. He has shown negligible insight into his dishonesty and the Tribunal is not satisfied that his dishonest conduct will not be repeated. There are four instances of dishonesty which span over two years and include an attempt to cover up the dishonesty. He has subsequently failed to give a candid explanation for his motivations."

3 In order to succeed on this appeal the appellant must show either that the decision of the Tribunal was wrong or that it was unjust because of a serious procedural or other irregularity in the proceedings in the Tribunal. The latter limb is not relied on by the appellant; he argues through Mr Ojo, who has presented his case most eloquently and economically, that the decision is wrong because the Tribunal failed to give due weight to a potential psychological explanation for his dishonesty. Had the Tribunal given due weight to that explanation, it is argued that it would not so readily have reached the conclusion that the dishonest conduct might well be repeated. It is argued that the failure to give due weight to that possible explanation led the Tribunal to impose a sanction which was in any event disproportionate.

4 Before I turn to the facts, I should set out shortly the relevant legal principles applicable to an appeal such as this.

5 Dishonesty by any professional is regarded extremely seriously. In *Tait v. Royal College of Veterinary Surgeons* [2003] UKPC 34 Lord Steyn stated at para.13, "For all professional men a finding of dishonesty lies at the top end of the spectrum of gravity of misconduct". He cited the famous case of *Bolton v The Law Society* [1993] EWCA Civ 32 where Sir Thomas Bingham MR stated at paras.14 to 16:

> "14. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation.

> 15. … In most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission… A profession's most valuable asset is its collective reputation and the confidence which that inspires.
>
> 16. … The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price."

6 As to the first purpose I remind myself of the well-known words of Sir Anthony Clarke MR in *General Medical Council v Meadow* [2006] EWCA Civ 1390 [2007] 1 QB 462 at para.32:

> "The purpose of FTP proceedings is not to punish the practitioner for past misdoings but to protect the public against the acts and omissions of those who are not fit to practise. The FPP thus looks forward not back. However, in order to form a view as to the fitness of a person to practise today, it is evident that it will have to take account of the way in which the person concerned has acted or failed to act in the past."

7 As to the second purpose I refer to my own decision of *Luthra v General Medical Council* [2013] EWHC 240 (Admin) at para.5:

> "The reason that the reputation of the profession is so important is not a reflection of a collective *amour propre*. It is an aspect of the need to protect the public. The public must be able to approach doctors, lawyers and other professionals with complete faith that they are both honest and competent. Without that faith the problems that would arise are too obvious to state."

8 Sir Thomas Bingham referred to the almost invariable consequence of a finding of dishonesty being an order striking off the professional. However, this is not absolutely invariable. Parliament has entrusted the decision to the Tribunal: it could easily have stated that where dishonesty was found that the consequence was automatic erasure. In *Igboaka v GMC* [2016] EWHC 2728 (Admin) Simler J in an *obiter dictum* at para.33 stated:

> "That does not mean that erasure is necessarily inevitable and necessary in every case of dishonest conduct by a doctor. There may be cases where the panel concludes in light of the particular circumstances of the case that a lesser sanction may suffice and is appropriate, bearing in mind the important balance of the interests of the profession and the interests of the individual. Factors that are likely to impact on such a decision are infinitely variable, they may include the nature of the

> dishonesty, the fact that in a particular case it appears to be out of character, or isolated in its duration; or there may be very compelling evidence of insight and remorse that would justify a conclusion that the doctor could return to practice without reputation of the profession being disproportionately damaged."

I agree with that but would emphasise that it will only be in a rare case that the usual sanction of striking off would not be applied where dishonesty is found.

9 A decision as to sanction is an evaluative judgment. See *Bawa-Garba v The General Medical Council & Ors* [2018] EWCA Civ 1879 at para.60. Where an evaluative judgment is formed after hearing oral evidence then it is particularly difficult to challenge on appeal: see *Beacon Insurance Company Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21 per Lord Hodge at paras.16 to 17. At 17 Lord Hodge stated:

> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole."

10 He cited the well-known dictum of Lord Hoffmann in *Biogen Inc v. Medeva Plc* [1996] UKHL 18 at para.54 where he stated:

> "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *"La vérité est dans une nuance")*, of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation."

11 The need for appellate caution is further enhanced where the decision has been made by a specialist tribunal: see *Bawa-Garba* at para.67 where the Lord Chief Justice stated:

> "That general caution applies with particular force in the case of a specialist adjudicative body, such as the Tribunal in the present case, which (depending on the matter in issue) usually has greater experience in the field in which it operates than the courts."

12 I now turn to the facts. The appellant qualified as a doctor in Nigeria in 1990. He moved to this country in 1995 first working as a senior house officer and then as a GP. In 2008 he was made bankrupt and in 2011 he was the subject of an investigation by the Primary Care Trust. In March 2012 at a time when he was working as a salaried GP, he entered into an individual voluntary arrangement due to his insolvency. In that same year the enquiry by the Primary Care Trust concluded with the administration of a final written warning. Later in that year he moved to work as a GP in London. On 21 March 2013 he submitted an appraisal to the Primary Care Trust in which he stated he had nothing to declare in relation to suspensions, restrictions on practice or being subject to an investigation since the last appraisal. This declaration was untrue and dishonest.

13 This led to an investigation by the General Medical Council ("GMC") which resulted in advice being tendered to the appellant on 3 February 2014. The advice was to note the guidance in Good Medical Practice on the importance of honesty and clarity in communications and financial dealings. It went on to state, "We hope (the appellant) will give clear, consistent and accurate accounts of his activities when required to do so in the future."

14 In October 2014 the appellant moved to another practice in London. In January 2015 the appellant completed and submitted a further appraisal to the relevant Primary Care Trust in which he stated he had nothing to declare in relation to suspensions, restrictions on his practice or being subject to an investigation since his last appraisal. These declarations were untrue and dishonest.

15 On 29 April 2015 the appellant submitted an application form to the Care Quality Commission ("CQC") stating that he had never been made bankrupt or been subject to any other insolvency processes or proceedings, resolved or otherwise. He also stated he was not currently the subject of, nor had he ever been the subject of, any investigation or proceedings by any professional body with regulatory functions in relation to health or social care professionals. This statement was untrue in all respects and was dishonest.

16 On 10 July 2015 the appellant met with a member of staff of the CQC. He stated directly to her that his application dated 29 April 2015 remained accurate. That statement was completely untrue and was dishonest.

17 On 31 May 2016 the GMC notified the appellant that it was investigating his conduct. On 25 October 2018 it notified him that the matter would be sent to a tribunal. Following a five-day hearing on 2 May 2019 the Tribunal made the order I have mentioned above. At the hearing the appellant admitted his conduct which I have set out above. Specifically, he admitted that he had acted dishonestly.

18 Although the grounds of appeal as formulated challenged the Tribunal's finding of impairment, before me the appeal has focused only on the question of sanction. The decision on sanction runs to 61 paragraphs over 12 closely typed pages. It is comprehensive. It recounts the oral evidence given by the appellant. Specifically, at para.36 it found:

> "The Tribunal accepts that since 2012 or 2013 Dr Olatigbe has suffered from anxiety as a result of work-related pressure and his financial circumstances."

19 However, it went on in para.37 to find as follows:

> "However, it does not accept that this provides sufficient explanation for why he would undertake the positive acts of providing dishonest information in March 2013, January 2015, April 2015 and July 2015. This is not a case where he has made mistakes as a result of being overwhelmed with mental health problems, as he accepts that he provided information that he knew was untrue and that he had been dishonest. Further, he asserted that he chose to treat his anxiety conservatively by increasing his exercise, and declined medication and failed to seek alternative treatment. His failure to give any explanation for his actions, save for that he was suffering from anxiety, demonstrates a significant and concerning lack of insight. Further, his evidence that after his 2013 dishonesty he did not think about his actions, any similar evidence in relation to the 2015 appraisal form, also demonstrates his

> significant lack of insight. The contents of his interview with Miss A, as reflected in para.10 of the Allegation, shows an effort to cover up his dishonesty."

20 After scrupulously listing in paras.42 to 43 mitigating and aggravating features, the Tribunal went on in para.53 to reach its conclusion which I have set out above but which I repeat:

> "The Tribunal finds that Dr Olatigbe's dishonesty is fundamentally incompatible with continued registration. He has shown negligible insight into his dishonesty and the Tribunal is not satisfied that his dishonest conduct will not be repeated. There are four instances of dishonesty which span over two years and include an attempt to cover up the dishonesty. He has subsequently failed to give a candid explanation for his motivations."

21 It went on to state in paras.54 and 55 the following:

> "Dr Olatigbe failed to uphold the proper standards of behaviour expected of doctors by the public, and his conduct breached a fundamental tenet of the profession. His failure to comply with the relevant professional standards was serious and his conduct brought the profession into disrepute.
>
> The Tribunal was mindful that a period of suspension is a temporary measure designed to remove a doctor from medical practice in anticipation that the doctor will return having addressed the concerns. In light of the information before it, including the absence of sufficient evidence of remediation and insight into his dishonesty, the Tribunal was not satisfied that a period of suspension would have that effect. It noted that Dr Olatigbe has had over six years to develop insight of his initial dishonesty, but has failed to adequately do so. The Tribunal does not consider that a period of suspension is sufficient to address the seriousness with which it views Dr Olatigbe's misconduct, and the need to uphold proper professional standards and maintain public confidence in the profession."

22 It reached its final determination in para.59 in the following terms:

> "The Tribunal determined that, for the reasons stated above, Dr Olatigbe's misconduct was fundamentally incompatible with continued registration on the Medical Register. The Tribunal have taken into account that Dr Olatigbe is an otherwise competent and hardworking clinician. Erasure deprives his patients of an otherwise good doctor. It is noted that he has suffered anxiety as a result of financial and work pressures. He had previously had a lengthy blameless career and has not repeated his misconduct. Erasure will impact considerably upon him and his family and will foreseeably affect his creditors. Significant weight is assigned to these features. However, erasure nevertheless appropriate and proportionate in light of the serial dishonesty, in the attempt in July 2015 to cover up the dishonesty, his lack of candour to the Tribunal, the lack of timely insight, and the lack of adequate insight and the risk of repetition."

23 Mr Ojo argues that the Tribunal, having accepted that at the relevant time the appellant was suffering from stress and anxiety, went on almost in the next breath casually to discount that as an exculpatory explanation for his conduct. There was here valid evidence of a medical

character which should have been given due weight. The problem is that the appellant did not seek to adduce any independent medical evidence about his condition; as to whether it was a contributory cause of his conduct; or whether it could have been then or now the subject of treatment.

24 Proceedings in the Tribunal are essentially adversarial rather than inquisitorial and it was not for the Tribunal to seek to fill the evidential lacuna, let alone to engage in speculation. Even now, no application has been made pursuant to the principles in *Ladd v Marshall* [1954] EWCA Civ 1 for permission to adduce psychological or psychiatric evidence of this nature. Had such an application been made it would have faced a seemingly insuperable obstacle in that it could have been obtained with due diligence for the proceedings before the Tribunal.

25 Therefore, the Tribunal had to make its judgment on the available evidence. It did not have to make a finding as to the question of dishonesty; this was admitted. It did however make findings, largely based on admissions, on the evidence of certain primary facts, namely that the appellant had attempted to cover up the dishonesty; that he had failed to give a candid explanation for his conduct; and that he had shown little or no insight into his conduct. These were findings of primary fact which were well available to the Tribunal on the evidence before it.

26 Having made those findings of primary fact, the Tribunal then had to make its evaluative judgment as to sanction. I can only interfere with that if it is wrong. Wrongness is not demonstrated if I would not have made the same decision. Wrongness is only demonstrated if the decision is clearly outwith the range of sanctions which could be legitimately imposed. In the light of its findings of primary fact, it would have been virtually impossible for the Tribunal to conclude that this case fell within the very narrow exception to the normal sanction of erasure. Indeed, I have to say that such a decision, if made, would itself have been plainly wrong.

27 For these reasons, therefore, I dismiss the appeal. The five-year period mentioned in ss.41(1) and (2) of the Medical Act 1983, before which the appellant can apply for restoration to the register, will start to run from today.

28 That concludes this judgment.

CERTIFICATE

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