

Section 29 Case Meeting

25 March 2020

Members and attendees participated via teleconference



Members present

Alan Clamp (in the Chair), Chief Executive, Professional Standards Authority
Mark Stobbs, Director of Scrutiny and Quality, Professional Standards Authority
Graham Mockler, Assistant Director of Scrutiny and Quality, Professional Standards Authority

In attendance

David Bradly of 39 Essex Chambers

Observers

Georgina Devoy, Senior Scrutiny Officer, Professional Standards Authority

1. Definitions

1.1 In this meeting note, standard abbreviations have been used. Definitions of the standard abbreviations used by the Authority, together with any abbreviations used specifically for this case are set out in the table at Annex A.

2. Purpose of this note

2.1 This meeting note records a summary of the Members' consideration of the relevant decision about the Registrant made by the regulator's Tribunal, and the Authority's decision whether or not to refer the case to the court under Section 29 of the Act.

3. The Authority's powers of referral under Section 29 of the Act

3.1 The Authority may refer a case to the relevant court if it considers that a relevant decision (a finding, a penalty or both) is not sufficient for the protection of the public.

3.2 Consideration of whether a decision is sufficient for the protection of the public involves consideration of whether it is sufficient:

- to protect the health, safety and well-being of the public
- to maintain public confidence in the profession concerned, and
- to maintain proper professional standards and conduct for members of that profession.

3.3 This will also involve consideration of whether the Tribunal's decision was one that a disciplinary Tribunal, having regard to the relevant facts and to the object of the disciplinary proceedings, could not reasonably have reached; or was otherwise manifestly inappropriate having regard to the safety of the public and the reputation of the profession (applying *Ruscillo*¹).

4. Conflicts of interest

4.1 The Members did not have any conflicts of interest.

5. Jurisdiction

5.1 The Legal Advisor confirmed that the Authority had jurisdiction to consider the case under Section 29 of the Act. Any referral in this case would be to the High Court of Justice of England and the statutory time limit for an appeal would expire on 27 March 2020.

6. The relevant decision

6.1 The relevant decision is the Determination of the Tribunal following a hearing which concluded on [REDACTED].

6.2 The Tribunal's Determination which includes the charges and findings is set out at Annex B.

7. Documents before the meeting

7.1 The following documents were available to the Members:

- Determination of the Tribunal dated [REDACTED]
- The Authority's Detailed Case Review
- Transcripts of the hearing
- Counsel's Note dated 24 March 2020
- The GMC's Code – in force at the time of the incident
- The Authority's Section 29 Case Meeting Manual

7.2 The Members and the Legal Advisor were provided with a copy of a response from the General Medical Council to the Authority's Notification of s.29 Meeting as well as correspondence between the General Medical Council and the Medical Practitioners Tribunal Service (MPTS).

¹ CRHP v Ruscillo [2004] EWCA Civ 1356

8. Background

- 8.1 The Registrant's registration was made subject to a two month suspension by a Tribunal of the MPTS on [REDACTED] by reason of his misconduct in telephoning a former patient and asking her to meet him at a named public house and in meeting her at that public house and telling her that she was very pretty, that she should consider divorcing her husband, that she should not tell her husband about their meeting, that he had not told his wife about the meeting and that he had met other patients outside work and had not told his wife, his motivation for doing so being sexually motivated.
- 8.2 The Tribunal had found the Registrant's fitness to practise impaired because it considered that he had very limited insight into the misconduct, which was not easily remediable without full insight, so that the Tribunal could not find that the Registrant was highly unlikely to repeat it. When it considered sanction, however, the Tribunal did describe the misconduct as a one-off isolated incident in a long career and found that there was not a significant risk that the Registrant would repeat it.
- 8.3 The Tribunal decided that it would not provide for a review of the suspension. It made a positive decision that, on the basis that the Registrant would be able to develop his insight further on his own with further CPD, a review was not required. There was no challenge to the Tribunal's decision not to require a review at the end of the suspension (the Registrant did appeal the decision; the appeal was dismissed). The suspension came into effect on [REDACTED], so that it would expire on [REDACTED].
- 8.4 By a decision made on [REDACTED] an Assistant Registrar at the GMC directed that there was to be a review of the suspension prior to its expiry, pursuant to section 35D(4B) of the Medical Act 1983. The review so ordered was listed for hearing on [REDACTED].
- 8.5 On [REDACTED] the High Court [REDACTED] dismissed applications by the Registrant for permission to challenge the Assistant Registrar's decision by judicial review and for an injunction to prohibit the GMC from holding the hearing. The court noted that the power to direct a review under section 35D(4B) is unlimited, and in particular not restricted by any requirement for a change of circumstances, and the GMC's guidance (being just guidance) is incapable of preventing the Assistant Registrar exercising the statutory discretion in appropriate circumstances.
- 8.6 The review directed by the Assistant Registrar duly came before a (different) Tribunal of the MPTS on [REDACTED]. The Tribunal entertained (it appears at its own initiative) as a preliminary issue argument as to whether it ought to perform the review at all. It determined as a preliminary issue that no review ought to be undertaken, on the basis that it was being asked to say that the Tribunal which had made the suspension order in 2019 was wrong not to have ordered a review, when (there having been no challenge to that decision when it was made) it was not entitled to go behind the 2019 decision and make that judgment, at least when there had been no change in circumstances.

9. Applying Section 29 of the 2002 Act

9.1 The Members considered all the documents before them and received legal advice.

9.2 The Members discussed the following concerns about the decision:

Were the Tribunal wrong not to review the decision as directed by the Assistant Registrar of the GMC?

9.3 The Members' primary concern in this case was the failure of the MPTS to review the decision that was directed by the Assistant Registrar.

9.4 The Members considered the legal advice given and noted that if the Assistant Registrar directs a review hearing pursuant to section 35D(4B) of the Medical Act 1983 then the MPTS are required to hold a review.

9.5 The Members were in agreement that that it was not lawful not to hear a review and agreed that the MPTS were obliged to conduct a review.

9.6 The Members also noted the correspondence between the GMC and the MPTS and that it was the GMC's view that the MPTS were wrong not to hold a review.

Conclusion on insufficiency for public protection

9.7 In light of their concerns, the Members concluded that the Tribunal's failure to hear the review hearing as directed by the Assistant Registrar was a serious procedural irregularity. However, the Members noted the insight and remediation demonstrated by the Registrant at the substantive hearing and considered that had the review been heard, a Tribunal would have been likely to have allowed the order to lapse. For this reason, the Members were satisfied that the decision to allow the Registrant to return to practise was not insufficient to protect the public. However, their concerns regarding the failure to hear the review should be dealt with by way of learning points.

10. Referral to court

10.1 Having concluded that the Tribunal's Determination was not insufficient for public protection, the Members were not required to consider whether they should exercise the Authority's power under Section 29 to refer the case to the relevant court.

11. Learning points

11.1 The Members agreed that the learning points set out at Appendix C should be communicated to the Regulator.



..... **31st March 2020**
Alan Clamp (Chair) **Date**

12. Annex A – Definitions

12.1 In this note the following definitions and abbreviations will apply:

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| The Authority | The Professional Standards Authority for Health and Social Care |
| The Tribunal | A Fitness to Practise Tribunal of the MPTS |
| The Registrant | [REDACTED] |
| The Regulator | General Medical Council |
| Regulator’s abbreviation | GMC |
| The Act | The National Health Service Reform and Health Care Professions Act 2002 as amended |
| The Members | The Authority as constituted for this Section 29 case meeting |
| The Determination | The Determination of the Tribunal sitting on 30 January 2020 |
| The Court | The High Court of Justice of England and |
| The Code | Regulator’s Code of Practise in force at time of incident |
| MPTS | Medical Practitioners Tribunal Service |