First Tier Tribunal
HESC Chamber
Primary Health Lists Jurisdiction

Appeal Number [2011] 15368.PHL

Re Heard at: Pocock Street London
On: 23rd July 2014

Before:

Judge John Aitken
Chamber President SEC
Specialist Member Dr S Sharma
Specialist Member Mrs L Bromley

Between

Dr Hasmukhlal Himatlal Shah

Appellant

-v-

South East Essex Primary Care Trust

Defendant

Representation:

The Appellant : Mr R Shah (Son)

The Respondent Mr R Booth QC

Decision

1. On 16th November 2012 the Upper Tribunal (Judge Ward) granted permission to appeal our decision of 3rd January 2012 in this case. On 29th October 2013 Judge Ward issued a decision indicating that in making a decision as to suitability the First Tier Tribunal were obliged to have regard to matters at the date the decision was made and to have reference to Regulation 6(4) of the Performers List Regulations 2004 in particular and for that reason the Panel should reassemble and remake its decision as regards suitability in the light not only of the allegations made and established but also those matters set out in Regulation 6(4). There has been some delay in relisting this matter that has been at the request of Dr Shah who sought to explore the possibility of appeal against the Upper Tribunal decision, and thereafter was on an extended holiday.

2. We note that Judge Ward indicated that the First Tier Tribunal would be able to rely upon the findings of fact made if we saw fit to do so. We do rely upon those findings, the circumstances were examined extensively, witnesses were heard and our conclusions were found to contain no error of law. We have looked at the findings made and reminded ourselves of them and consider they were proper and clear

on the evidence we heard. Whilst we appreciate that Dr Shah does not agree with those findings, we consider that he was given every opportunity to have his case heard and it would not be fair to witnesses to constantly re-litigate where no error was found, and particularly so in circumstances such as this when the giving of evidence and cross examination can reasonably be considered to be difficult. It is fair and reasonable to all to proceed on that basis.

3. We are grateful to both representatives who put their submissions into writing for us to consider, there was a slight hiccough caused by misunderstanding at the end of the hearing, but we had before us Mr Shah's submission on behalf of Dr Shah in advance of our deliberation on this matter and have considered it fully.

4. The 2004 Performers List Regulations were replaced as of 1st April 2013 by the National Health Service (Performers List) Regulations 2013 which is a very similar scheme and Regulation 6(4) of the 2004 Regulations by Regulation 7(3) of the 2013 Regulations. The parties were invited to make submissions as to which regulations the matter should be considered under, both sought to argue the regulations in force at the time of the last hearing, the Upper Tribunal was silent on the matter.

5. The Transitional provisions are clouded by the mixed nature of our decision, part falling before the new regulations this part after. Regulation 9 of Schedule 2 of the Regulations deals with appeals.

   "***9.*** *(1) Sub-paragraph (2) applies where a Practitioner has, before the transfer date, appealed to the First-tier Tribunal against a decision of a PCT which has not, by then, been the subject of a decision by way of determination by that Tribunal.*

   (2) Any redetermination of a PCT's decision by the First-tier Tribunal on or after the transfer date is to take effect as if it were a redetermination of a decision of the Board.

   (3) Where there has been a determination by the First-tier Tribunal before the transfer date, the Board may take any steps under these Regulations which it could have taken if the determination had occurred after that date."

6. For completeness we have looked at the Regulations both then and now in force to see whether it would have made a difference at any stage to our reasoning.

7. We heard live evidence from Ms Vivian Barnes of the NHS and she was cross examined by Mr Shah, but most of the evidence bringing us up to date was submitted in writing and added to the previous evidence. Ms Barnes explained some delay in the NHS handling of the application, she also explained there were no other serious complaints

in the past few years and no complaints about failing to offer or provide a chaperone.

8. The facts arising form the allegations we found as follows at paragraph 28 of the original decision:

"*Taking all matters into consideration we accept the account of Patient A, we find that she was given more than one internal examination without a chaperone present nor was one offered, in particular an internal examination was given on 7th November 2001. We also find that on 2nd December 2005 Dr Shah touched her breasts as she has described and that the only reasonable explanation of that is that it was done in a sexual manner."*

9. Paragraph 4 of Regulation 6 of the NHS Performers Lists Regulations reads as follows:

4) Where the Primary Care Trust is considering a refusal of the performer's application under paragraph (1) or (2), it shall consider all facts which appear to it to be relevant and shall in particular take into consideration, in relation to paragraph (1)(a), (c) or (d)—

a) The nature of any offence, investigation or incident
b) The length of time since any offence, incident, conviction or investigation
c) Whether there are other offences, incidents or investigations to be considered
d) Any action or penalty imposed by any licensing, regulatory or other body, the police or the courts as a result of any such offence, incident or investigation
e) the relevance of any offence, investigation or incident to his performing the services, which those included in the relevant performers list perform, and any likely risk to his patients or to public finances
f) Whether any offence was a sexual offence for the purposes of Part 2 of the Sexual Offences Act 2003, or if it had been committed in England and Wales, would have been such an offence
g) whether he has been refused admission to, or conditionally included in, or removed, contingently removed or is currently suspended from, any list or any equivalent list, and if so, the facts relating to the matter which led to such action and the reasons given by the Primary Care Trust or equivalent body for such action; and
h) whether he was at the time, has in the preceding six months been, or was at the time of the originating events a director of a body corporate, which was refused admission to, conditionally included in, removed or contingently removed from, any list or equivalent list or is currently suspended from any such list, and if so, what the facts were in each such case and the reasons given by the Primary Care Trust or equivalent body in each case.

10. Paragraph 3 of Regulation 7 of the 2013 Regulations which replaces the former Paragraph 6 reads as follows:

> "*(3) Where the Board is considering a refusal of a Practitioner's application under a ground contained in paragraph (2) it must, in particular, take into consideration—*
>
> *(a) the nature of any matter in question;*
>
> *(b) the length of time since that matter and the events giving rise to it occurred;*
>
> *(c) any action or penalty imposed by any regulatory or other body as a result of that matter;*
>
> *(d) the relevance of that matter to the Practitioner's performance of the services which those included in the relevant performers list perform, and any likely risk to the Practitioner's patients or to public finances;*
>
> *(e) whether any offence was a sexual offence for the purposes of Part 2 of the Sexual Offences Act 2003 (notification and orders)(**1**), or which if it had been committed in England and Wales, would have been such an offence;*
>
> *(f) whether, in respect of any list, the Practitioner—*
>
> *(i)was refused inclusion in it,*
>
> *(ii)was included in it subject to conditions,*
>
> *(iii)was removed from it, or*
>
> *(iv)is currently suspended from it,*
>
> *and, if so, the facts relating to the matter which led to such action together with the reasons given by the holder of the list; and*
>
> *(g) whether, in respect of any list, the Practitioner was at the time of the originating event or in the six months preceding that event, a director of a body corporate, which—*
>
> *(i)was refused inclusion in it,*
>
> *(ii)was included in it subject to conditions,*
>
> *(iii)was removed from it, or*
>
> *(iv)is currently suspended from it,*
>
> *and, if so, the facts relating to that event and the reasons given for such action by the holder of the list."*

11. It can be seen from a comparison of the two Regulations that a) is for our purposes the same merely replacing matters for offence,

investigation or incident. That b) is likewise of no different effect. Old Regulations c) is not applicable here since the only matters we are concerned with are those which have been established by us, although we do consider all of the other circumstances. Old d) and new c) require looking at other bodies' actions or penalties and are of the same effect. Old e) and new d) are to the same effect. Old f) and new e) are to the same effect, but neither are applicable. Dr Shah has not been convicted before any court. It would be wrong to take account of behaviour established on a balance of probabilities as an offence. That does not mean that the behaviour established is not taken into account, it is, but only under applicable areas of the rules and not as an offence. Old g) and h) and new f and g) are of similar effect but it is not suggested that they are in any way applicable in this case.

12. The result of that comparison between the two regulations is that in this case the outcome would be identical under both and there is no disadvantage to either the NHS or Dr Shah.

13. Under a), we consider the nature of what happened. We consider this to be a most serious aspect of the matter. Dr Shah touched a patient during an examination in a sexualised manner without her consent. This, as the Upper Tribunal were to comment at paragraph 21 and no one has sought to persuade us otherwise:

    "has no place in a doctor/patient relationship".

14. It is a fundamental breach of trust by a person who is given that trust in part by the NHS, in part by their professional generally and it is fundamental to the role of a General Practitioner that in situations where patients are alone they can trust their GP. We note that this is a particular feature of work as a GP in that they are in many situations alone with patients and patients must we consider retain that trust on the assumption that they knew the circumstances as we know them. Dr Shah is unable to offer any assistance to us on the nature of this incident as he still denies that it occurred.

15. We look also at the failure to provide or even offer a chaperone whilst conducting intimate examinations in 2001 and on other occasions up to 2005. This is another matter which erodes or certainly has the potential to erode the trust of patients.

16. Under b) we must consider the length of time which has passed. We particularly note in this context that in 1992 Dr Shah stood trial for alleged sexual offences against young patients. We make it plain now as we did in our last decision we know he was acquitted and we deal with him on the basis of innocence. However a disturbing feature is that having had what must have been a very traumatic Crown Court trial he was by 2001 conducting intimate examinations without a chaperone or the offer of one. That was 9 years later, the sexualised touching was in 2005, 4 years after the first of the intimate examinations without a

chaperone. It is now 9 years since the touching and 9 to 13 since the intimate examinations without a chaperone. It is a considerable period of time since the matters with which we are concerned took place, however they themselves took place over a considerable period that is from 2001 to 2005 or 4 years albeit irregularly. Dr Shah points to periods from 2005 to 2009 when he continued to practice without complaint, and the period since July 2010 when his licence was reinstated.

17. Nonetheless we consider that when one looks at the overall situation it can be seen that despite the most shocking event in 1992 that being a trial which risked his imprisonment on sex offences it did not have sufficient effect to ensure his practices were maintained in a way which was likely to inspire public trust. Whilst is was several years later we consider that had Dr Shah's behaviour such as failing to offer chaperones been remediable the shock of a Crown Court Trial would have had the necessary effect. We consider the effect upon an innocent man of such a trial is arguably stronger than on a man who was guilty, the innocent man knows that his behaviour may be misinterpreted and he must surely be doubly careful. The fact that he was conducting intimate examinations in the way we have described despite that Trial leads us to conclude that there is in effect no warning or condition which can ensue that he could be relied upon.

18. We must consider the actions of other bodies. There are two in particular which Dr Shah relies upon. The first is the Crown Prosecution Service who did not seek to prosecute him for indecent assault in respect of the touching incident. The second is the GMC whose Interim Orders panel did not suspend him and whose Fitness to Practice Panel considered that he had insight and could have his licence returned.

19. We do not consider that the decision of the CPS assists in this matter. They take a position on the likelihood of success in respect of an offence being proved beyond reasonable doubt. We have looked at the circumstances considered the evidence and established that the events as described did happen, the CPS may be correct in deciding that a jury would not convict upon the higher standard of proof but that cannot deflect us from dealing with the facts as we have found them. The different burdens inevitably lead in some cases to a different result without the rational basis for either decision being impaired.

20. We do not derive much assistance from the decision of the Interim Orders panel, we are dealing with a situation of proven misconduct, they were looking at an unproven situation before a hearing, for those reasons although we acknowledge that he was allowed to practice and no complaints were received, it has some but not great effect upon our decision.

21. We have considered carefully the decision of the Fitness to Practice panel. We note their initial decision to suspend and their later decision to reinstate. We do not however consider that the panel was in possession of the facts as we know them. They were dealing with the facts as we too have found them. However, and we consider crucially, they considered that Dr Shah had demonstrated insight into his behaviour. Mr Shah relied upon the indicative sanctions guide which we apprehend must also have been in the mind of the Fitness to Practice panel in considering insight, it says this:

    ""When assessing whether a doctors has insight the panel will need to take into account whether he/she has demonstrated insight consistently throughout the hearing, e.g. has not given any untruthful evidence to the panel or falsified documents."

    "*The main consideration for the panel therefore, is to be satisfied about patient protection and the wider public interest and that the doctor has recognised that steps need to be taken, and not the form in which this insight may be expressed*."

22. The Fitness to practice Panel found this:

    "The Panel is of the view that you have demonstrated insight into the impact that inappropriate behaviour could have on a female patients. You have undertaken extensive educational and practical training to ensure that your practice adheres strictly to the GMC guidelines on intimate examinations. The Panel considered that your misconduct was remediable if you acted in accordance with GMC guidelines on the use of chaperones".

23. They did so however having been told by Dr Shah's advocate that he had not sought to appeal the decision of the Fitness to Practice panel and respected their decision. Indeed Dr Shah had supplied a witness statement to this effect which was before the panel. The document is at bundle 2 page 360 and paragraph 2 says this:

    "During the past year, I have had considerable opportunity to reflect on the findings of the Fitness to Practice Panel. I respect the decision of the panel and have taken various steps to address the issues raised in the determination."

24. In evidence before us when questioned about that in the hearing in late 2011 he said this:

    *"Paragraph 2 "**I respect the decision of the panel**" it is true I wrote it. It is not a lie, I did respect it although I did not agree to all of the findings given in that hearing and through that there were a few suggestions or weaknesses I tried to address later on. I did not respect the part of the decision which suggests I sexually touched her breasts, other parts and as a whole I respect the decision. I did examine her, I*

did not respect the decision that I examined her without a chaperone. It was their decision I picked out the weaknesses and addressed them. I did not respect the decision that I performed other internal examinations without a chaperone and without offering one. I cannot say which elements I respected. I did not agree with many of the findings"

25. He appears to be making clear that any remediation is on his basis alone, he went on to explain exactly what he meant:

"I agreed that I examined the patient and it was justified, they were professional examinations in my view and according to my records. I did not agree that I performed other examinations and failed to record them. I agree with some aspects, 7th Nov 2001, I did the test which needed to be done, but in the same visit it was without chaperone, I do not respect with the things I did not agree with. I did not agree with the findings other than there was an examination. I can only say I agree or not agree. It is what I felt and what is written. I do not accept that it is not a true statement. There were some facts I agreed with and some I did not. I did not respect the finding of my misconduct, I did not agree with the appropriate sanction being suspension, I did not do wrong, I had to respect the decision as a whole. I understand the importance of telling the truth and not misleading the regulatory body, the statement may be misleading in legal view, I did respect the decision but not agree with the decision, I dealt with the weaknesses. I do not agree that I did not respect the decision."

26. It is very clear to us that the Regulatory body was misled, whether it was intentional or not, the respect mentioned within the statement of Dr Shah when examined closely was said to extend only to those parts with which he agreed. The overall impression which the regulatory body were given was that having not appealed and considered the decision for a year which he respected he had accepted it. In fact as he has made clear to us he accepted no part of those decisions against him, only those findings he agreed with. In that context Dr Shah has twice given evidence, before both the Fitness to practice panel and before us, which has been rejected as untrue, that is a key feature of insight as put to us by the appellant, but not one apparently taken into account by the Fitness to Practice panel who were left with the impression of a contrite Doctor who had accepted his mistakes whereas he remains adamant he has done nothing wrong. Had the Fitness to Practice panel been in possession of the facts as we know them to be we consider that they would certainly have rejected the suggestion that Dr Shah had insight into this matter. We consider that since insight is considered an important feature of whether a Doctor should recommence practice their decision was likely to have been very different, had they been given the full facts and for that reason we can place little weight upon the decision that was in fact made.

27. We understand that it cannot be a condition that someone admits the allegations, however it is clear looking at the material before us that the Fitness to Practice panel considered there were admissions being made when that was not the case.

28. We also consider what we have mentioned in respect of the warning he had in 1992 at the Trial which failed to provoke within him insight into the need for even the offer of chaperones in some instances.

29. We also find it difficult to reconcile his present witness statement with insight, at paragraph 7 of his statement dated 12th June 2014 he says this

    "I *have always denied any misconduct. The Fitness to Practice Panel in July 2009 found against me on balance of probability"*

30. The reference to the standard of proof is an unnecessary qualification, they found against him on the appropriate standard. At paragraph 41 he goes on:

    "*The reality is that I posed no risk to patients"*

31. We have compared those statements and the general tenor of the statement as a whole and it paints and entirely different and combative picture as compared to the statement of June 2010 and which was before the Fitness to Practice panel and upon which it relied.

32. We have carefully considered all of the matters as required and looked afresh at the questions posed within the Regulations. We have taken into account the material placed before us and in particularly the references that Dr Shah has provided however it is clear for the reason above that Dr Shah is not suitable to practice within the NHS.

Decision

Appeal Dismissed.

Judge John Aitken
12th August 2014