EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 37
XA15/22

Lord Woolman
Lord Pentland
Lord Tyre

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Appeal

by

THE PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE

Appellant

against

A decision of the Medical Practitioners Tribunal of the General Medical Council dated 15 December 2021 in the case of Dr Hannah Isabel Austin, Medical Practitioner

Appellant: O'Neill, Q.C. sol adv; Brodies LLP
Respondents: No appearance

18 August 2022

[1] On 15 December 2021 the Medical Practitioners Tribunal determined that a doctor's fitness to practise was impaired by reason of her misconduct; in particular that she had acted dishonestly, misled her employer and as a result had carried on practising as a doctor when she ought to have been suspended. By way of sanction, the MPT imposed a suspension of 12 months, being the most severe sanction available short of erasure. In terms of section 29(4) of the National Health Service Reform and Health Care Professions Act 2002 the Professional Standards Authority for Health and Social Care refers the MPT's decision to

this court to consider whether it is "sufficient … for the protection of the public". It proceeds as an appeal against the decision under section 29(7).

[2] The Authority challenges the decision on the basis that the sanction is not sufficient for the protection of the public. Given the doctor's past dishonesty, in relation to which she had previously received a period of suspension, only erasure was appropriate in the present case. It was also contended that the decision was not sufficient to maintain public confidence in the medical profession and to maintain professional standards and conduct in that profession (section 29(4A)). The court is asked to quash the decision insofar as it relates to sanction and to substitute a sanction of erasure.

[3] The doctor is no longer a party to the proceedings. She initially lodged skeletal answers to the appeal, but subsequently withdrew them. Answers were lodged by the General Medical Council in which it adopted a neutral position on the appeal. It has taken no further part in proceedings. The appeal thus proceeded unopposed on the basis of full written submissions from the Authority alone. We did not consider it necessary to hold an oral hearing.

Regulatory regime

[4] Under section 29 of the 2002 Act the Authority is empowered to refer "relevant decision(s)" to the "relevant court" (section 29(4)). Section 29(5) defines the "relevant court" in Scotland as the Court of Session. A relevant decision includes

> "a direction by a Medical Practitioners Tribunal of the General Medical Council under paragraph 5A(3D) or 5C(4) of Schedule 4 to the Medical Act 1983 for suspension of a person's registration or for conditional registration" (section 29(1)(ca)).

[5] The Authority shall refer a relevant decision "if it considers that the decision is not sufficient (whether as to a finding or a penalty or both) for the protection of the public" (section 29(4)). Section 29(4A) sets out the considerations involved in determining whether a decision is sufficient for the protection of the public, namely whether it is sufficient – (a) to protect the health, safety and well-being of the public; (b) to maintain public confidence in the profession concerned; and (c) to maintain proper professional standards and conduct for members of that profession.

[6] Where the Authority refers a case, it is to be treated as an appeal against the decision (section 29(7)). Section 29(8) sets out the various ways in which the court may dispose of the case. It may *inter alia* (a) dismiss the appeal, (b) allow the appeal and quash the relevant decision, (c) substitute for the relevant decision any other decision which could have been made by the committee or other person concerned, or (d) remit the case to the committee or other person concerned to dispose of the case in accordance with the directions of the court.

[7] The MPT will take a two-stage approach in disciplinary proceedings: first, it must consider whether the conduct alleged against the practitioner amounts to misconduct and, second, if it does, whether the practitioner's fitness to practise is impaired as a result. Only if the MPT determines that fitness to practise is impaired will it consider whether to impose a sanction. The MPT's power to impose sanctions is conferred by section 35D of the Medical Act 1983:

> "(2) Where the Medical Practitioners Tribunal find that the person's fitness to practise is impaired they may, if they think fit—
>
> (a) except in a health case or language case, direct that the person's name shall be erased from the register;
>
> (b) direct that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding twelve months as may be specified in the direction; or

(c) direct that his registration shall be conditional on his compliance, during such period not exceeding three years as may be specified in the direction, with such requirements so specified as the Tribunal think fit to impose for the protection of members of the public or in his interests."

[8] Where the MPT considers imposing a sanction on a practitioner, it must have proper regard to the Sanctions Guidance issued by the GMC. It must follow the Guidance unless there are sound reasons for departing from it and those reasons must be stated clearly in the decision (cf *Professional Standards Authority* v *Health and Care Professions Council & Doree* [2017] EWCA Civ 319). A non-exhaustive list of factors is set out in the Guidance which may be suggestive of suspension or erasure being appropriate. Insofar as relevant, it provides:

"97 Some or all of the following factors being present (this list is not exhaustive) would indicate suspension may be appropriate.

a. A serious breach of *Good medical practice*, but where the doctor's misconduct is not fundamentally incompatible with their continued registration, therefore complete removal from the medical register would not be in the public interest. However, the breach is serious enough that any sanction lower than a suspension would not be sufficient to protect the public or maintain confidence in doctors.

b. In cases involving deficient performance where there is a risk to patient safety if the doctor's registration is not suspended and where the doctor demonstrates potential for remediation or retraining.

…

e. No evidence that demonstrates remediation is unlikely to be successful, eg because of previous unsuccessful attempts or a doctor's unwillingness to engage.

f. No evidence of repetition of similar behaviour since incident.

g. The tribunal is satisfied the doctor has insight and does not pose a significant risk of repeating behaviour.

…

109. Any of the following factors being present may indicate erasure is appropriate (this list is not exhaustive).

a. A particularly serious departure from the principles set out in *Good medical practice* where the behaviour is fundamentally incompatible with being a doctor

b. A deliberate or reckless disregard for the principles set out in *Good medical practice* and/or patient safety.

…

h. Dishonesty, especially where persistent and/or covered up …

i. Putting their own interests before those of their patients …

j. Persistent lack of insight into the seriousness of their actions or the consequences."

The core facts

[9] Dr Hannah Isabel Austin qualified as a doctor in 2007. In 2016 she was employed as a Public Health Trainee on attachment with Health Protection Scotland. In November 2017 she was referred to the GMC by NHS Lothian following an internal investigation into allegations of dishonest conduct said to have taken place in the second half of 2016. The allegations were that she misrepresented to supervisors the volume of work that she had carried out on projects while on attachment and, separately, she had misled colleagues and supervisors as to the status of a journal article.

[10] Fitness to practise proceedings against Dr Austin concluded in May 2019. The MPT found the allegations proved. It determined that her fitness to practise was impaired because of misconduct, having found proven dishonesty which was:

> "repeated, persistent and sustained over a 6 month period. It took place in both her email correspondence and during face to face meetings with colleagues and was directly related to her professional practice. The last act of dishonesty took place during a formal investigatory hearing at her employing Trust which was held

> 4 months after her first admission of her dishonesty in August 2016. A further feature of her dishonesty is that in relation to the Mumps Paper it had the potential to have adverse consequences for her co-authors" (Decision of 29 May 2019, p20).

[11] The MPT determined that Dr Austin's registration should be suspended for 6 months. She was informed that the suspension would be effective from 2 July 2019 if she did not lodge an appeal.

[12] At review hearings in December 2019 and January 2020 the reviewing tribunal imposed a further suspension of three months. A final review took place on 14 May 2020 at which her suspension was revoked.

The 2020 charges

[13] In December 2020 Dr Austin was referred to a further MPT. The allegations against her were:

> "That being registered under the Medical Act 1983 (as amended):
>
> 1. Following a Medical Practitioners Tribunal's determination of 29 May 2019 suspending your registration for a period of six months, on 2 July 2019 at 13:08 you telephoned the MPTS and told Ms A that:
>
> (a) you had appealed;
>
> (b) Mr B at the Court of Session in Scotland ('the Court') had confirmed that no reference number could be provided until the appeal had been processed, but that you would receive a reference number by the end of the week;
>
> (c) you would pass your reference number on to Ms A as soon as you received it; or words to that effect.
>
> 2. When responding to requests to provide your reference number, you sent an email to the MPTS on 12 July 2019 at 09:17, which stated 'my apologies for the delay, I will chase this up with my legal representative today and get back to you as quickly as possible'.
>
> 3. The information you provided as set out in paragraphs 1 and 2 was untrue.

4. You knew that the information you provided as set out in paragraphs 1 and 2 was untrue because:

   (a) Mr B had sent you an email on 2 July 2019 at 08:35 advising that your appeal had not been accepted, or words to that effect;

   (b) you had not lodged any further appeal documentation with the Court.

5. Your actions as described at paragraphs 1 to 3 were dishonest by reason of paragraph 4.

6. You continued to work as a Specialty Training Registrar in public health medicine for NHS Tayside during the period between 2 July 2019 and 8 August 2019.

7. You knew that you:

   (a) had not lodged a valid appeal against your suspension;

   (b) if you did not appeal, the substantive sanction would have been effective from 2 July 2019.

8. Your actions as described at paragraph 6 were dishonest by reason of paragraph 7.

And that by reason of the matters set out above your fitness to practise is impaired because of your misconduct."

The second MPT's determination

[14] The MPT issued its determination on 15 December 2021. Dr Austin gave evidence. The MPT made various findings in fact regarding the allegations before correctly setting out the two-stage approach it required to take.

Findings in fact

[15] Dr Austin admitted certain facts which formed the basis of the charges but disputed that she had been dishonest. The MPT accepted that, on 1 July 2019, Dr Austin genuinely

believed that she had lodged an appeal with the Court of Session. It did not, however, accept her evidence that she continued to believe this was so even after sight of an email from court staff on 2 July advising that appeals could not be accepted by email. She took no further action to lodge an appeal. That being so, her subsequent statements to MPTS were untrue. In terms of continuing to work when she should have been suspended, an ordinary decent person would consider this dishonest. All of the allegations were found proved.

The decision on misconduct

[16] Her dishonesty was repeated and sustained. She misled the MPTS, being the organisation responsible for regulating doctors, and her employer and colleagues. These were serious matters. Public confidence depended on doctors being honest and trustworthy. Her conduct fell so far short of the standards of conduct reasonably to be expected of a doctor as to amount to serious misconduct.

The decision on fitness to practise

[17] The MPT considered that dishonesty amounted to a breach of a fundamental tenet of the medical profession. The reviewing tribunal were unaware of the 2019 dishonesty when finding Dr Austin had shown insight into and remediated her 2016 dishonesty. There was no evidence that she had shown insight into or remediated her 2019 dishonesty. The 2019 dishonesty was similar to that in 2016. It was the MPT's view that Dr Austin resorts to untruths to "buy time" and to delay the inevitable when she is stressed. These considerations were suggestive of there being a real risk of repetition of the conduct. Her fitness to practise was impaired. A finding that it was not would undermine public confidence and proper standards.

The decision on sanction

[18] The GMC sought to have Dr Austin's name erased from the medical register. It contended, and the MPT accepted, that there were various aggravating factors relating to her dishonesty and that there were no mitigating factors.

[19] In determining sanction, the MPT took into account the following considerations. Dr Austin had not repeated the dishonest conduct since the reviewing tribunal revoked her suspension. It was significant that she had previously shown insight and remediation before the reviewing tribunal. Other than the dishonest conduct, there were no concerns about her work. She was highly regarded by NHS Tayside.

[20] The MPT considered whether suspension would be appropriate or proportionate. It noted that suspension had a deterrent effect and would be appropriate where the misconduct fell short of being fundamentally incompatible with continued registration, where only erasure would be appropriate. Although the reputation of the profession as a whole was more important than Dr Austin's individual interests, the MPT considered that there was a potential for remediation such that erasure would not be in the public interest. Remediation would be difficult, but there was a successful pathway to it. That being so, erasure would not be proportionate. Suspension for twelve months was sufficient to send a clear message to Dr Austin, the profession and the wider public that this type of behaviour was unacceptable.

Grounds of appeal

[21] In its detailed and helpful written submissions the Authority contended that the MPT's decision on sanction was not sufficient for the protection of the public. It was not

sufficient to protect the health, safety and well-being of the public; to maintain public confidence in the medical profession; and to maintain professional standards (section 29(4A)). A sanction of erasure ought to have been imposed. The grounds of appeal can be summarised as follows.

[22] The decision was irrational and flawed by reason of its own internal inconsistencies (cf *Professional Standards Authority for Health and Social Care* v *The General Optical Council and Rose* [2021] EWHC 2888 (Admin)). It was irrational for the MPT to rely on Dr Austin having shown insight and remediation in relation to past misconduct. The reviewing tribunal were ignorant of the further dishonesty when concluding that she was capable of remediation and insight. The MPT found that there was a lack of insight into and remediation for the conduct which the hearing concerned. This should have indicated that erasure was the only available outcome. Its decision on sanction was not within the range of reasonable responses open to it.

[23] There was no proper basis for the MPT's conclusions regarding Dr Austin's capacity for insight and remediation. Its conclusions were unsupported wishful thinking (cf *Professional Standards Authority for Health and Social Care* v *Nursing and Midwifery Council and Judge* [2017] EWHC 817 (Admin)). As to the implication by the GMC that a practitioner could demonstrate a capacity for insight and remediation in respect of repeated acts of dishonesty, this misunderstood the nature of remediation and its role in mitigating against future misconduct. It also failed to acknowledge that it took several review hearings before the reviewing tribunal concluded that Dr Austin had shown insight and remediation.

[24] Dr Austin's conduct was fundamentally incompatible with continued registration. The MPT did not properly address this matter. The 2019 dishonesty was in direct response to the findings that she was dishonest in 2016. It was also more serious. It implicated others

and she succeeded in continuing to practise when she should have been suspended. Her failure to demonstrate insight and remediation was indicative of a deep attitudinal problem which was incompatible with continued registration. The tribunal fell into the errors identified in *General Medical Council* v *Dr Anthony Donadio* [2021] EWHC 562 (Admin). Cases of deliberate dishonesty as to licence to practise, particularly in the face of regulatory action that has withdrawn that right, must be treated as being of the utmost gravity (*Donadio* at para [50]).

Answers to the grounds of appeal

[25] The GMC lodged answers to the appeal. These are the only answers remaining in process. It stated that it did not intend to participate in the proceedings and adopted a neutral stance on the questions of law posed by the Authority. Consideration was given by the GMC to appealing against the decision. Having taken legal advice, it concluded that the sanction imposed by the MPT was not outside the range of responses reasonably open to it. In reaching its decision the MPT had regard to the Guidance and the applicable test – whether Dr Austin's conduct was fundamentally incompatible with continued registration. A finding of dishonesty did not mandate erasure (cf *Professional Standards Authority for Health and Social Care* v *Nursing and Midwifery Council* 2017 SC 542). At the review hearing, the MPT would be able to test Dr Austin's insight and remediation and, if not satisfied that such had been shown, could erase her name from the medical register (section 35D(5)).

Decision

[26] We are satisfied that the appeal must be allowed for the reasons advanced by the Authority. In short, we consider that Dr Austin's persistent dishonesty was so grave as to be

wholly incompatible with her continued registration as a doctor. Honesty lies at the very heart of the profession of doctor. Such repeated dishonesty as occurred in the present case carries with it the potential to undermine completely public confidence in the medical profession. In the circumstances, we are satisfied that erasure was the only sanction that could properly have been imposed. In *Good medical practice* persistent dishonesty is expressly stated to be one of the grounds justifying erasure. We consider that the guidance on this point is directly applicable in the circumstances of the present case.

[27] In our view, the sanction of twelve months suspension was not sufficient to protect the health, safety and well-being of the public; to maintain public confidence in the medical profession; and to maintain proper professional standards and conduct for members of the medical profession. We note that the MPT's decision not to order erasure was one that was taken only by the narrowest of margins. In view of the repeated nature of Dr Austin's dishonesty, we do not consider that she could be said to show any real capacity for insight or remediation. We consider that her history of dishonesty, her propensity to resort to dishonesty when under stress, and her failure to have learned from the previous disciplinary proceedings made it impossible to hold that there were grounds for optimism about her ability to comply with proper professional standards in the future. Dr Austin was guilty of repeated and sustained dishonesty in two periods of her medical practice; these occurred three years apart. The second episode of dishonest conduct took place as a direct response on her part to findings of dishonesty made against her by the first MPT. The second episode was more serious as it involved dishonesty directed towards a regulatory body, as well as towards her employer. It also involved dishonesty in continuing to practise while suspended, in breach of a restriction imposed for the purpose of protecting the public. Furthermore, it implicated others in her dishonesty.

[28] The fact that the reviewing tribunal had found in May 2020 that Dr Austin had shown insight and remediation in relation to the 2016 dishonesty was of no real relevance since this decision had been taken in ignorance of her subsequent dishonesty. What mattered was the repeated and sustained nature of the dishonesty and its inherent gravity; these factors made it impossible to say that there was truly any insight or potential for remediation.

[29] We shall allow the appeal, quash the MPT's decision of 15 December 2021 insofar as it relates to the sanction imposed, and substitute for that sanction an order that Dr Austin's name be erased from the register of medical practitioners. We have reserved all questions of expenses.