

Neutral Citation Number: [2014] EWHC 2190 (Admin)

Case No: CO/121/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 16th July 2014

Before :

MRS JUSTICE LANG

Between :

**THE PROFESSIONAL STANDARDS
AUTHORITY**

Appellant

- and -

**(1) THE GENERAL CHIROPRACTIC COUNCIL
(2) CAMERON BRIGGS**

Respondents

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Peter Mant (instructed by **the Professional Standards Authority**) for the **Appellant**
Victoria Butler-Cole (instructed by **the General Chiropractic Council**) for the **First
Respondent**

The Second Respondent did not appear and was not represented

Hearing date: 24th June 2014
Judgment
As Approved by the Court

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE LANG DBE

Mrs Justice Lang:

1. The Professional Standards Authority (“the PSA”) has referred to the High Court a decision of the Professional Conduct Committee (“PCC”) of the General Chiropractic Council (“GCC”), made on 5th November 2013 in respect of a registered chiropractor, Mr Briggs.
2. The PCC found that, in February 2012, Mr Briggs was guilty of unacceptable professional conduct by providing chiropractic treatment to patients when registered as "non-practising" and without having indemnity insurance. The PCC imposed a six month suspension order, without provision for any review.
3. The PSA has referred this case to the High Court under section 29 of the National Health Service Reform and Health Care Professions Act 2002 ("the 2002 Act"), on the following grounds:
 - a) The GCC as prosecutor erred in failing to bring charges of dishonesty against Mr Briggs in respect of representations that he made to his employers concerning his registration and insurance.
 - b) On the facts found proved, the sanction was unduly lenient having regard to the Registrant's lack of insight, remediation or remorse, and the Committee’s own finding that there was a risk of repetition.
 - c) The Committee failed to give adequate reasons for its decision.
4. The GCC has consented to the case being remitted for a full re-hearing by a freshly constituted panel of the PCC, on the three grounds relied upon by the PSA, with further particulars of unacceptable professional conduct added. The PSA now asks the Court to make an order solely in terms of the consent order (which is narrower in scope than the referral sought in the grounds of appeal).
5. Mr Briggs does not consent to the proposed remittal. Mr Briggs has not attended the hearing as he lives in Australia, but he has submitted written representations, which I have read and taken into account.

The Charge

6. The charge against Mr Briggs (as amended) was as follows:

“That, being a registered chiropractor:

 1. At all material times you practised as a chiropractor at the Kingdom Chiropractic Clinic, 205 South Street, St Andrews, Fife KY16 9EF and 31 Bonny Gate, Cupar, Fife KY15 4BU (the clinics).
 2. In around February 2012 you provided chiropractic treatment to one or more patients at the clinics when

you were registered with the General Chiropractic Council as a non-practising chiropractor.

3. In around February 2012, you provided chiropractic treatment to one or more patients without having appropriate professional indemnity insurance in place"

The findings of the Professional Conduct Committee

7. The facts of the charge were found proved in full. The PCC found that those facts amounted to unacceptable professional conduct, for the following reasons.
8. Under rule 6 of the General Chiropractic Council (Professional Indemnity Insurance) Rules Order 1999, failure to have insurance automatically constitutes unacceptable professional conduct.
9. Mr Briggs would have known that it was his responsibility to ensure that he was registered as a practising chiropractor, and he had specifically been reminded, in the letter of 8 February 2012, that he could not practise as a chiropractor until he received notification that his status had changed. He had not filled out the application form to change his status and he continued to treat patients knowing his true status. This was not simple oversight but a "pattern of irresponsible behaviour".
10. By practising as he did, he misled the public who would have thought that he was entitled to practise and that he had appropriate insurance. His actions had the potential to put patients at risk.
11. The PCC imposed a sanction of 6 months suspension. It noted that Mr Briggs had not presented any mitigation. He had chosen not to attend or give evidence by Skype and there was no evidence of any insight, remorse or regret. The PCC found no evidence that he had remedied his behaviour and could not be sure that it would not happen again.
12. The PCC said that the sanction imposed reflected the seriousness of the offence and would send out a clear message, and that "the relatively short period of suspension would be appropriate and proportionate in all the circumstances".

Law

13. Pursuant to section 29(4) of the 2002 Act, the Authority may refer a case to the High Court where it considers that:

“(a) a relevant decision falling within subsection (1) has been unduly lenient, whether as to any finding of professional misconduct or fitness to practise on the part of the practitioner concerned (or lack of such a finding), or as to any penalty imposed, or both

...

and that it would be desirable for the protection of members of the public for the Council to take action under this section.”

14. Where a case is referred to the High Court, it is to be treated as an appeal (s.29(7)).
15. In *Ruscillo v Council for Regulation of Healthcare Professionals* 120041 EWCA Civ 1356, the Court of Appeal held, applying CPR 52.11, that an appeal under section 29 should be allowed if the relevant decision was “wrong” or if there has been “a serious procedural or other irregularity”.
16. Lord Phillips MR gave guidance on the approach for the Court to adopt in deciding whether a decision was “wrong”, at [73]:

"73. What are the criteria to be applied by the Court when deciding whether a relevant decision was “wrong”? The task of the disciplinary tribunal is to consider whether the relevant facts demonstrate that the practitioner has been guilty of the defined professional misconduct that gives rise to the right or duty to impose a penalty and, where they do, to impose the penalty that is appropriate, having regard to the safety of the public and the reputation of the profession. The role of the Court when a case is referred is to consider whether the disciplinary tribunal has properly performed its task so as to reach a correct decision as to the imposition of penalty. Is that different from the role of the Council in considering whether a relevant decision has been 'unduly lenient'? We do not consider that it is. The test of undue leniency in this context must, we think, involve considering whether, having regard to the material facts, the decision reached had due regard for the safety of the public and the reputation of the profession.”

17. In *Ruscillo*, Lord Phillips identified under-charging by the regulatory body as a potential serious procedural or other irregularity (at [79] – [83]) which could result in an unduly lenient decision. In such a case, the whole investigatory process has to be examined, not just the hearing. The Court may not be able to decide whether or not the penalty was appropriate or not, and may have to remit the case to the Tribunal with directions on how to proceed (at [72]).
18. Lord Phillips confirmed that an element of double jeopardy is inherent in the statutory scheme (at [42]):

“The intervention of the Council under section 29, whether to put in issue an acquittal or the adequacy of a sentence, clearly places a practitioner under the stress of having his case reopened when it would otherwise be closed. This element of double jeopardy is, however, necessarily inherent in the scheme of review under section 29. The object of that scheme is the protection of the public and the

Council can only refer a decision to the High Court when it considers that this is necessary for the protection of the public. We do not find it surprising that where this requirement is satisfied considerations of double jeopardy should take second place.”

19. Under-charging has been considered in two subsequent cases. In *Council for the Regulation of Healthcare Professionals v Nursing and Midwifery Council & Michelle Kingdom* [2007] EWHC 1806 (Admin), the Administrative Court held that the NMC’s failure to allege dishonesty in respect of representations made by the registrant in respect of her qualifications was a serious procedural error. Beatson J. stated that: “the issue is whether, on the material available to the Council, there was a serious prima facie case of dishonesty for her to answer” at [35]. He considered whether remitting the matter was going to lead to a wholly different case being unfairly put against her, but decided that was not so on the facts of the case.
20. In *R (Council for the Regulation of Health Care Professionals) v General Medical Council & Dr Rajeshwar* [2005] EWHC 2973 (Admin), Sullivan J remitted a case to the tribunal where he accepted that the GMC had undercharged the registrant by failing to allege that there was a sexual motivation for conducting inappropriate examinations of the patient’s breasts which were not medically justified. He concluded that the penalty imposed would have been unduly lenient if the issue of improper motivation had been resolved against the Doctor.
21. On analysing these cases, the questions to be asked are:
 - i) on the evidence, and applying its own rules, should the GCC have included the further allegations in the charge;
 - ii) if so, did the failure to include those allegations in the charge mean that the Court is unable to determine whether the sanction was unduly lenient or not.
22. Plainly, any further allegations must arise out of the same episode/s which form the basis of the existing charge, and be directly connected to the existing allegations, otherwise it would be unfair to the registrant.

Allegations of dishonesty

23. The PSA asks for an order that a fresh panel of the PCC determine the charge against the registrant with additional allegations of dishonesty added. The proposed amended charge is as follows:

“1. At all material times you practised as a chiropractor at the Kingdom Chiropractic Clinic, 205 South Street, St Andrews, Fife, KY16 9EF and 31 Bonnygate, Cupar, Fife KY15 4BU (“the Clinics”).

2. In around February 2012, you provided chiropractic treatment to approximately 150 – 180 patients at the Clinics

when you were registered with the General Chiropractic Council as a non-practising chiropractor.

3. In around February 2012, you provided chiropractic treatment to approximately 150 – 180 patients without having appropriate professional indemnity insurance in place.

Additional Allegations:

4. When you provided the treatment described at paragraph 2 above, you knew you were registered with the General Chiropractic Council as a non-practising chiropractor.

5. When you provided the treatment described at paragraph 3 above, you knew you did not have the appropriate professional indemnity insurance in place.

6. In securing and/or maintaining the employment described at particular 1 above, you acted dishonestly in that, expressly or impliedly, you held yourself out as meeting the regulatory requirements for practise in the United Kingdom in terms of:-

a) being registered as a practising chiropractor with the General Chiropractic Council; and

b) possessing professional indemnity insurance in respect of the provision of chiropractic advice and treatment, when you knew you did not meet those requirements.

7. On a date prior to 28th February 2012, when you informed the practice manager of the clinics that you would bring in proof of your professional indemnity insurance, you acted dishonestly in that you knew you did not possess such insurance.

8. On or about 1st March 2012, when you informed the owner of the clinics that it was not the case that you were registered with the General Chiropractic Council as a non-practising chiropractor, you acted dishonestly in that you knew you were registered as non-practising.

9. On or about 4th March 2012, when by e-mail you informed the owner of the clinics that you had completed the forms for registration as a practising chiropractor and sent them by facsimile to the General Chiropractic Council, you acted dishonestly in that you knew you had not sent the forms to the Council.”

24. At the PCC hearing, Mr Sinclair who was Mr Briggs' employer, gave evidence which was largely uncontested. There was also email correspondence in evidence. I have also received representations from Mr Briggs about the course of events.
25. On carefully considering this material, there is plainly evidence which supports the additional allegations, nos 4 to 9 above. By section 20(12) of the Chiropractors Act 1994, the Investigating Committee must refer an allegation to the PCC where it concludes that there is a case to answer. It has no discretion. I consider it was a serious error not to refer the additional allegations to the PCC. They arose out of the episode which formed the basis of the principal allegations and were directly connected to the allegations which were referred.
26. At the hearing, the PCC expressly rejected the presenting officer's submission that there had been a breach of C1 of the Code of Practice (the duty to act with honesty and integrity) because dishonesty had not been alleged. They were correct in doing so, as an allegation of dishonesty ought to be pleaded in the charge if it is to be relied upon.
27. If findings of dishonesty had been made, it is likely that a more severe sanction would have been appropriate. The PSA has drawn to my attention that dishonesty may result in removal from the register in some circumstances (see GCC Sanctions Guidance; *Atkinson v General Medical Council* [2009] EWHC 3636 (Admin); *Parkinson v Nursing & Midwifery Council* [2010] EWHC 1898 (Admin)). However, I am unable to reach any concluded view on this, as the issue of dishonesty has yet to be considered by the PCC.
28. Therefore the case should be remitted to a fresh panel of the PCC for a re-hearing.
29. At the re-hearing, it will, of course, be open to Mr Briggs to dispute the allegations of dishonesty and to put forward any matters in mitigation which may be material. Many of the representations he has made to this Court can properly be made to the PCC. He will be given a fair opportunity to be heard.

Unduly lenient sanction

30. The PSA further submits that the sanction imposed was unduly lenient, even without the additional allegations of dishonesty. Practising without insurance places patients at risk, and can justify removal from the register. The PCC found that the Registrant lacked insight, did not show remorse, and that there was a risk of repetition. The failure to order a review at the end of the suspension period meant that there was no opportunity for the GCC to ascertain whether Mr Briggs acknowledged and understood the unacceptable risks he had taken by practising when neither properly registered nor insured. I have been persuaded by these submissions, primarily because of the lack of a review. Therefore I allow the appeal on ground 2 also.

Failure to give adequate reasons

31. Failure to provide adequate reasons for a decision was held to be a serious irregularity leading to a remittal in *Council for the Regulation of Health Care*

Professionals v. General Dental Council & Marshall [2006] EWHC 1870 (Admin) because the Judge was unable to determine whether or not the sanction was appropriate.

32. However, in this case, I do not find the reasons to be inadequate, bearing in mind that they are the reasons of a regulatory panel, not a court. I found them intelligible and sufficient in the circumstances. Therefore, I reject the PSA's third ground of appeal.

Conclusions

33. The appeal is allowed and the case will be remitted back to a fresh panel of the PCC for a re-hearing.