Case No: CO/5552/2015

Neutral Citation Number: [2016] EWHC 1237 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/05/2016

Before:

MRS JUSTICE McGOWAN

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Between:

THE PROFESSIONAL STANDARDS AUTHORITY	**Applicant**
- and -	
HEALTH AND CARE PROFESSIONS COUNCIL (1)	
And	**Respondents**
FRANCIS AJENEYE (2)	

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- -

Mr Mant (instructed by **Field Fisher**) for the **Applicant**
Ms Scott (instructed by **Bircham Dyson Bell**) for **Respondent 1**
Mr Dunlop (instructed by **Mr Ajeneye**) for **Respondent 2**

Hearing dates: 26/04/2015

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Judgment

Mrs Justice McGowan :

Introduction

1. This matter comes before the Court by way of an appeal by the Professional Standards Authority ("***the Authority***") against the decision of the First Respondent, the Health and Care Professions Council's ("***the First Respondent***") Conduct and Competence Committee ("***the Panel***") made on 9 September 2015.

2. The Authority brings the appeal under s.29 of the National Health Service Reform and Health Care Professions Act 2002 ("***the 2002 Act***") against the Panel's decision to impose a 5 year caution order against a registered biomedical scientist, Francis Ajeneye ("***the Second Respondent***"), in respect of a charge of dishonestly providing inaccurate references.

3. An unduly lenient sanction is one which no reasonable panel, having due regard to the public interest, including to uphold standards and maintain public confidence in the profession, could properly have imposed.

4. The Authority seeks to amend the grounds of appeal by the addition of a ground (f) alleging, in the alternative, that the Panel failed to give adequate reasons for its decision. The Appellant argues that this was foreshadowed in its own skeleton argument but is raised specifically to deal with the submissions made by the First Respondent on 19 April 2016 and that in any event, no prejudice is caused to either Respondent.

Background

5. The Second Respondent was a senior biomedical scientist at Homerton University Hospital. He provided false references for two acquaintances of his, Grace Oni and Titlayo Oyedele, both of whom were seeking to be employed as biomedical scientists.

    i) Grace Oni, 26th June 2013.

        a) The Second Respondent said that he had studied at university with Ms Oni between 1985 and 1989 and had remained in contact with her ever since.

        b) He supplied an electronic reference which said she had worked for him or under his supervision as a "***BMS 1 Blood Science's***" from September 2010 to March 2011.

        c) He said, in answer to a question about the nature and depth of their acquaintance, that it had been as a "***BMS Supervisor***".

    ii) Titlayo Oyedele, 13th March 2013.

        a) The Second Respondent said that he had met Ms Oyedele at a Church Convention in 2012.

        b) ***"The above named candidate has been known to me for 2 years. Titi worked in the Haematology Department at the Homerton University***

Hospital, London as a voluntary Biomedical Scientist for 3 months between February, 2012 to October, 2012…"

6. Ms Oni had never worked for or with the Second Respondent. She had been employed as a cleaner at the University Hospitals Bristol NHS Foundation Trust between March 2012 and September 2013.

7. Ms Oyedele had never worked for or with the Second Respondent and they had not even met until after the period covered in the reference.

8. Unsurprisingly the lack of competence on the part of both caused serious concerns about their continued employment and an investigation into the nature of their applications and references began. In one case Ms Oyedele's lack of competence for the position had caused her to give non-matched blood to a patient, which had directly caused harm, albeit not permanent, to that patient.

9. When challenged about the references, the Second Respondent maintained his position that;

   i) In July 2013, Ms Oni had worked at Homerton Hospital, he said she had been a trainee there in early 2012 for six months,

   ii) He told his employers that an employment agency had misrepresented what he had said in the reference,

   iii) Further he claimed that he had told the employment agency that he had not worked with Ms Oni,

   iv) He had not considered how the references would be used.

10. When the matter came before the Panel the Second Respondent accepted that both the references were inaccurate. He denied any dishonesty or that he had intended to mislead. In relation to the reference for Ms Oni, he maintained the position that the employment agency had written the reference and he had simply failed to check its contents before he added his signature.

The Hearing before the Panel

11. The Panel sat between 24 August 2015 and 9 September 2015 to hear the allegations against the Second Respondent, the two women for whom he had provided references and another applicant for a post, Mr. Oladele Eluwole. The other three were alleged to have been guilty of incompetence and misconduct. The Second Respondent attended some parts of the hearing in order to give evidence on his own behalf.

12. The Panel found the two allegations of providing false, in the sense of inaccurate, references proved. They continued to consider the question of dishonesty and applied the proper two-stage test.

"170. First it determined that reasonable and honest people would consider that Mr Ajeneye's actions in providing references with many inaccuracies as set out……..would be considered dishonest by reasonable and honest people. The

Panel determined that reasonable and honest people would regard those actions of sending inaccurate and misleading references as being dishonest.171. Turning to the subjective element of the test, the Panel considered Mr Ajeneye's evidence and the way he gave it. The Panel considered Mr Ajeneye did not answer questions directly, instead giving discursive explanations. The Panel did not find Mr Ajeneye to be a credible or reliable witness. The Panel rejected his evidence that the inaccuracies in the references arose by simple mistake on his part, and rejected his evidence that he was not fully aware of the content of the references he provided. On that basis the Panel concluded that he must have realised he was being dishonest by the standards of reasonable and honest people at the time that he provided the two references."

13. The Panel went on to consider impairment to practise in the future.

"174. The provision of these false references to support job applications for posts of BMS could only be considered as serious breaches of those required standards of conduct, and, as such, amounted to the ground of misconduct."

"176. Mr Ajeneye has engaged with this regulatory process to some extent. There was some evidence before the Panel of his insight into his misconduct by reason of his admissions in evidence in respect of the particulars 1 and 2. Also, he demonstrated some insight by undertaking online courses in data protection principles and document management. The Panel considered that this showed insight which was limited. He displayed no understanding of the potential risk of harm to patients brought about by his actions. He had disputed dishonesty and shown no remorse, and there was accordingly no evidence of remediation of his dishonesty. In these circumstances the Panel concluded that the risk of recurrence remained at this time. Any recurrence of his provision of untrue references in support of applications for posts as a BMS could put patients at risk of harm and would undermine the public's confidence in the profession of BMS.

177. The Panel determined that Mr Ajeneye's fitness to practice is impaired by reason of the risk Mr Ajeneye's proven lack of integrity presents to patients, and by reason of the need to protect the public's confidence in the profession."

"183. The Panel next considered whether a caution order would be sufficient and appropriate. Whilst the misconduct involved dishonesty, it was only in respect of two references. Mr Ajeneye seems to have been drawn into the provision of those references by Ms Oni and Ms Oyedele as there was no evidence that he suggested himself as a referee, or had gained

> ***any personal benefit from providing them. The Panel took into account that the personal testimonials supported Mr Walker's (counsel) submission that Mr Ajeneye had an otherwise unblemished record in a career that he clearly relished. In these circumstances, the panel was prepared to accept the truth behind the assertions made through Mr Walker that Mr Ajeneye accepted the findings of the panel, totally regretted his misconduct, and will never again provide inaccurate references.***
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> ***"184 For those reasons the panel determined that a caution order would sufficiently protect the public and the public interest. It would send a message to the public and the profession that inaccurate references should never be provided, whilst allowing Mr Ajeneye to continue in safe and effective practice as a BMS. To mark the seriousness of the misconduct, however, the caution order would be for the maximum period of five years."***

The panel concluded that any greater sanction would be disproportionate and therefore inappropriate.

The Legal Framework

14. This was "***a relevant decision***" under s. 29(1)(j) of the 2002 Act.

15. An appeal is governed by CPR 52.11 which provides that:

> ***"(3) The appeal court will allow the appeal if the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court."***

16. A decision is wrong when the tribunal:

    i) erred in law.

    ii) erred in fact.

    iii) erred in the exercise of its discretion.

17. Where a case is referred to the High Court, it is to be treated as an appeal under s.29(7). Under section 29(8), the Court may:

    i) dismiss the appeal,

    ii) allow the appeal and quash the relevant decision,

    iii) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or

iv) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court, and may make such order as to costs… as it thinks fit.

18. The general principle applies that the court must have respect for the experience and expertise of the Panel and a disagreement with the sanction is not a sound basis upon which to allow an appeal. The approach to be followed by this court was established in Ruscillo v Council for Regulation of Healthcare Professionals, GMC & Another [2004] EWCA Civ 1356.

> ***"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 that task so as to reach a correct decision as to the imposition of a penalty. Is that any 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 has due regard for the safety of the public and the reputation of the profession."***
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> ***74 . Collins J in Truscott held that the approach to 'undue leniency' should be that applied in Lomas v Parle [2003] EWCA Civ 1804. That was a case concerned with the power of the court to increase, on appeal, a sentence of imprisonment for contempt of Court. In that case Thorpe LJ, giving the judgment of the Court of Appeal held that it was appropriate to adopt the same approach as that applied by the Criminal Division of this Court to the reference of a sentence by the Attorney General under the Criminal Justice Act 1988. As to that approach, Thorpe LJ cited this passage from the judgment of Judge LJ in Neil v Ryan [1998] 2 FLR 1068, 1069:***
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> ***… but a sentence should not be increased under that Act unless the court is satisfied that it is not merely lenient, but 'unduly' lenient. And, what is more, if the court reaches that conclusion, when deciding the appropriate level of sentence the court must also reflect the element of what is sometimes described as double jeopardy."***
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> ***75. The reference to having regard to double jeopardy when considering whether a sentence is unduly lenient is not, as we***

have already indicated, really apposite where the primary concern is for the protection of the public. More pertinent is this passage in the judgment of the Lord Chief Justice in Attorney General's Reference (No 4 of 1989)(1990) 90 Cr App 266:

The first thing to be observed is that it is implicit in the section that this Court may only increase sentences which it concludes were unduly lenient. It cannot, we are confident, have been the intention of Parliament to subject defendants to the risk of having their sentences increased – with all the anxiety that this naturally gives rise to – merely because in the opinion of this Court the sentence was less than this Court would have imposed. A sentence is unduly lenient, we would hold, where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. In that connection regard must of course be had to reported cases, and in particular to the guidance given by this court from time to time in so-called guidelines cases. However it must always be remembered that sentencing is an art rather than a science; that the trial judge is particularly well-placed to assess the weight to be given to various competing considerations; and that leniency is not in itself a vice. That mercy should season justice is a proposition as soundly based in law as it is in literature."

76. This passage was cited with approval by Leveson J in Solanke. As he observed, not all of it is appropriate in a case where the primary object of imposing a penalty is the protection of the public. We consider that the test of whether a penalty is unduly lenient in the context of section 29 is whether it is one which a disciplinary tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could reasonably have imposed.

77. Leveson J in Solanke referred to 'the range of sanctions which the tribunal could reasonably consider appropriate' and accepted that an unduly lenient sentence was one which 'departed by a substantial extent from the norms of sentencing generally applied'. We have reservations as to whether this language is helpful in relation to the types of disciplinary sanction that are available in relation to the regulation of health care professionals. These range from a reprimand to sanctions that prevent the practitioner from continuing to practise. In any particular case under section 29 the issue is likely to be whether the disciplinary tribunal has reached a decision as to penalty that is manifestly inappropriate having regard to the practitioner's conduct and the interests of the public.

> ***78. The question was raised in argument as to the extent to which the Council and the Court should defer to the expertise of the disciplinary tribunal. That expertise is one of the most cogent arguments for self-regulation. At the same time Part 2 of the Act has been introduced because of concern as to the reliability of self-regulation. Where all material evidence has been placed before the disciplinary tribunal and it has given due consideration to the relevant factors, the Council and the Court should place weight on the expertise brought to bear in evaluating how best the needs of the public and the profession should be protected. Where, however, there has been a failure of process, or evidence is taken into account on appeal that was not placed before the disciplinary tribunal, the decision reached by that tribunal will inevitably need to be reassessed."***

19. The court must always keep in mind the general principle that the Panel is an expert body with experience in its field and will be reluctant to interfere with the decision of a panel that saw the witnesses and heard the evidence and submissions at first hand. It is clear however that the court must interfere if the test in CPR 52.11(3) is met.

20. Each case of this type can only properly be resolved by the application of general established principle to its own specific facts. The purpose of the imposition of a sanction is not merely to punish the individual in the wider public interest but to ensure that public confidence is maintained in the standards to be required of health professionals and that faith can be placed in the regulatory system to police and punish any significant lapse.

21. Deliberate dishonesty must come high on the scale of misconduct. That is particularly so when a direct consequence of that misconduct is physical harm to a patient. The lack of financial motive or personal gain means that a further aggravating feature is not present. It does not mitigate the risk of harm to patients created by the breach of professional standards. Equally, the number of instances of dishonesty is important, once might be described as an aberration but more than once, even if only twice, may demonstrate a tendency to act dishonestly. A failure immediately or speedily to acknowledge and admit such conduct is material. An attempt to deny the alleged dishonesty by contesting proceedings by seeking to place blame elsewhere is a factor that may also demonstrate a tendency to act dishonestly. In the context of professional standards it is capable of being highly relevant to the question of impairment to practise. An acknowledgement of responsibility after the charges have been found proved is not necessarily valueless but it cannot have the same weight as an unequivocal acceptance at an earlier stage. It may be a sliding scale and will always depend on the individual circumstances of a case.

Argument

22. The Authority contends that the sanction was unduly lenient, on the following grounds:

    i) The Panel erred in its approach to the issue of insight;

ii) It failed to have regard to the full context of the Second Respondent's misconduct which demonstrated a pattern of dishonesty;

iii) The Panel failed, without any or any adequate reason, to apply the First Respondent's Indicative Sanctions Policy;

iv) The sanction that was imposed failed, in all the circumstances, to reflect the seriousness of the misconduct, both in terms of: (i) the general seriousness of dishonesty in applications and references for employment in health care professions, and (ii) the specific seriousness of the particular misconduct in this case; and

v) The Panel failed to give adequate weight to the wider public interest in declaring and upholding standards and maintaining public confidence in the profession and the system of regulation.

23. The Second Respondent seeks to argue that the appeal is brought on an incomplete analysis of the factual background. He further contends that the penalty, even if lenient, was not unduly lenient on the following grounds:

i) Even if the insight shown was limited, it was real and was properly evaluated by the Panel. The acceptance of responsibility over the night following the findings was genuine and spoke to a lack of impairment.

ii) That the "***pattern***" of dishonesty is not made out, either by the provision of two dishonest references or the combination of those breaches with the fact and manner of contesting the charges.

iii) That the Panel did consider the Indicative Sanctions Policy.

iv) That on all the material available the sanction imposed was not unduly lenient. He relies upon:

a) his long and otherwise unblemished career;

b) that he obtained no benefit from the references;

c) that he had many positive references from colleagues;

d) the fact that he was remorseful;

e) the fact that he 'clearly relished' his career and would be unlikely to want to jeopardise it by repeating his misconduct after he had been subject to a caution order;

v) that there is no merit in the contention that the Panel did not adequately have regard to the public interest.

24. The First Respondent raises a separate point that the Panel failed to give adequate reasons for the finding that the Second Respondent would never again provide false references. Further that such a failing could amount to such a serious procedural error that might justify quashing the Panel's decision. Its consent is "***offered***" to an order

quashing the decision so that it can be remitted to the Panel, as previously constituted, to re-determine the sanction and provide such adequate reasoning. In all other respects it supports the case advanced on behalf of the Second Respondent.

Ruling

25. The essence of this appeal is whether the sanction imposed is unduly lenient when considering the actions of the Second Respondent and the wider public interest. It seems clear that the Panel did have regard to the Indicative Sanctions Policy.

26. The court must give due weight to the expertise of the Panel but that does not answer every possible criticism of a decision. As was highlighted in Council for the Regulation of Health Care Professionals v GMC and Southall [2005] EWHC 579 Admin) the Panel's greater expertise may be of more weight in judgment of professional and clinical practice than in instances of dishonesty. In this case the Panel's expertise is not necessarily greater in assessing the level of culpability and the potential damage to public confidence in the provision of two dishonest references enabling wholly unqualified people to obtain employment as blood scientists.

27. In this case the Second Respondent was an experienced blood scientist, he knew the skill required in his post. He provided dishonest references on two separate occasions to enable others to perform that role with all the attendant risk to the public that would inevitably follow. When challenged he sought to avoid responsibility by saying that the employment agency had completed the references and he had signed them without fully understanding their purpose. The Panel found his insight to be limited and his acceptance of responsibility only came overnight after their initial findings.

28. Notwithstanding the respect to be afforded to the Panel's expertise and experience and the high test before reaching a finding on undue leniency I have no doubt that the sanction imposed in this case was unduly lenient as a sanction for the conduct of the Second Respondent. This was not a lapse in professional standards. It was two acts of dishonesty in combination with a dishonest attempt to place blame elsewhere in the course of the hearing. The damage caused to the public interest is evident in the harm caused to one patient and the manifest risk to which others were exposed.

29. Further the damage to public confidence caused by the fact that two wholly incompetent and dishonest individuals were employed as health professionals with the assistance and connivance of the Second Respondent is obvious. That such conduct should be met by a caution, even for 5 years, does not ensure that the regulator is seen to be meeting the creation of an unacceptable level of risk by dishonesty with an appropriate response. Even if the Second Respondent is rightly characterised as having some limited insight and a desire to maintain his career which would go some way to prevent reoccurrence this sanction would diminish public confidence.

30. In reaching the judgment that the decision of the Panel was unduly lenient I have taken into account the factors relied upon by the Second Respondent. I do not find that the testimonials, his career history, his remorse and his undoubted wish to continue in his post together combine to justify the leniency of the sanction.

31. Given that finding it is unnecessary to determine whether sufficient reasoning was provided by the Panel for its finding as to future risk of misconduct. Although, as was

conceded by the First Respondent, it is unlikely that the reasoning was adequate. As discussed at the conclusion of the hearing, the parties will make submissions on paper as to the best course to achieve the re-determination of the proper sanction in this case.