Neutral Citation Number: [2021] EWHC 32 (Admin)

Case No: CO/12/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 January 2020

Before :

MRS JUSTICE FARBEY

- -

Between :

Professional Standards Authority for Health and Social Care	**Appellant**
- and -	
General Medical Council	**First Respondent**
and	
Dr David Henry Dighton	**Second Respondent**

- -
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Ms Fenella Morris QC (instructed by **Browne Jacobson LLP**) for the **Appellant**
Mr Ivan Hare QC (instructed by **GMC Legal**) for the **First Respondent**
Radcliffes Le Brasseur for the **Second Respondent**

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 11 January 2020 at 10.30 am.

Mrs Justice Farbey :

Introduction

1. In a judgment handed down on 19 November 2020, I allowed the appeal of the Professional Standards Authority for Health and Social Care ("PSA") against a decision of the Medical Practitioners Tribunal of the General Medical Council ("GMC") which is the first respondent. The Tribunal had determined that the second respondent (who was a cardiologist) should be suspended from the medical register for a period of one year following disciplinary proceedings in which he was found to have excessively prescribed potentially addictive drugs to a patient. I quashed the Tribunal's decision and substituted a sanction of erasure from the register. My judgment may be found at [2020] EWHC 3122 (Admin).

2. The PSA now seeks its costs in the sum of £29,947.50 together with VAT of £5,989.50 making a total of £35,937.00. I have received written submissions on costs from Ms Fenella Morris QC on behalf of the PSA (dated 30 November 2020 and 29 December 2020); from Mr Ivan Hare QC on behalf of the GMC (dated 11 December 2020); and from the second respondent's solicitors (dated 9 December 2020). I am grateful to all parties for their focused arguments.

Procedural history

3. The PSA launched its appeal on 3 January 2020 seeking an order from the court that the second respondent's name be erased from the medical register. By email dated 21 January 2020, the GMC's solicitor wrote to the PSA in the following terms:

> "I can confirm based on the papers received to date, subject to anything that might otherwise be raised in your skeleton argument, the GMC is minded to take a neutral stance on the appeal and would not be actively defending the appeal. Therefore you can, on that basis, consider whether you can seek agreement with Dr Dighton. Therefore, as previously has been the GMC's position in similar circumstances, the GMC consider that costs would be a matter between the PSA and Dr Dighton.
>
> Can I please confirm what steps have been taken with Dr Dighton's representatives to seek agreement at this stage?"

4. By telephone on 23 January 2020, the PSA invited the second respondent to consent to the outcome which the PSA went on to achieve in the appeal. He refused.

5. On 27 February 2020, the GMC's Case Examiners decided to allow the second respondent's application for voluntary erasure. The PSA objected to the GMC's decision on the grounds that only a court-ordered erasure would adequately protect the public interest. Correspondence placed before the court by the second respondent shows that the PSA came close to applying for an interim injunction against the GMC. However, on 6 March 2020, the GMC informed the other parties that the decision to permit voluntary erasure would (in effect) be stayed pending the determination of this appeal so as not to constrain the High Court's exercise of its statutory jurisdiction.

6. On 20 April 2020, the second respondent's solicitors wrote to the court explaining his position. The letter was accompanied by a bundle of documents relating in the main to the process that had been undergone in relation to voluntary erasure. The letter made plain that the second respondent did not intend to play a further part in the appeal but was not willing to sign a consent order.

7. By letter dated 27 August 2020, the PSA again asked the second respondent to concede the appeal. He declined to do so. On 2 September 2020, the GMC confirmed its willingness to sign a consent order (subject to the second respondent's agreement) quashing the determination of the Tribunal and substituting the sanction of erasure. The GMC made clear that it would oppose any application by the PSA to seek costs from the GMC.

8. The PSA's position has at all times been that the Tribunal's suspension order, even if coupled with voluntary erasure, would be insufficient for the protection of the public. The PSA pursued the appeal on the grounds that a court-imposed erasure was necessary in light of the importance of upholding confidence in the medical profession and the importance of the maintenance of standards.

9. The GMC submitted to the Tribunal that suspension was the appropriate sanction. It reminded the Tribunal that it had the power to impose an erasure: the appropriate sanction was a matter of the Tribunal's discretion taking relevant factors into consideration.

10. The GMC's view, expressed at the appeal hearing, was that voluntary erasure would protect the public interest. However, the GMC did not actively oppose the appeal. It did not file a skeleton argument. It filed a bundle of authorities relating to voluntary erasure but that bundle was not deployed by any of the parties and was not mentioned at the appeal hearing.

11. The GMC instructed Mr Hare (who did not appear at the Tribunal hearing) to appear at the appeal hearing. He made no submissions in opposition to the appeal. He answered questions from me about the GMC's position before the Tribunal that suspension was appropriate, and about its subsequent position that voluntary erasure would protect the public interest.

12. I asked Mr Hare these questions because the GMC is a specialist decision-maker whose views I regarded as valuable in relation to whether a court-ordered erasure was necessary or whether voluntary erasure would suffice. It does not follow that Mr Hare actively disputed anything that Ms Morris said. Mr Hare's approach was consistent with the GMC's willingness to sign a consent order.

13. The second respondent's position before the Tribunal was that he should be permitted to remain on the register but with conditions. In the letter of 20 April written for this appeal, his solicitors submitted that voluntary erasure would provide adequate public protection. They regarded the GMC as the cause of the appeal:

> "If suspension was inappropriate (as the PSA submit) then that is not the responsibility of Dr Dighton. On the PSA's approach Dr Dighton would be compelled to defend the correctness of the MPT decision which was based

> upon the submission of the GMC, with the consequent risk on costs, simply to secure his own voluntary erasure…
>
> Dr Dighton does not think that it would be right for him to consent to the PSA's appeal and does not agree that any order for costs should be made against him since the PSA's appeal seeks to correct the consequences of a submission made by the GMC."

14. In my previous judgment, I concluded that the Tribunal's flawed decision to suspend the second respondent could not be permitted to stand. I accepted the PSA's submission that the public interest (specifically, public confidence in the medical profession) required a court-imposed rather than voluntary erasure. Therefore, the PSA gained the relief which it had sought in the Appellant's Notice.

The parties' submissions

15. Ms Morris submits that the PSA is the successful party and that each of the respondents is an unsuccessful party. There is no reason for the court to depart from the general rule that the costs of a successful party should be paid by the by the unsuccessful parties (CPR 44.2(2)).

16. The PSA brought the appeal in the public interest in the exercise of a statutory function which it is required to perform (section 29 of the National Health Service Reform and Health Care Professions Act 2002). That statutory function only arose once the GMC had decided not to exercise its own right of appeal against the Tribunal's decision (section 40A of the Medical Act 1983). Had the GMC decided to exercise its power in the public interest, then it would have incurred the costs involved in securing the outcome which the PSA obtained. It would therefore be wrong for the GMC to pass the costs to the PSA when it ought itself to have brought an appeal with the concomitant costs. If the GMC had acted, the PSA would not have appealed and would have incurred no costs.

17. Ms Morris points out that the PSA had invited the second respondent to consent to the outcome in these proceedings in advance of the hearing on two occasions but he had declined to do so. He too should be liable to pay costs. The question of how the costs should be allocated between the respondents is one for the court.

18. Mr Hare submits that there should be no order for costs against the GMC. Given that the GMC adopted an entirely neutral stance and had been prepared to settle the case on terms sought by the PSA (save as to costs), it is not an unsuccessful party for the purposes of CPR 44.2(2)(a). The second respondent was the unsuccessful party since he was twice invited to consent to the ultimate outcome but declined to do so.

19. Mr Hare submits that the GMC is a respondent to the appeal simply as the body with statutory responsibility for the Tribunal. As such, it is in the same position as a tribunal which does not oppose a legal challenge against its decision (*Sarkar v GMC; PSA v GMC & Sarkar* [2020] EWHC 1896 (Admin), para 64, per Tipples J). It is well-established that, in such cases, there should be no order for costs against the tribunal, including in cases where the tribunal appears only to provide assistance to the court (*R (Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 1 WLR 2739, para 47).

20. Mr Hare submits that the Tribunal is independent of the GMC which was under a duty to reach its own decision on sanctions having proper regard to the need for public protection. The PSA is wrong to rely on the fact that the GMC did not exercise its own right of appeal. Under section 40A of the Medical Act, the GMC has a power not a duty to appeal. The present appeal is not a judicial review of the GMC's decision not to appeal. It would not have been appropriate for the GMC to seek to appeal the Tribunal' decision when the GMC had sought the sanction of suspension.

21. Mr Hare submits in the alternative that the costs sought by the PSA are disproportionate. They are out of step with the costs of less than £15,000 which the GMC has incurred when it has brought successful one-day appeals.

22. The second respondent submits that the court should make no order for costs against him. Given that the GMC submitted that the appropriate sanction was suspension, my judgment has had the effect of correcting an error both of the GMC and of its Tribunal. In this respect the distinction made by the GMC between acting in its role as a party to proceedings and its role, through the Tribunal, as adjudicator is relevant: it was the GMC as a party before the Tribunal that had sought suspension. The GMC's Case Examiners had granted the application for voluntary erasure prior to this appeal. The second respondent had made written submissions only and did not otherwise take part in the appeal. In the alternative, the costs claimed by the PSA are disproportionate. The second respondent advances a number of detailed submissions as to the ways in which the costs should be reduced.

Discussion

23. The starting point is that the court has discretion as to both whether costs are payable by one party to another and the amount of those costs (CPR 44.2(1)). If the court decides to make an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order (CPR 44.2(2)). In deciding what order (if any) to make about costs, the court will have regard to (among other factors) the conduct of the parties (CPR 44.(4)(a)).

24. The PSA was the successful party on all issues. The question is: who if anyone was an unsuccessful party?

25. In my judgment, the second respondent was unsuccessful. He knew at all material times that the PSA was seeking an order of erasure. He made written submissions opposing a court-ordered erasure on the grounds that voluntary erasure would suffice. I considered but rejected those submissions for reasons set out in my previous judgment. His submissions were unsuccessful.

26. It is not accurate for the second respondent to say that the court merely corrected an error of the Tribunal that had been prompted by the GMC. The second respondent was represented by counsel before the Tribunal and made submissions on the appropriate sanction. As it transpires, his submissions fell short by a considerable margin. His opposition to a more serious sanction was no less causative of the appeal than anything said by the GMC.

27. The second respondent has at no stage agreed to a court-ordered erasure. He rejected the PSA's invitation to do so on two occasions. He caused the court to have to hear the

appeal when the GMC was willing to settle the matter. He caused the court to have to consider the relative merits of voluntary and court-ordered erasure, as reflected in my main judgment.

28. The GMC was neutral. Ms Morris criticises the GMC for instructing counsel if it regarded itself as being in the same neutral position of a court or tribunal, which regularly do not instruct counsel when their decisions are challenged in judicial review proceedings. However, Mr Hare did not argue against the appeal grounds. He did not promote the approach taken by the GMC at the Tribunal hearing and did not promote any outcome in the appeal. It was the second respondent's written submissions that caused the court to consider voluntary erasure.

29. I do not accept Ms Morris's submission that the GMC was under an obligation to launch an appeal (which would have avoided the involvement of – and the costs incurred by – the PSA). The key question is whether, in light of its public function, the GMC exercised its discretion unreasonably by failing to appeal (*PSA v GMC & Hilton* [2019] EWHC 2192 (Admin), para 9; *Sarkar*, above, paras 59-60). The question of the merits of an appeal may be answered differently by different lawyers without any unreasonableness. It does not, therefore, follow that the GMC was unreasonable to refrain from appealing because the PSA succeeded. It is in any event a matter for the GMC to assess its own competing priorities in the public interest and in light of its overall resources.

30. In this case, Mr Hare makes the point that it would have been inappropriate for the GMC to exercise a right of appeal because of the position which it took before the Tribunal. That the PSA took a different view of the appropriate sanction does not mean that the GMC had inadequate regard to its public interest function. On the facts of the present case, it was in my judgment reasonable for the GMC to discharge its public interest function by (i) reminding the Tribunal of its power to order something other than the sanction advocated by the GMC; (ii) deciding not to appeal after the Tribunal had adopted the sanction which it had advocated but then (iii) deferring to the PSA's view of the matter by expressing an early willingness to settle; and (iv) adopting a neutral position in the appeal. There has in my judgment been no public interest deficit caused by the GMC.

31. Standing back, and applying CPR 44.2, I am persuaded that the GMC was a neutral party and as such should not be treated as an unsuccessful party. If I am wrong, then the GMC's general conduct justifies a departure from the general rule that an unsuccessful party should be ordered to pay costs.

32. For these reasons, there will be no order for costs against the GMC. I would have reached the same conclusion under the approach of Tipples J in *Sarkar* in which she held that the GMC, as the statutory body responsible for the Tribunal, is in no different position to that of an inferior court or tribunal in a judicial review. On established case law, the ordinary rule is that no order for costs will be made against the court or tribunal unless it has actively opposed the appeal (*Sarkar*, above, para 64, citing *Davies*, above).

33. Ms Morris submits that Tipples J's conclusions about the applicability of *Davies* turned on the facts of the case before her. I do not agree. Tipples J is in my view expressing a more general conclusion.

34. Ms Morris submits that the GMC is not in the same position as a court or tribunal as it is a party to PSA appeals with specific public interest duties imposed by statute. However, nothing in the circumstances of the present case would have caused me to depart from Tipples J's approach. It would lead to the same outcome, namely that there should be no order for costs against the GMC.

35. I need to deal with one further aspect of the costs claimed. The PSA claims the costs of work undertaken in relation to whether it was appropriate for the GMC to proceed to determine the second respondent's application for voluntary erasure prior to the determination of the appeal. As I have said, the GMC on 6 March 2020 made it clear that it would not implement its decision on erasure pending the appeal. The PSA had on 3 March 2020 informed the respondents that it was no longer seeking interim relief to prevent the GMC from giving effect to the voluntary erasure decision.

36. The respondents both maintain that the costs associated with the PSA's position on the inappropriateness of voluntary erasure should not be awarded. Mr Hare submits that the costs should be discounted because they relate to a possible injunction which was ultimately not sought. The PSA abandoned its position. The second respondent submits that the work done in relation to voluntary erasure was not work done in relation to the appeal such that the costs fall outside the standard basis of assessment.

37. I do not agree with the second respondent that these costs were unrelated to the appeal. They related to the matter of potential interim relief to preserve the PSA's position in the appeal. However, I accept Mr Hare's submission that these costs should be discounted because the PSA abandoned its position. I note the comparatively small amount involved: £946. I shall consider the proportionality of the PSA's costs on the basis that this small portion should be discounted.

Proportionality

38. The second respondent submits that the costs claimed are disproportionate in circumstances in which the PSA faced no opposition in oral submissions. This was a short statutory appeal with no complex issues. There was no need for the PSA to have instructed Queen's Counsel in a straightforward matter and her fees were unduly high. The PSA's claim for correspondence (letters or emails) is excessive, as is the claim for the attendance of two solicitors at the appeal hearing. Overall, the court should make a very substantial reduction.

39. I do not accept that it was disproportionate to instruct Queen's Counsel. The appeal was not complex but it was serious: it concerned the appropriate sanction for a doctor who had prescribed excessive drugs over a sustained period of time to a vulnerable patient who demonstrated the behaviour of an addict and who was at risk of overdose. It is understandable that the PSA would wish to instruct Leading Counsel.

40. That said, the overall costs incurred by the PSA were in my judgment disproportionately high. The appeal hearing was concluded within half a day of court time. There were no complex questions of law or fact. The issues remained static as the GMC took a neutral position and as the second respondent limited his submissions to saying that voluntary erasure was appropriate. Even taking account of the higher fees which Queen's Counsel receive (and even having received the benefit of Ms

Morris's experience and excellent submissions), I regard the PSA's costs as being very high indeed.

41. I agree that it would not be reasonable for the second respondent to pay the cost of the attendance of two solicitors at the hearing.

42. Each case turns on its particular circumstances but the suggestion of £15,000 made by the GMC is in my judgment closer to the mark than the £29.947.50 sought. I am prepared to award £20,000 as being reasonable and proportionate overall.

Conclusion

43. The second respondent will pay the PSA's costs in the sum of £20,000 plus VAT which on my calculation amounts to £24,000 in total. Any error in my assessment of VAT will be corrected in the Order which will follow this judgment.