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REGULATORY BRIEFING

Disciplinary Proceedings

"Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out"- **Francis Bacon.**

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The anonymity of blackmail victims in Disciplinary Proceedings *Dr Tony Walker v GMC [2010] EWHC 3849*

On 13 December 2010 the GMC convened a Fitness to Practise Panel ("the Panel") to consider two allegations against Dr Tony Walker. The first was that he was engaged in sexual conduct with a patient. The second was that, on 13 August 2008, he had been convicted of the offence of battery against his wife.

At the beginning of the hearing, Counsel for Dr Walker made an application that the part of the proceedings relating to the allegations of sexual misconduct be heard in private. That application was refused by the Panel and Dr Walker sought a judicial review of their decision.

The matter came before Mr Justice Wyn Williams. The following undisputed facts are set out in his judgment:

1) The GMC's website had published information relating to the Fitness to Practice proceedings which identified Dr Walker and noted the allegation of improper sexual activity with a patient;

2) While the precise nature of it was in dispute, Dr Walker had admitted that he had engaged in sexual activity with the patient on two separate occasions and that he had sent the patient text messages with a sexual content;

3) Within hours of the second occasion of sexual activity, the patient's husband attempted to blackmail Dr Walker. Almost immediately Dr Walker reported the matter to the police. The husband admitted the offence and was sentenced to a term of imprisonment. It was the police who reported the doctor's conduct to the GMC.

4) At the conclusion of the Fitness to Practice hearing details of the case would be made public. Given the nature of the case, these details were bound to include information about the sexual activity between the doctor and the patient.

With this factual matrix in mind, Mr Justice Wyn Williams turned to consider the two grounds relied upon by Dr Walker in the judicial review proceedings, namely:

1) There is a well established public policy principle that in the criminal courts the victims of blackmail should not be identified during the trial of the alleged blackmailer. If that policy was to have any force, and so as not to deter the reporting of incidents of blackmail, it should extend to bodies such as the GMC;

2) There was evidence from Dr Walker's psychotherapist that if the proceedings were in public, his ability to properly participate would be impaired to the extent that there was a risk that a fair hearing could not take place.

In respect of the first ground, it was argued by Dr Walker that there was a clear public interest in encouraging victims of blackmail to come forward. It was submitted that a blackmail victim who may later be subject to disciplinary action might not come forward if there was a risk that any such subsequent proceedings would be held in the "*full glare of publicity".* The thrust of the doctor's argument was that a *"fair reading of the determination of the Panel shows that they had no regard to that wider public interest".*

Mr Justice Wyn Williams accepted that the Panel did not refer expressly to the public interest in encouraging victims of blackmail to come forward. However, he considered it was clear that that aspect of Dr Walker's case had not been lost on them. In the circumstances, any challenge to the decision on the ground that there had been a failure to take account of a material consideration must fail.

In any event, the learned judge was "*far from satisfied*" that the tribunal would have erred in law even if they had not had regard to the public interest point. On the specific facts of the case, Dr Walker did come forward notwithstanding the fact that he knew the GMC would probably become involved. Indeed Counsel for the GMC argued, and the Court accepted, that the true deterrent in coming forward was likely to be the risk of disciplinary action itself rather than the possibility any such action could be dealt with in public.

Accordingly, even if there had been a failure to have regard to a wider public interest, it was so peripheral that no error of law could be established.

Mr Justice Wyn Williams dealt with Dr Walker's second ground of review in short order. The Panel was a specialist tribunal well used to assessing health issues.

Their determination in respect of Dr Walker's health could only be impugned if found to be Wednesbury unreasonable. They had correctly summarised the thrust of the medical evidence and had applied their own expertise in deciding that it was unnecessary to hold proceedings in private on the health grounds advanced.

This decision of the Administrative Court clearly provides little comfort for those victims of blackmail who may find themselves subject to disciplinary action due to their conduct. Of more general interest though is the restatement (in paragraph 10 of the judgment) of the wide discretion afforded to specialist tribunals: there is a "*clear line of authority which suggests that a claimant seeking to persuade a court that such a tribunal has erred in exercising its discretion has a significant hurdle to overcome. Obviously, the exercise of discretion can be impugned upon classical Wednesbury principles, but to repeat, a wide margin is afforded to a specialist tribunal when exercising its discretion*".

Hearsay Evidence in Disciplinary Proceedings

R (Johannes Philip Bonheoffer) v GMC [2011] EWHC 1585 (Admin)

B, an eminent and international consultant paediatric cardiologist, applied for judicial review of the decision of a Fitness to Practise Panel of the defendant General Medical Council ("the Panel") regarding its decision to admit hearsay evidence against him. The Panel's decision allowed hearsay evidence pursuant to r.34(1) of the Fitness to Practise Panel Rules 2004 ("PPR 2004") although such evidence would not have been admissible in criminal proceedings under the ss. 114(1)(d) and 116(2)(c) of the Criminal Justice Act 2003 ("CJA 2003").

The allegations against B concerned serious sexual misconduct whilst B was practising in Kenya. B denied the allegations.

Most of the evidence came from one man ("X") who claimed that B had abused him and others. X was willing to travel to the UK from Kenya to give oral evidence. However the General Medical Council decided not to call X as a witness based upon the sole rationale that X's live testimony would expose him to a risk of significantly increased harm in Kenya.

B submitted that the Panel's conclusion was irrational and amounted to a violation of art. 6(1) of the European Convention on Human Rights 1950 ("the Convention").

The Administrative Court, (Laws LJ, Stadlen J) found for B and quashed the Panel's decision. It held there was no absolute rule whether under art.6 of the Convention or the common law entitling a person facing disciplinary proceedings to cross-examine witnesses on whose evidence the allegations against him were based. This was so, even in cases where there that witness's testimony was the sole or decisive basis of such allegations.

The discretion conferred on the Panel by r.34 of the PPR 2004 was to admit any evidence which they considered be to relevant to the case before them and which they considered fair to admit. Thus as far as r.34 was concerned it did not follow automatically from a conclusion that hearsay

evidence would be inadmissible under ss.114 or 116 that it would be unfair for the Panel to admit it. The ultimate question was what protection was required for a fair trial.

Whilst there was no automatic exclusionary rule in deciding whether the admission of such evidence would be fair, art.6 of the Convention and the common law obliged disciplinary bodies to take into account the absence of the statutory (and non statutory) safeguards provided for in criminal matters. It was held that the more serious the allegation, the greater the importance of ensuring that the accused was afforded fair and proper procedural safeguards.

It was held that disciplinary proceedings against a professional could engage art.6(2) and art.6(3) of the Convention including the right to cross-examine witnesses; the main factor to be determined as to the reach of art.6 rights was the gravity of the issues in the case, rather than the case's classification as civil or criminal. What was required to constitute a fair trial in disciplinary proceedings had to be considered having regard to all relevant factors, with particular weight being given to the seriousness and nature of the allegations and the gravity of the proceedings' consequences to the accused. The more serious the allegation, the more astute the courts had to be to ensure a fair trial.

The Court recognised that the instant case involved an unusual matrix of facts especially as X had repeatedly expressed his willingness to give oral evidence. The allegations made against B and the consequences of a finding against him were both extremely serious. Accordingly, the procedural safeguards afforded to B should have been stringent.

There was no indication that the Panel properly considered these factors in B's case and the Court noted that the Panel's judgment suggested a near rejection of the General Medical Council's case as to harm to X, in any event. Thus the Panel's decision to admit the hearsay evidence of X was irrational and a breach of B's right to a fair hearing under art.6 of the Convention.

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